

**COMMISSION DECISION**

**Of 20/X/2005**

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

**(Case COMP/C.38.281/B.2) – Raw Tobacco Italy**

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## COMMISSION DECISION

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

(Case COMP/C.38.281/B.2) – Raw tobacco Italy

Only the 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 (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<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 25 February 2004 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 27(1) of Regulation (EC) No 1/2003 and Article 11 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty<sup>3</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case<sup>4</sup>,

Whereas:

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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 L 123, 27.4.2004, p. 18.

<sup>4</sup> OJ ...

## 1. FACTS

### 1.1. Subject of the case and procedure

- (1) From 1995 until the beginning of 2002 four major Italian processors of raw tobacco (hereinafter referred to collectively as "the processors") entered into agreements and/or participated in concerted practices aimed at fixing the trading conditions for the purchase of raw tobacco in Italy in respect of both direct purchases from producers and purchases from third packers, including:
  - (a) the setting of common purchase prices which processors would pay on the delivery of tobacco and other trading conditions;
  - (b) the allocation of suppliers and quantities;
  - (c) the exchange of information to co-ordinate their competitive purchasing behaviour;
  - (d) the determination of quantities and prices in respect of surplus production; and
  - (e) the co-ordination of bids for public auctions in 1995 and 1998
- (2) This Decision also concerns two separate infringements, which consisted of the decisions by which, from the beginning of 1999 until the end of 2001, the professional association of Italian tobacco processors (Associazione Professionale Trasformatori Tabacchi Italiani, hereafter "APTI") determined the contract prices which it would negotiate with the Italian confederation of associations of raw tobacco producers, Unione Italiana Tabacco, ("UNITAB") for the conclusion of Interprofessional Agreements, and the decisions by which, during the same years, UNITAB determined the selling prices for its members which it would negotiate with APTI for the conclusion of the same Interprofessional Agreements.
- (3) The Commission received information indicating that since 1999 the national association of processors of raw tobacco APTI, had concluded agreements with UNITAB concerning price ranges for distinct qualities for one or more varieties of raw tobacco. On 15 January 2002, the Commission sent requests for information, pursuant to Article 11 of Council Regulation No. 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty,<sup>5</sup> to UNITAB and to APTI. Both associations replied on 12 February 2002.
- (4) On 19 February 2002, Deltafina SpA ("Deltafina"), an Italian processor and member of APTI, made an application for immunity from fines under Part A of the Commission notice on immunity from fines and reduction of fines in cartel cases <sup>6</sup> (hereinafter "the Leniency Notice") (immunity from fines) and, alternatively, under Part B of the Leniency Notice (reduction of a fine). The applicant stated that the

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<sup>5</sup> OJ L3, 21.2.1962, p. 204/62.

<sup>6</sup> OJ C 45, 19.02.2002, p. 3-5 (hereinafter the "Notice" or the "Leniency Notice").

evidence submitted could enable the Commission to find an infringement or infringements of Article 81(1) of the Treaty in connection with an alleged cartel affecting the Community within the meaning of paragraph 8(b) of the Leniency Notice. The evidence submitted by Deltafina consisted of an initialled agreement between Italian processors of raw tobacco and an explanatory memorandum thereof.

- (5) The application was supplemented on 22 February 2002 with additional documents consisting of hand-written agreements, notes of meetings and discussions among Italian raw tobacco processors. On 22 February, the Commission provided Deltafina with a written acknowledgement of receipt of its application for immunity from fines in accordance with paragraph 14 of the Leniency Notice. Deltafina submitted additional evidence on 19, 21, 25 and 26 March, 18 April and 17 May 2002.
- (6) After examination of the application for immunity from fines and the evidence submitted, the Commission concluded that Deltafina was the first, within the meaning of point 8(b) of the Leniency Notice, to submit evidence which might enable the Commission to find an infringement of Article 81 of the Treaty. In view of the above, on 6 March 2002 the Commission informed Deltafina, by way of decision, that at the end of the administrative procedure, it would grant Deltafina immunity from fines with regard to any infringement(s) found as a result of the Commission's investigation in connection with the evidence that Deltafina submitted, provided that the latter met the cumulative conditions set out in point 11 of the Leniency Notice.
- (7) On 4 April 2002 at 4:15 p.m., the Commission received from Dimon Italia S.r.l. ("Dimon"), an Italian processor which is also a member of APTI, an application for immunity from fines pursuant to point 8 of the Leniency Notice and, subsidiarily, an application for a reduction of any fine that would otherwise have been imposed, pursuant to points 20-27 of the Leniency Notice. Dimon's submission consisted of (i) an introductory note describing the tobacco processing market in Italy and how a cartel was enacted and operated in that sector from 1993 to 2001, and (ii) five annexes of supporting documentation.
- (8) On 9 April 2002, the Commission acknowledged receipt of Dimon's application for immunity from fines of 4 April 2002 and, pursuant to point 12 of the Leniency Notice, informed Dimon that immunity from fines was not available for the suspected infringement as the application did not meet the requirements set out in points 8(a) and 9 or 8(b) and 10 of the Leniency Notice. The Commission also acknowledged, pursuant to point 25 of the Leniency Notice, the subsidiary application for the reduction of any fine that would otherwise have been imposed.
- (9) On 8 April 2002, Dimon supplemented its submission of 4 April 2002 with additional evidence consisting of a further explanatory note and 10 annexes. On 17 April 2002, the Commission acknowledged Dimon's submission of 8 April 2002.
- (10) On 4 April 2002 at 6:47 p.m., the Commission received from Transcatab S.p.A. ("Transcatab"), an Italian processor which is also a member of APTI, an application requesting a reduction of any fine that would otherwise have been imposed, pursuant to points 20-27 of the Leniency Notice. On 9 April 2002, the Commission acknowledged receipt of the application pursuant to point 25 of the Leniency Notice. Transcatab submitted a new application on 10 April 2002, consisting of 44 annexes and an explanatory note thereof. On 30 April 2002, the Commission provided

Transcatab with a written acknowledgement of receipt pursuant to point 25 of the Leniency Notice.

- (11) On 18-19 April 2002, the Commission carried out investigations pursuant to Article 14(2) of Regulation No. 17 at the premises of Dimon and Transcatab and investigations pursuant to Article 14(3) of Regulation No. 17 at the premises of Trestina Azienda Tabacchi S.p.A. (“Trestina”) and Romana Tabacchi s.r.l. (“Romana Tabacchi”).
- (12) After examination of the evidence submitted on 4 April 2002 by Dimon, the Commission came to the preliminary conclusion that Dimon was the first undertaking to submit evidence of the suspected infringement which represented, within the meaning of point 22 of the Leniency Notice, significant added value with respect to the evidence already in the Commission’s possession. In view of the above, on 8 October 2002, the Commission informed Dimon by way of decision that it intended, pursuant to point 23(b) of the Leniency Notice, to grant it, at the end of the administrative procedure, a reduction of 30-50% of any fine that would otherwise have been imposed with regard to any infringement(s) found as a result of the Commission’s investigation, provided that Dimon met the condition set out in point 21 of the Notice, namely, it had ended its involvement in the suspected infringement no later than 4 April 2002.
- (13) After examination of the evidence submitted on 10 April 2002 by Transcatab, the Commission came to the preliminary conclusion that Transcatab was the second undertaking to submit evidence of the suspected infringement which represented, within the meaning of point 22 of the Leniency Notice, significant added value with respect to the evidence already in the Commission’s possession.<sup>7</sup> In view of the above, on 8 October 2002 the Commission informed Transcatab by way of decision that, pursuant to point 23(b) of the Leniency Notice, it intended to grant it, at the end of the administrative procedure, a reduction of 20-30% of any fine that would otherwise have been imposed with regard to any infringement(s) found as a result of the Commission’s investigation, provided that Transcatab met the condition set out in point 21 of the Leniency Notice, namely, it had ended its involvement in the suspected infringement no later than 10 April 2002.
- (14) On 4 March 2003, the Commission transmitted a request for information, via the Italian Competition Authority, to the Italian Ministry of Agricultural and Forestry Policies (hereinafter the “Ministry”) concerning Italian legislation on interprofessional agreements. On 12 May 2003, the Ministry replied to the Commission’s request for information. On 31 July 2003, the Commission received additional information from the Ministry.
- (15) On 25 February 2004, the Commission initiated proceedings in this case and adopted a Statement of Objections (hereinafter also referred to as “the SO”) which was sent to the addressees of this decision, as well as Boselli S.A.L.T.O. s.r.l. (“Boselli”) and Trestina.

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<sup>7</sup> The information submitted by Transcatab on 4 April 2002 did not constitute significant added value.

- (16) The companies had access to the Commission's investigation file in the form of a CD ROM which contained all accessible materials. The Hearing Officer extended the deadlines for the presentation of the replies to the SO until 17 May 2004.
- (17) Having replied in writing to the SO, the addressees of the SO attended an oral hearing (with the exception of Dimon Incorporated ("Dimon Inc."), Standard Commercial Corporation ("SCC") and Boselli), which was held on 22 June 2004.
- (18) On 21 December 2004, the Commission adopted an Addendum to the Statement of Objections of 25 February 2004 (hereinafter also referred to as "the Addendum"), giving access to the additional documents which were referred to therein and inviting the addressees to reply.
- (19) The Commission received written replies from Deltafina, Universal Corporation ("Universal"), Transcatab, Mindo s.r.l. ("Mindo", legal successor of Dimon) and Romana Tabacchi.
- (20) An oral hearing on the Addendum took place on 1 March 2005. Following the hearing, the Commission received further comments from Universal and Deltafina on 18 March 2005 which supplemented their defence, following the invitation of the Hearing Officer to do so.
- (21) Comments were also received from Dimon Inc. on 5 April 2005 and from SCC on 14 April 2005, both purporting to clarify certain facts to which Deltafina and Universal referred during the oral hearing of 1 March 2005. These documents were sent to Universal and Deltafina on 27 April 2005, together with a document contained in the Commission internal file and an invitation to express their comments, which they sent by letters of 11 May 2005.
- (22) The essential elements of the parties' replies and their further observations are individually taken up in specific recitals of this Decision, as necessary.
- (23) On 3 June 2005 and 13 September 2005 the Commission sent further requests for information to the addressees of this Decision (except to APTI and UNITAB), replies to which followed within the required deadlines.
- (24) Finally, a letter of clarification was sent to APTI on 29 September 2005 to which APTI replied by letter of 6 October 2005.
- (25) Having given the undertakings concerned the opportunity to make their views on the objections raised against them, the Commission has decided to close the proceedings against Boselli and Trestina, since it did not have sufficient evidence of their participation in the conduct which is the subject matter of this Decision.

## **1.2. The parties**

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

- (26) Italian processors of raw tobacco buy raw tobacco from farmers and farmers' associations in Italy (as well as pre-processed tobacco from other processors), process (or re-process) it and resell it in conditioned and packaged form to the tobacco

manufacturing industry in Italy and worldwide. They are known also as “first processors”<sup>8</sup> because they are the first to process the tobacco (as opposed to the second processing done by the cigarettes manufacturers) or “tobacco leaf merchants” because of their role of intermediaries between the farmers and the final product manufacturer.<sup>9</sup>

- (27) The processing consists of several steps. The first steps are regrading and removing undesirable leaves, dirt and other foreign matter from the tobacco. The tobacco can then be blended to meet customer specifications and threshed or processed in whole-leaf form. Threshing involves mechanically separating the stem from the tissue portions of the leaf, which are called strips, and sieving out small scrap. Strips and stems are redried and packed separately. Redrying involves further reducing the natural moisture left in the tobacco after it has been cured by the growers. The objective is to pack tobacco at safe moisture levels so that it can be held by the customer in storage for long periods of time.
- (28) In Italy, there are approximately 49 processors in the raw tobacco sector that are recognised by the Italian Republic.<sup>10</sup> The expression “exporter” is generally employed in respect of processors which have threshing equipment, which makes it possible to produce the finished processed product (strips) sought by the cigarette manufacturers. Processors which are only able to produce loose leaves (“LL”) are called third packers or simply packers. After their initial treatment (for example, removal of impurities and sorting) packers forward the tobacco to exporters for further treatment so that tobacco can be offered to manufacturers. This second treatment necessarily repeats processes already applied during the initial treatment (for example, water spraying or treatment with steam and drying).
- (29) Deltafina, Dimon, Transcatab and Romana Tabacchi are among the largest Italian exporters.

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<sup>8</sup> Article 6(2) of Regulation (EEC) No 2075/92 (as amended by Council Regulation (EC) No 1636/98) defines “first processor” as “*any approved natural or legal person who carries out first processing of raw tobacco by operation, in his own name and on his own account, of one or more first tobacco processing establishments suitably equipped for that purpose*”.

<sup>9</sup> For the purposes of the present procedure, the terms “processors” and “first processors” are interchangeable.

<sup>10</sup> In the period 1993-2005, the number of processors has decreased from approximately 140 to 49. A list of all 49 undertakings can be found in Official Journal C 117, 19.5.2005, p. 8. This publication is pursuant to Article 54(c) of Commission Regulation (EC) No 2848/98 of 22 December 1998 laying down detailed rules for the application of Council Regulation (EEC) No 2075/92 as regards the premium scheme, production quotas and the specific aid to be granted to producer groups in the raw tobacco sector. In Italy, a system for the recognition of processors, which is made mandatory by Art. 17 of Regulation 2075/92, has been in place since the 1993 harvest. The competent body for the recognition of processors is AIMA, which has adopted guidelines on the basis of the instructions received from the Ministry of Agricultural and Forestal Policies (*see* Circolare n. 167/G-1 of 2 March 1999, Circolare n. 626/G of 24 May 1995 and Note n. 199/G-1 of 5 March 1998).

#### 1.2.1.1.Deltafina and its parent Universal Corporation

- (30) Deltafina was founded under a different name<sup>11</sup> in 1960. It became a wholly owned Italian subsidiary of Universal (then called Universal Leaf Tobacco Corporation Inc.) in 1984. Universal is the world's largest independent leaf tobacco merchant with operations in tobacco, lumber, and agriproducts. It enjoyed a turnover of some USD 3 276 million during the fiscal year ended 31 March 2005 and controls facilities in the U.S., Europe, Africa, Latin America, and Asia. Its headquarters are in Richmond, Virginia.
- (31) Deltafina has a blending strip facility in Assisi and two processing factories in Francolise (Caserta) and Ospedalichio di Bastia Umbra (Perugia). According to Deltafina's own estimates, it processes 30 million kilograms of tobacco and buys 25% of its Italian tobacco directly from growers, while it buys the remaining 75% from third packers.<sup>12</sup> Deltafina exports 43 million kilograms of tobacco, of which 60% to Europe and 40% outside Europe. 70% of tobacco sold by Deltafina is of Italian origin (about 30 000 tons, while 30% is traded from other countries. For the 1998 crop, according to calculations made by Transcatlab SpA prior to the present proceedings, Deltafina enjoyed a market share of 38% for Italian Burley purchases, 22% for Italian Bright purchases, 45% for Italian DAC purchases and 10% for Italian Oriental purchases.<sup>13</sup> According to its own estimate, Deltafina enjoyed a market share of some 25% in respect of purchases of Italian raw tobacco for the 2001 harvest (last full year of the infringement). Its turnover for the financial year ended 31 March 2005 was EUR 95,634 million, of which some EUR 66 million can be attributed to sales of Italian processed tobacco<sup>14</sup>.

#### 1.2.1.2.Dimon and its parent Dimon Incorporated

- (32) Dimon was, at the time of the facts which form the subject matter of this case, the Italian wholly owned subsidiary of Dimon Inc., the world's second largest independent leaf tobacco merchant. For the fiscal year ended 31 March 2005 it reported revenues totalling USD 1 311,388 million. Dimon Inc. would employ nearly 17 000 employees worldwide with facilities in the U.S., Europe, Africa, Latin America, and Asia. Until 29 September 2004, Dimon Inc. owned Dimon through its wholly owned holding company Intabex Netherlands B.V.
- (33) Dimon was established in 1995 when Dimon Inc. acquired the 100% shareholding of Reditab S.r.l., formerly a 50/50 joint venture between Dibrell Brothers (now merged into Dimon Inc.) and a local Italian partner, the Reale family. Dimon operates as a processor in Italy and purchases raw tobacco directly from growers and in some cases from third packers. Dimon enjoys a high ratio of purchases directly from farmers in Italy. It also purchases processed tobacco (loose leaf and strip) from third packers.

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<sup>11</sup> The name corresponded to the names of the five concessions granted by the Italian monopoly.

<sup>12</sup> Submission by Deltafina of 18 April 2002 [Doc. 38281/639]

<sup>13</sup> See Transcatlab's presentation, pre-existing to the present investigation, for 1998 purchases [Doc. 38281/3516-3520]. For a description of tobacco varieties see (87) further below

<sup>14</sup> See Deltafina's communications to the Commission of 13 June 2005 and 16 September 2005..

Dimon processes tobacco in its factory in Sparanise. According to calculations made by Transcatab SpA prior to the present proceedings, for the 1998 crop, Dimon enjoyed a market share of 16% for Italian Burley purchases, 13% for Italian Bright purchases, 11% for Italian DAC purchases and 10% for Italian Oriental purchases.<sup>15</sup>

- (34) On 30 September 2004 Intabex Netherlands B.V. sold its entire stake in Dimon to four Italian individuals who are totally unrelated to the Dimon group. Since then, the company has changed its name to Mindo S.r.l (“Mindo”). For the purposes of this Decision, reference will continue to be made to Dimon or to Dimon (Mindo) or simply to Mindo.
- (35) According to its own estimate, Dimon enjoyed a market share of some 11.28 % in respect of purchases of Italian raw tobacco for the 2001 harvest. Its turnover for the financial year ended 31 March 2005 was EUR 39,992 million<sup>16</sup>.

#### 1.2.1.3. Transcatab and its parent Standard Commercial Corporation

- (36) Transcatab (now called Transcatab S.p.A. in Liquidazione) was, at the time of the facts which form the subject matter of this case, the Italian subsidiary of SCC, the world's third largest independent leaf tobacco merchant, with revenues totalling USD 896,412 million for the year ended 31 March 2005. SCC was founded in 1910 and has developed purchasing, processing, storing, selling and shipping activities in respect of tobacco grown in over 30 countries, servicing cigarette manufacturers from 25 processing facilities located in North Carolina, Kentucky, Brazil, Zimbabwe, Malawi, Turkey, Argentina, Italy, Russia, Spain and Thailand.
- (37) In Italy, for the 1998 crop, according to its own calculations prior to the present proceedings, Transcatab enjoyed a market share of 23% for Italian Burley purchases, 6% for Italian Bright purchases, 10% for Italian DAC purchases and 3% for Italian Oriental purchases.<sup>17</sup> Transcatab has the highest proportion of direct purchases of Burley tobacco directly from farmers in Italy. According to its own estimate, Transcatab enjoyed a market share of some 10.8 % in respect of purchases of Italian raw tobacco for the 2001 harvest. Its turnover for the financial year ended 31 March 2005 was EUR 32,338million<sup>18</sup>.
- (38) On 13 May 2005 SCC completed a merger with Dimon Inc., forming a new entity called Alliance One International, Inc..

#### 1.2.1.4. Romana Tabacchi

- (39) Romana Tabacchi is an independent company founded by the Baiani family in 1976. It is a wholly owned private company with 100% of its shares still owned by the Baiani

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<sup>15</sup> See Transcatab's presentation for 1998 purchases [Doc. 38281/3516-3520].

<sup>16</sup> See Mindo's communications to the Commission of 13 June 2005, 14 and 16 September 2005.

<sup>17</sup> See Transcatab's presentation for 1998 purchases [Doc. 38281/3516-3520].

<sup>18</sup> See Transcatab's communications to the Commission of 13 June 2005, 12 and 16 September 2005.

family. From 1976 until 1997, Romana Tabacchi acted as an agent for Intabex Holdings Worldwide, S.A. (“Intabex”), the world’s fourth largest leaf merchant. In 1997, Dimon Inc. acquired Intabex and, as a consequence, any contractual relationship between Romana Tabacchi and Intabex was terminated. In 2000, Romana Tabacchi began buying and selling tobacco under a cooperation agreement with ATI, the leaf division of the former Italian monopoly and, in January 2001, Romana Tabacchi and ATI concluded a commercialisation agreement. The agreement was renewed in July 2001.<sup>19</sup>

- (40) According to its own estimate, Romana Tabacchi enjoyed a market share of some 8.86 % in respect of purchases of Italian raw tobacco for the 2001 harvest, mainly through purchases from third packers (see recital (28))<sup>20</sup>. Its turnover for the financial year ended 31 March 2005 was EUR 20,568 million<sup>21</sup>.

#### 1.2.1.5. APTI

- (41) APTI (Associazione Professionale Trasformatori Tabacchi Italiani) is the Italian association of processors of raw tobacco. It was founded in 1944. Its members include the main companies operating in the sector. These can be companies belonging to multinational groups as well as Italian independent companies and processing co-operatives. APTI represents both exporters and third-packers.
- (42) At the national level, APTI is a member of wider tobacco-specific trade associations such as (i) the Associazione Interprofessionale Nazionale del settore tabacco (ASSINTABAC), (ii) the Comitato di Gestione Nazionale per il Tabacco Burley (COGENTAB)<sup>22</sup>. It is also a member of the Confederazione Generale dell’Agricoltura Italiana (CONFAGRICOLTURA) which is a non-tobacco specific national organisation in the agricultural sector.
- (43) At the international level, APTI participates, through its representative in FETRATAB (Federazione Europea dei Trasformatori del Tabacco), in MMT (Maison des Métiers du Tabac - Tobacco House), which is a European association of tobacco producers, processors, manufacturers and retailers.
- (44) The statutory aim of APTI is to represent at the national and international level the Italian raw tobacco processing and exporting industry and to protect the interests of the undertakings in this sector by assisting them in the different stages of their activity at the economic, technical, commercial and associative level. Pursuant to Article 1(b) of its Statute, APTI “determines and concludes on behalf of the processors agreements, including interprofessional ones, that derive from Community, national or regional law, and trade union and economic contracts that are valid at the national and European level” (APTI “*definisce e sottoscrive, in rappresentanza delle categorie, gli*

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<sup>19</sup> For the text of the new “*Accordo di Commercializzazione*”, see Doc. 38281/3310-3325.

<sup>20</sup> Purchases from third packers have in fact a higher content of raw tobacco as third packers remove most impurities.

<sup>21</sup> See Romana Tabacchi’s communications to the Commission of 13 June 2005 and 16 September 2005.

<sup>22</sup> See for more details paragraph (182) below.

*accordi, ivi compresi quelli interprofessionali, che scaturiscono da normative Europee, nazionali e regionali e i contratti tanto sindacali che economici aventi validità nazionale ed europea”). Pursuant to Article 21 of its Statute, its members are bound by the measures taken by the association. (“Gli Associati si impegnano ad assumere comportamenti in armonia con la politica dell’Associazione, per la salvaguardia del settore e gli interessi degli Associati.”) The decisions adopted by APTI are binding only upon its members.*

(45) APTI has 17 members, out of a total of 49 processors in Italy, namely (in alphabetical order):

1. A.T.I. - Azienda Tabacchi Italiani S.p.a.
2. A.T.I. - Azienda Tabacchi Italiani S.r.l.
3. Agri Campello S.c. a r.l.
4. Agrindustria S.r.l.
  
5. Agritrading S.r.l.
6. Consorzio Monte Grappa S.c. a r.l.
7. Consorzio PRO TAB S.c. a r.l.
8. Contab Sud S.r.l.
9. Deltafina S.p.A. - (Universal Corp.)
10. Dimon Italia S.r.l. - (Dimon Inc.) (now Mindo)
11. Eurotabac S.c. a r.l.
12. Gianni L. & F. S.r.l.
13. L.A.G.I. S.r.l.
14. S.L.I.T.O. - Società Lavorazione Italiana Tabacchi Orientali S.r.l.
15. Sacit Sud S.r.l.
16. Transcatlab S.p.A. - (Standard Commercial Corp.)
17. Trestina Azienda Tabacchi S.p.A.

#### *1.2.2. The producers of raw tobacco – UNITAB*

(46) There are some 27 000 producers of raw tobacco in Italy<sup>23</sup>. This number decreased by 50% in the period 1993-2000. The size and type of producer depends on the geographic location and the variety produced as described in more detail at recital (83) below.

(47) UNITAB Italia is the Italian confederation of producers’ associations. It was founded in 1995 as a result of the merger between two national unions grouping Italian associations of producers (Unione Nazionale Tabacchicoltori or UNATA and Consorzio Nazionale Tabacchicoltori or CNT). As of February 2002, it represented 18 associations of producers of raw tobacco (out of a total of 29 associations) grouping together approximately 24 000 producers. This number corresponds to some 80% of all producers. Each producer is represented in UNITAB only via its membership in one of the 18 member associations.

(48) UNITAB Italia is a member of the Unione Internazionale di Produttori di Tabacco (UNITAB), a federation of (mainly European) tobacco growers associations as well as

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<sup>23</sup> Source: Nomisma Report *Il sistema tabacco italiano verso la competizione globale*, 2003

of the Associazione Interprofessionale Nazionale del settore tabacco (ASSINTABAC) and the Comitato di Gestione Nazionale per il Tabacco Burley (COGENTAB).<sup>24</sup>

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

#### *1.3.1. Common organisation of the market in raw tobacco*

- (49) The common organisation of the market (CMO) for raw tobacco was established by Council Regulation (EEC) No 727/70 of 21 April 1970 on the common organisation of the market in raw tobacco<sup>25</sup>. It was replaced in 1992 by Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organisation of the market in raw tobacco<sup>26</sup>, which was substantially amended in 1998<sup>27</sup>.
- (50) Council Regulation (EC) No 864/2004 of 29 April 2004 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union<sup>28</sup> reformed the CMO for raw tobacco. Under the new system, which is to apply from 2006, during a transitional 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

- (51) 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

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<sup>24</sup> See for more details paragraph (182) below.

<sup>25</sup> OJ L 94, 28.4.1970, p. 1.

<sup>26</sup> OJ L 215, 30.7.1992, p. 70. Regulation as last amended by Regulation (EC) No 864/2004 (OJ L 161, 30.4.2004, p. 48).

<sup>27</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>28</sup> OJ L 161, 30.4.2004, p. 48.

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>29</sup> and, since 1999, their groups or the producers that are not members of a group that are subject to a quota scheme.

- (52) 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>30</sup> or of continuing to pay them to raw tobacco processors (the choice made by Italy). The premiums were fixed premiums determined by the Council for each harvest year and for each variety group of raw tobacco.
- (53) Since 1998, the premium granted to each producer has been linked to the quality of his produce and Community aid is now modulated according to the purchasing price of raw tobacco, which is considered the only objective indicator of its quality.
- (54) More precisely, the total premium has four components:
- (a) specific aid not exceeding 2% of the premium<sup>31</sup>;
  - (b) 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;
  - (c) a variable component (which is intended to reflect the quality of the produce) accounting for between 30% and 45% of the total premium;
  - (d) a fixed component that makes up the remainder of the total premium and varies depending on the size of the variable component<sup>32</sup>.
- (55) 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>33</sup>. Producer groups allocate the 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.

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<sup>29</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>30</sup> Council Regulation (EC) No 711/95 of 27 March 1995 (L 73, 1.4.1995, pp. 13 and 14).

<sup>31</sup> See Article 4a(5) of Regulation 2075/92, as amended by Regulation 1636/98.

<sup>32</sup> Article 4a(3) of Regulation 2075/92, as amended by Regulation 1636/98 and Annex V(A)(1) of Regulation 2848/98.

<sup>33</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).

- (56) The producer groups must comply with certain rules when allocating the variable component of the premium among their members<sup>34</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). Sales of tobacco for which the producer receives a price that does not exceed a certain level are excluded from individual receipts. In this case, it is presumed that the quality of the produce is too poor to justify the payment of the variable premium.
- (57) 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>35</sup>.
- (58) Lastly, the Community rules provide that "Member States shall apply a system of advances on premiums for producers"<sup>36</sup>. From 16 October of the crop year, the advance can be paid on application direct to the producer or producer group<sup>37</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 (EC) No 2848/98 was adopted, the maximum amount of the advance was equal to 50% of the premium payable. Following an amendment in 2000<sup>38</sup>, the maximum amount of the advance is equal to the fixed component of the premium payable.

(b) Cultivation contracts

- (59) The 1998 reform also developed further the rules on cultivation contracts that had been drawn up in 1995<sup>39</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 are not entitled to 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>40</sup>. The obligation to conclude cultivation contracts in advance guarantees greater stability of revenue for producers, enabling them to step up

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<sup>34</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.

<sup>35</sup> Article 10(2) of Regulation 2075/92, as amended by Regulation 1636/98.

<sup>36</sup> Article 19 of Regulation 2848/98, as amended by Regulation (EC) No 531/2000.

<sup>37</sup> For the 2000 crop, the processors may also submit applications.

<sup>38</sup> Amendment introduced by Commission Regulation (EC) No 531/2000 of 10 March 2000 (OJ L 64, 11.3.2000, p. 13).

<sup>39</sup> See Articles 9 to 12 of Regulation 2848/98.

<sup>40</sup> Except for a number of years when the deadline was 30 June.

their efforts or investments aimed at delivering better-quality tobacco. In Italy cultivation contracts are concluded between each processor and each producer group.

(c) Inter-branch organisations

- (60) 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<sup>41</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 (EEC) No 2077/92, Article 81(1) of the 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>42</sup>.
- (61) Regulation (EEC) No 2077/92 was implemented in Italy by way of Law 449/97 of 27 December 1997 and subsequent decrees<sup>43</sup>, and has been further amended.<sup>44</sup>
- (62) The Italian Ministry of Agricultural and Forestry Policies (hereinafter the "Ministry") submitted that so far it has recognised the following interprofessional organisations pursuant to Article 3(1) of Regulation (EEC) No 2077/92: (i) Associazione interprofessionale tabacchicoltori (AIT), (ii) Interbright, (iii) Interburley, and (iv) Interorientali. According to the information submitted by the Ministry, these organisations have not entered in any interprofessional agreement so far<sup>45</sup>.
- (63) Neither UNITAB nor APTI have been recognised as interprofessional organisations pursuant to Article 3 (1) of Regulation (EEC) No 2077/92. Nor has ASSINTABAC, the largest tobacco interprofessional organisation grouping both producers and processors. It was created in 1996 by UNITAB, APTI and two federations of producers' co-operative that process tobacco (Federoagrolimentare Confcooperative and Anca Lega Coop).

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<sup>41</sup> OJ L 215, 30.7.1992, p. 80.

<sup>42</sup> See Article 7(3) of Regulation (EEC) No 2077/92.

<sup>43</sup> Legislative Decree 173/1998 which defined interprofessional organisations more specifically and set out the criteria and modalities for the recognition of national interprofessional organisations, producers groups and their national unions.

<sup>44</sup> Law 57/01 and Legislative Decree 228/2001 which specifies that interprofessional organisations must be constituted in the form of association within the meaning of Articles 14 and ff. Of the Italian civil code and imposed that only one interprofessional organisation per product may be recognised.

<sup>45</sup> See letter 22 July 2003 from the Ministry to the Italian Authority for Competition and Market replying request for information from Commission of 4 March 2003.

1.3.2. *Interprofessional agreements in the context of the Italian rules governing agricultural products*

1.3.2.1. Law 88/88 and interprofessional agreements

- (64) Law 88/88, which was adopted on 16 March 1988, is aimed at regulating interprofessional agreements, cultivation contracts and sales of agricultural products.<sup>46</sup> This law is not sector-specific as it regulates the tobacco sector as well as other sectors.
- (65) Pursuant to Article 6 of Law 88/88, interprofessional agreements are concluded at national level between, on the one hand, the recognised producers associations (either the national associations of agricultural producers or the associations' unions) and, on the other hand, processing or marketing undertakings or their national associations, if these associations are empowered to do so by their statute or by an express decision of their members. (*"Gli accordi interprofessionali sono conclusi a livello nazionale tra le unioni nazionali riconosciute delle associazioni di produttori agricoli, le associazioni nazionali riconosciute di produttori agricoli [...] da un lato, e le imprese di trasformazione o commercializzazione o loro associazioni nazionali, a ciò delegate per statuto o per atto espresso, dall'altro [...]"*).
- (66) Article 10 of Law 88/88 requires interprofessional agreements to be lodged by the contracting parties at the offices of the Ministry and other offices.
- (67) Pursuant to Article 2(1)(d) of Law 88/88, the purpose of interprofessional agreements is, inter alia, (i) to regulate the quantities of agricultural production according to national and foreign demand in order to stabilise the market, (ii) to establish criteria and general terms of production, sales and services, and (iii) to determine in advance the prices of the products or the criteria for determining those prices prior to the fixing of cropping programmes. (*"Gli accordi interprofessionali hanno il compito di: (a) disciplinare la quantità della produzione agricola, per farla corrispondere alla domanda sui mercati interni ed esteri, e per perseguire condizioni di equilibrio e stabilità del mercato; [...] (c) stabilire i criteri e le condizioni generali della produzione e vendita dei prodotti e delle prestazioni dei servizi; (d) determinare in anticipo i prezzi dei prodotti o i criteri per la loro determinazione onde fissare i programmi di coltivazione"*).
- (68) In order to reach these objectives, Article 5(1)(b) of Law 88/88 provides more specifically that interprofessional agreements must determine the product concerned by the agreement, the modalities and the timing for its delivery and the minimum price,<sup>47</sup> (or in the case of pluriannual agreement, the criteria for its determination), the quantities and qualities of the products, the deadlines within which the cultivation

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<sup>46</sup> Legge 16 marzo 1988 n. 88 Norme sugli accordi interprofessionali e sui contratti di coltivazione e vendita dei prodotti agricoli (G.U. 23.3.1988, n. 69, Serie Generale).

<sup>47</sup> The determination of the minimum price under Article 5(1)(b) is the specific means through which the general aim of determining in advance the prices of the products under Article 2(1)(a) is reached.

contract is to be concluded, control systems for the quality of the products, and bodies which are representative both of processors and producers to control the application of the contracts (*“per il raggiungimento delle finalità della presente legge, gli accordi interprofessionali stabiliscono, in particolare:*

*a) il prodotto oggetto dell'accordo e dei contratti di coltivazione e vendita, le modalità e i tempi di consegna;*

*b) il prezzo minimo o, in caso di accordi poliennali, i criteri per la sua determinazione, con particolare riferimento alla dinamica dei costi di produzione, i tempi, le modalità di pagamento e le eventuali anticipazioni di prezzo;*

*(c) i quantitativi ed i requisiti qualitativi dei prodotti;*

*(d) il termine entro il quale dovranno essere stipulati i contratti di coltivazione e vendita;*

*(e) i sistemi di controllo dei requisiti qualitativi dei prodotti;*

[...]

*(i) la costituzione di organismi paritetici per la verifica periodica dell'attuazione degli accordi e dei contratti e per ogni altra iniziativa utile al raggiungimento degli obiettivi degli accordi.”*

- (69) In the event that the parties are not able to conclude an interprofessional agreement within certain deadlines established by Article 3 of Law 88/88, the Minister for Agriculture and Forestry, pursuant to Article 4, will convene a meeting of the parties, should one of them so request, for the purpose of facilitating the conclusion of an agreement (*“Il Ministro dell'agricoltura e delle foreste, se non interviene la stipula degli accordi interprofessionali nei termini di cui all'art. 3, convoca le parti su richiesta di una di esse per favorire l'accordo”*).
- (70) Under Article 7 of Law 88/88, the regional delegate for agriculture is also required to call the parties together, should one of them so request, for the purpose of facilitating the conclusion of supplementary agreements or agreements at regional or interregional level
- (71) Article 8 of Law 88/88 provides that the parties to an interprofessional agreement are to encourage the conclusion of cultivation contracts for the sale of the products and requires them to verify that the cultivation contracts concluded comply substantively with the agreement, in particular with relation to the price.
- (72) Article 12(1) of Law 88/88 provides that aid for modernisation and restructuring within the agri-foodstuffs sector relating to processing and distribution is to be granted, as a matter of preference, to undertakings which have concluded cultivation contracts in accordance with the interprofessional agreements.
- (73) Under Article 12(2) of Law 88/88, agricultural aid is, as a matter of preference, to be granted, in compliance with the priority criteria laid down by the legislation in force, to agricultural producers that are members of associations which have concluded cultivation contracts in accordance with the interprofessional agreements.

- (74) Legislative decrees 143/1997 of 4 June 1997<sup>48</sup> and 300/1999 of 30 July 1999<sup>49</sup> attributed expressly to the Minister of Agricultural and Forestry Policies the competence for national interprofessional agreements (“*accordi interprofessionali di dimensione nazionale*”).
- (75) In March 2001, Law 57/01<sup>50</sup> authorised the Italian government to enact, within 120 days from its entry into force, a legislative decree to modernise the agricultural sector and, in particular, to revise Law 88/88 in order to guarantee the proper functioning of and increased transparency in the market.<sup>51</sup>
- (76) In May 2001, the Italian government adopted Legislative Decree 228/01,<sup>52</sup> which was intended to modernise the agricultural sector. The decree, despite containing provisions on interprofessional organisations and producers organisations, did not contain any express amendments to Law 88/88. Nonetheless, it stated that the agreements reached within an interprofessional organisation cannot impede competition with the exception of those agreements that result from a forecast and co-ordinated planning of production on the basis of its possible absorption by the market or from a program of quality improvement having as a direct consequence a limitation of volumes offered on the market (“*Gli accordi conclusi in seno ad una organizzazione interprofessionale non possono comportare restrizioni della concorrenza ad eccezione di quelli che risultino da una programmazione previsionale e coordinata della produzione in funzione degli sbocchi di mercato o da un programma di miglioramento della qualità che abbia come conseguenza diretta una limitazione del volume di offerta*”).<sup>53</sup>

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<sup>48</sup> Decreto Legislativo 4 giugno 1997, n. 143 "Conferimento alle regioni delle funzioni amministrative in materia di agricoltura e pesca e riorganizzazione dell'Amministrazione centrale" (pubblicato nella Gazzetta Ufficiale n. 129 del 5 giugno 1997). Article 2.3 reads: “*Spettano al Ministero [per le Politiche Agricole] i compiti di riconoscimento e di sostegno delle unioni, delle associazioni nazionali e degli organismi nazionali di certificazione; spettano, altresì i compiti relativi: agli accordi interprofessionali di dimensione nazionale*”.

<sup>49</sup> Article 33.2(b) of Decreto Legislativo 30 luglio 1999, n. 300 "Riforma dell'organizzazione del Governo, a norma dell'articolo 11 della legge 15 marzo 1997, n. 59" (pubblicato nella Gazzetta Ufficiale n. 203 del 30 agosto 1999 - Supplemento Ordinario n. 163).

<sup>50</sup> Legge 5 marzo 2001, n. 57 - Disposizioni in materia di apertura e regolazione dei mercati (Gazzetta Ufficiale Italiana n. 66 of 20 March 2001).

<sup>51</sup> Article 8 of law 57/01 reads: “(*Principi e criteri direttivi*)

*1. Nell'attuazione della delega di cui all'articolo 7, il Governo si atterrà ai principi e criteri contenuti nel capo I e nell'articolo 20, comma 5, della legge 15 marzo 1997, n. 59, e successive modificazioni, nonché ai seguenti principi e criteri direttivi: [...]*

*(q) revisione della legge 16 marzo 1988, n. 88, relativa agli accordi interprofessionali e dell'articolo 12 del decreto legislativo 30 aprile 1998, n. 173, relativo agli organismi interprofessionali, per assicurare il migliore funzionamento e la trasparenza del mercato”.*

<sup>52</sup> Decreto legislativo 18 maggio 2001, n. 228 - Orientamento e modernizzazione del settore agricolo, a norma dell'articolo 7 della legge 5 marzo 2001, n. 57. (Supplemento Ordinario n. 149/L alla Gazzetta Ufficiale Italiana n. 137 del 15 giugno 2001).

<sup>53</sup> *Ibidem.*

- (77) Eventually, the Italian government proposed in December 2001 that the Parliament adopt a new law, again authorising the government to adopt a Legislative Decree to amend Law 88/88.<sup>54</sup> (A new law had become necessary given that, pursuant to Law 57/01, the government was authorised to amend Law 88/88 only within 6 months from the entry into force of Law 57/01 and that period had expired).
- (78) On 13 February 2003, the Parliament adopted the new law, which was promulgated by the Italian President on 7 March 2003.<sup>55</sup> The new law provides that the Italian government is authorised to review the Italian law provisions concerning interprofessional organisations and agreements, cultivation and sale contracts in order to guarantee the correct functioning of the market and create adequate competitive conditions (*“rivedere la normativa in materia di organizzazioni e accordi interprofessionali, contratti di coltivazione e vendita, al fine di assicurare il corretto funzionamento del mercato e creare le condizioni di concorrenza adeguate”*).<sup>56</sup>
- (79) Law 88/88 has found application in a number of agricultural sectors, such as potatoes, sugar beetroots, milk and sunflower seeds<sup>57</sup>. In the tobacco sector, a framework interprofessional agreement between APTI, on one hand, and UNITAB’s legal predecessors (CNT and UNATA), on the other, was agreed for the 1990 crop on 4 April 1990<sup>58</sup>. That agreement required the signatory parties to enter into agreements for each tobacco variety. The 1990 Framework agreement was transposed into a Ministerial Decree<sup>59</sup>. Furthermore, on 6 May 1999 APTI and UNITAB concluded a framework interprofessional national agreement for the 1999-2000-2001 crops of bulk dried raw tobacco (*“Accordo Quadro Interprofessionale Nazionale per il tabacco greggio allo stato secco sciolto produzione 1999-2000-2001”*).<sup>60</sup> Interprofessional Agreements for individual varieties followed in 1999, 2000 and 2001 (see sections 1.5.7.5, 1.5.7.6, 1.5.7.7, 1.5.7.8, 1.5.7.9, 1.5.8.2 and 1.5.9.2).

#### 1.3.2.2. Sectoral measures: the administrative acts (“circolari”)

- (80) In order to ensure the effective implementation of the Community legislation and for clarification purposes, the Italian Republic has adopted a series of detailed administrative acts (so-called “circolari”), which are specific to the raw tobacco sector

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<sup>54</sup> Article 21 of Disegno di legge n. 2122, presented by the Italian government to the Camera dei Deputati on 19 December 2001. This proposal was discussed on 14 January 2002 by the Commissione Permanente of the Camera dei Deputati, which decided that the provisions on the authorisation to reform Law 88/88 should not be part of that proposal but be part of another proposal connected to the 2002 budgetary law.

<sup>55</sup> Legge n. 38 del 7 Marzo 2003 (G.U. n. 61 del 14 Marzo 2003).

<sup>56</sup> Article 1(e) of law 38/03 of 14 March 2003.

<sup>57</sup> See Transcatlab’ reply to the Statement of Objections, page 23.

<sup>58</sup> *Ibidem*

<sup>59</sup> D. M. 5 April 1990 (G.U. n. 95 del 24 April 1990)

<sup>60</sup> For a signed copy of the agreement see Doc. 38281/1425-1431 and Doc. 38281/195-201.

and exist alongside other non-sectoral national measures on interprofessional agreements and interprofessional organisations, as explained below.

- (81) Implementing and interpretative administrative acts of the CMO regulations in the raw tobacco sector are adopted either by the Italian Agricultural Minister or by the head of AGEA (Agenzia per le erogazioni in agricoltura, that is to say, the agency for the payment of agricultural subsidies).<sup>61</sup> They have binding effects on the administrative bodies which issue them and their respective personnel, but not, generally, on third parties.
- (82) Certain of these administrative acts acknowledge that (i) the price indicated in cultivation contracts may be determined also on the basis of sectoral agreements between associations of producers and associations of processors,<sup>62</sup> or provide that (ii) individual producers belonging to non-recognised associations may obtain the fixed part of the premium on the basis of a cultivation contract concluded directly with the associations of processors,<sup>63</sup> and that (iii) producers' associations (individually) will determine the minimum sale prices for their respective members as a condition for the registration of the cultivation contracts.<sup>64</sup>

#### 1.4. The industry of raw tobacco in Italy

##### 1.4.1. The production and varieties of raw tobacco

- (83) For the 2002 harvest, the Italian production quota eligible for the Community premiums and attributed to Italian producers of raw tobacco amounted to 130,604

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<sup>61</sup> A list of the most recent administrative acts and the full text thereof is available on the website of the Italian Agricultural Ministry (Ministero delle Politiche Agricole e Forestali) at: [http://www.politicheagricole.it/norme/CercaNormativa.asp?Ope=NOFORM&Settore=TABACCO&TipoDoc=\\*](http://www.politicheagricole.it/norme/CercaNormativa.asp?Ope=NOFORM&Settore=TABACCO&TipoDoc=*)

<sup>62</sup> See, for example, Circolare del 6 agosto 1999 recante "Reg. (CE) n. 2848/98, della Commissione, del 22 dicembre 1998, applicabile dal raccolto 1999 Cooperative e consorzi di cooperative per la trasformazione: "Appare opportuno evidenziare, inoltre, che il pagamento del "prezzo contrattuale", indicato nel contratto di coltivazione e conferimento sopra specificato, anche sulla base di accordi settoriali conclusi tra associazioni di produttori ed associazioni di trasformatori, abilita i produttori individuali ad ottenere il premio [...]" (underline added).

<sup>63</sup> *Ibidem*, "gli organismi associativi di produzione non riconosciuti non hanno diritto ad ottenere, per sè, nè il premio nè l'aiuto specifico. I produttori individuali ad essi direttamente aderenti possono ottenere la parte fissa del premio, sulla base del contratto di coltivazione e conferimento da essi stipulato direttamente con gli organismi associativi di trasformazione" (underline added).

<sup>64</sup> See Circolare AGEA (Agenzia per le erogazioni in agricoltura) maggio 2002, n.14 Contratti di coltivazione tabacco raccolto 2002. Adempimenti. Modulistica e standard dei contratti.: "Inoltre, è indispensabile, ai fini della registrazione e validazione, che ai contratti presentati dalle associazioni sia allegata una delibera dell'assemblea dei soci, o del consiglio se espressamente previsto dallo statuto, con la quale si stabiliscono i prezzi minimi per varietà e grado qualitativo da rispettare in fase di commercializzazione."

tons<sup>65</sup>, representing some 38% of the production in the Community. The value of this production is estimated at EUR 87,826 millions<sup>66</sup>.

- (84) There are almost 27 000 producers of raw tobacco in Italy. The size and type of producer depends, on the geographic location and the variety produced. Four regions (Campania, Umbria, Veneto and Apulia) produce 87,5% of total national production.
- (85) Several thousand tonnes are usually produced in excess of the quota (so-called “surplus production”). Surplus production is not eligible for the premiums.<sup>67</sup> The premiums represent on average over 80% of the producers’ income.
- (86) Different varieties of tobacco are grown in Italy but in general all of these varieties are non-strategic, that is to say, they are just used as fillers in cigarettes and not to confer a certain aroma to it. Cigarette manufacturers buy different varieties and different qualities of tobacco, which they blend together to form the final product. Within the same variety and the very same plant, there exist different qualities according to the position of the leaf on the stalk.<sup>68</sup> Each variety has specific growing requirements and for this reason different varieties are grown in different geographic locations in Italy.
- (87) Raw tobacco is classified in the following main varieties and with the following numbering by Regulation (EEC) No 2075/92:
  - (01) Flue-cured is tobacco dried in ovens. It mainly comprises Virginia and Bright. The process requires significant investments for the acquisition and maintenance of the ovens. Higher quality flue-cured tobacco is grown in northern Italy, in the Veneto region, by medium to large-sized farms that may also handle processing grouped together in co-operatives. In central Italy growers are mainly small or medium-sized farms, which undertake processing in the form of co-operatives formed by various growers whose production is organised by local third packers.
  - (02) Light air-cured is tobacco dried in the air under cover, not left to ferment. It comprises Burley, Badischer, and Maryland. The great majority of it (approximately 90%) is grown in southern Italy (Campania) by numerous small producers. Processing is handled mainly by third packers and exporters.
  - (03) Dark air-cured (“DAC”) is tobacco dried in the air under cover, left to ferment naturally before being marketed. It comprises, *inter alia*, Badischer

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<sup>65</sup> Annex II of Council Regulation (EC) No 546/2002 of 25 March 2002 fixing the premiums and guarantee thresholds for leaf tobacco by variety group and Member State for the 2002, 2003 and 2004 harvests and amending Regulation (EEC) No 2075/92 (OJ L 084 28.03.2002, p. 4). For an evolution of quotas from 1993 to 2002 see “Document de travail des services de la Commission, Rapport au Parlement Européen et au Conseil sur le fonctionnement de l’organisation commune du marché dans le secteur du tabac brut”, SEC (2002) 1183.

<sup>66</sup> Commission internal information.

<sup>67</sup> Article 10 of Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organization of the market in raw tobacco (OJ L 215, 30.7.1992, p. 70).

<sup>68</sup> Leaves that are in a lower position, for example, have different contents of nicotine.

Geudertheimer, Nostrano del Brenta, Beneventano and Havannah. DAC is produced for the most part in Campania.

- (04) Fire-cured is tobacco dried by fire. It comprises mainly Kentucky and hybrids, Moro di Cori and Salento. Kentucky is traditionally grown in Tuscany and northern Umbria, as well as in Campania. Processing is handled by co-operatives and independent packers.
- (05) Sun-cured is tobacco dried in the sun. It comprises the group of varieties also known as Oriental. Oriental tobaccos are produced almost entirely in Apulia by small family-run farms and processed mostly by local co-operatives.
- (88) The following Table 1 gives a break down of raw tobacco production in Italy in percentage terms by variety and by region (for the year 2001)<sup>69</sup>:

**Table 1**

Region	Variety 01	Variety 02	Variety 03	Variety 04	Variety 05
<b>Veneto</b>	34.7%	3.8%	-	11.1%	-
<b>Tuscany</b>	7.8%	-	-	34.1%	-
<b>Umbria</b>	47.4%	-	-	-	-
<b>Campania</b>	-	90.9%	93.2%	36.4%	1.1%
<b>Apulia</b>	-	-	1.1%	-	90.5%
<b>Others</b>	10.1%	5.5%	5.7%	18.4	8.4%

- (89) Flue-cured tobacco (Bright) and light air-cured tobacco (Burley) are the most important varieties produced in Italy, with guarantee thresholds for the 2002 harvest of, respectively, 49,002 and 49,436 tons. DAC, fire-cured (Kentucky) and sun-cured (Oriental) follow with, respectively, 16,256, 6,255 and 9,157 tons.<sup>70</sup> The area for tobacco cultivation is declining in Italy and is likely to continue to decline over the coming years in particular in areas where DAC and Oriental tobaccos are produced, due to the decrease in demand for these varieties.

#### *1.4.2. Production cycle in Italy*

- (90) In Italy, tobacco seedlings are transplanted into the fields around mid April-June. Reaping starts in August-October. Purchase of crop usually takes place between October and January, while receiving ends in March. Cultivation contracts for direct

<sup>69</sup> Source: Nomisma VIIIth report, La filiera del tabacco in Italia, Impatto socioeconomico e aspetti di politica fiscale, 2002

<sup>70</sup> Annex II of Council Regulation (EC) No 546/2002 of 25 March 2002 fixing the premiums and guarantee thresholds for leaf tobacco by variety group and Member State for the 2002, 2003 and 2004 harvests and amending Regulation (EEC) No 2075/92 (OJ L 084 28.03.2002, p.4).

purchases between individual producers or association of producers and the processors are generally entered into in the period March-May of the year of harvest.

- (91) Cultivation contracts contain a price, known as the “contract price”, which is the price that the processors commit to pay according to the quality of tobacco. Between 1999 and 2001 “contract prices” for raw tobacco in Italy were (also) agreed by way of “Interprofessional Agreements” between APTI and UNITAB.
- (92) The price that is actually paid upon receiving the tobacco and which results as a direct proportion of quality grades and other factors (including further bargaining) is called “delivery price”. Delivery price is usually determined in the period December-February. Contracts with other processors for indirect purchases are usually signed between September and June.
- (93) Article 16(1) of Regulation No 2848/98 stipulates that, except in cases of force majeure, producers must deliver their entire production to first processors by 30 April of the year following the year of harvest for the groups of varieties VI, VII and VIII and by 15 April of the year following the year of harvest for the other groups of varieties, failing which they will lose their entitlement to the premium.

#### *1.4.3. The importance of intermediaries in the Italian market*

- (94) In many cases, producers of Burley tobacco and third packers sell their produce only via sales agents or intermediaries. According to Dimon the five companies that export 95% of Italian Burley are able to contract only 18% of it directly with producers.<sup>71</sup>
- (95) Deltafina submitted to the Commission that the importance of intermediaries has increased dramatically after the CMO reform entered into force in 1993. According to Deltafina, with the introduction of the quota system, production quotas were allocated to intermediaries who, in the past, would have committed fraud by making fake invoices and certifying that they were producing tobacco in order to receive the Community premiums. According to Deltafina, the intermediaries would allow growers without quotas or with a quota that was lower than their production capabilities to sell their production via their own quotas, by invoicing processors under their own names.<sup>72</sup>
- (96) Another form of intermediation exists for Bright. According to Deltafina, about 50% of Bright is sold by producers and associations of producers to co-operatives, which process the tobacco and re-sell it to exporters.<sup>73</sup>

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<sup>71</sup> See Dimon’s internal presentation found at its premises during the inspection [Doc. 38281/2855]. Other statistics indicate that Italian Burley and Bright sold to international manufacturers is for 28.8% and 32.9% respectively contracted directly from producers (See submission of Deltafina of 18 April 2002, Doc. 38281/639). Tobacco that is directly contracted with producers is called “direct tobacco” while the one contracted through other packers is called “indirect tobacco”.

<sup>72</sup> See Deltafina’s submission of 18 April 2002 [Doc. 38281/635].

<sup>73</sup> See Deltafina’s submission of 18 April 2002 [Doc. 38281/636].

#### 1.4.4. *Tobacco prices in Italy*

- (97) In Italy, prices for raw tobacco paid to producers increased in the period 1990-2000 by 53.5% according to ISTAT. On average agricultural products have increased only by 15.9% over the same period.<sup>74</sup>
- (98) For flue-cured tobacco, between 1993 and 2000, the average price in the Community increased by 296.7% with the Italian (and Greek) production experiencing the highest increase in price. For light-cured tobacco, between 1993 and 2000, the average price in the Community increased by 189.8% with the Italian (and Greek) production again experiencing the highest increase in price. For dark air-cured tobacco, between 1993 and 2000, the average price in the Community decreased by 6.1%, with the Italian production experiencing the lowest prices within the Community. For fire-cured tobacco, between 1993 and 2000, the average price in the Community increased by 497.7%. For sun-cured tobacco, between 1993 and 2000, the average price in the Community decreased by 48.6%<sup>75</sup>.
- (99) In Italy, prices of raw tobacco greatly differ by region depending on the variety. In 1999-2000, for example, the price for flue-cured Bright grown in Veneto was double the price of that grown in Umbria and more or less five times that of Bright grown in Apulia. For fire-cured, the price obtained in Umbria is 2,4 times the price obtained in Campania. Regional prices for light cured (with the exception of Veneto) and dark cured are more or less the same throughout Italy.
- (100) Quality of tobacco is indicated through a grade, which is a symbol, letter, number, or some combination of the three. The tobacco's stalk position, colour, texture, elasticity, and leaf size are among the factors taken into account when determining its grade. Contrary to what happens in other parts of the world, for example in the United States where the U.S. Department of Agriculture's Agricultural Marketing Service (AMS) grades, inspects, and certifies the quality of raw tobacco in accordance with official USDA standards or contract specifications, in the Community there are no official standards for grading tobacco nor any state system of certification that can guarantee uniform grading.
- (101) In addition to quality, other elements greatly influence the final price, such as foreseen demand, the evolution of prices world-wide, and the previous year's prices, and, to a limited extent, the stocks available to processors.

#### 1.4.5. *Cross-border trade*

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<sup>74</sup> See Deltafina's submission of 18 April 2002 [Doc. 38281/682].

<sup>75</sup> Source: information communicated to the Commission pursuant to Commission Regulation (EC) No 2636/1999 of 14 December 1999 on the communication of information on tobacco from the 2000 harvest onwards and repealing Regulation (EEC) No 1771/93 (O.J. L 323 , 15/12/1999, p. 4-7) and Commission Regulation (EEC) No 1771/93 of 2 July 1993 on the communication of information on tobacco from the 1993 harvest onwards (O.J. L 162, 03/07/1993 p. 13-16).

- (102) In 2002, the last year of the facts to which this Decision refers, Italy was the largest producer of tobacco in the Community with a percentage of 38,2% of all tobacco produced. In particular, Italian production represents 99,5% of all Community production of fire-cured, 60,6% of light-cured, and almost 49% of DAC. Italy is also the largest exporter of tobacco in the Community, and this is especially the case for the varieties just mentioned. For example, for the year 2001, Italy exported a total of 109,5 tons of tobacco leaf<sup>76</sup>, of which a significant amount to other Member States. Exports of tobacco have increased over time due to the fact that with the end of the cigarette monopoly in Italy previously held by ETI, which used to acquire a great proportion of Italian production, processors had to start selling abroad to face the decrease in purchases on the part of ETI.

## 1.5. Facts objected to

### 1.5.1. *The processors' cartel*

- (103) There is no evidence in the Commission's file to indicate that agreements were concluded by processors prior to 1993 or that any concerted practice took place between them prior to 1993. Deltafina explained to the Commission that up to that year competition among processors was strong<sup>77</sup>. Apparently, scarcity of tobacco and over-capacity in the processing industry became an issue as a result of competitive demand given that a quota system for the production of tobacco was introduced only in 1993.<sup>78</sup>
- (104) From 1993 onwards, processors started meeting periodically as follows:
- (a) at APTI, in official meetings of which official minutes were taken and in which regulations or lobbying initiatives were discussed as well as discussions on interprofessional agreements;<sup>79</sup>
  - (b) at parallel meetings which were held on the occasion of APTI's meetings, which took place among the major processors with a view to reaching a common position to be defended in APTI;
  - (c) at informal meetings between the exporters in which they exchanged information and reached, or tried to reach, agreements on the price to be paid to producers and third packers and on non-aggression in respect of suppliers.<sup>80</sup> These meetings were concentrated in spring, in view of the signing of the cultivation contracts and the

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<sup>76</sup> Source: Nomisma Report *Il sistema tabacco italiano verso la competizione globale*, 2003.

<sup>77</sup> Deltafina's submission of 18 April 2002 [Doc. 38281/630]

<sup>78</sup> Deltafina's submission of 18 April 2002 [Doc. 38281/639]

<sup>79</sup> Deltafina's submission of 18 April 2002 [Doc. 38281/642]

<sup>80</sup> Deltafina's submission of 26 March 2002 [Doc. 38281/601].

interprofessional agreements and in autumn in view of the opening of the purchasing market.<sup>81</sup>

- (105) These contacts between the exporters were facilitated by the fact that the market is very small and transparent<sup>82</sup>. In addition, members of the processors' management would know each other very well and would easily swap from one firm to another thereby increasing the possibility of contacts between the companies (for example, the chairman of Deltafina in 1992 became the chairman of Dimon in 1994).
- (106) Meetings used to take place at two different levels: at the level of the chairmen<sup>83</sup> of the companies, with a monthly frequency, and at the level of the purchasing managers. The latter meetings were aimed at implementing the agreements reached by the chairmen of the companies and at exchanging information about the conditions of buying on the market. These meetings would usually be arranged by phone and would take place in restaurants, hotels or, occasionally, in the offices of one of the companies. No official minutes would be taken, although the participants would keep their own records of the meetings in the form of handwritten notes and/or memoranda.
- (107) With the entry into force of the CMO reform for the 1993 crop, Italian production became subject to a quota system and the amount of raw tobacco produced in Italy under the previous CMO declined. According to Deltafina, this decline in production created scarcity of raw tobacco and over-capacity in the processing industry.<sup>84</sup>

#### 1.5.2. *The years 1993-1994*

- (108) In the period 1993-1994, "*negotiations and discussions were then held with the most significant players in the market place*".<sup>85</sup> Transcatab admits that in 1993-1994 there have been exchanges of information among processors on the prices at which to buy tobacco or at which each single company would buy tobacco ("*scambi di informazioni relative ai prezzi ai quali acquistare tabacco*",<sup>86</sup> and "*scambi di informazioni relativi al prezzo al quale ciascuna ditta intendeva acquistare tabacco*"<sup>87</sup>). Dimon submits

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<sup>81</sup> Deltafina's submission of 26 March 2002 [Doc. 38281/602].

<sup>82</sup> The transparent character of the market is also a consequence of the production and sale cycle in the sector whereby contacts between producers and growers will all occur at set times during the year at which demand and offer levels (and prices) can be easily monitored on the market.

<sup>83</sup> Throughout this document, the expression "chairman" refers indistinctly to top officers with a directive role and representing the company, without distinguishing between President, CEO, Managing Director, Founder and other titles.

<sup>84</sup> See Deltafina declaration [Doc. 38281/635].

<sup>85</sup> See Deltafina's submission of 21 March 2002 [Doc. 38281/539-540].

<sup>86</sup> See Transcatab's submission of 4 April 2002 [Doc 38281/892].

<sup>87</sup> See Transcatab's submission of 9 April 2002 [Doc 38281/1273].

that since 1993 Dimon “*had informal contacts with other Italian processing companies, primarily, Transcatlab, Deltafina and RT*”.<sup>88</sup> However, in its reply to the SO, Dimon denies its participation in any illegal practices during those years<sup>89</sup>.

### 1.5.3. The year 1995

- (109) During autumn 1995, Deltafina, Dimon and Transcatlab met on a regular basis with a view to discussing and agreeing on trading terms including supplies and prices for Bright, Burley and DAC.

#### 1.5.3.1. Preliminary contacts and discussions

- (110) On 29 September 1995, the chairmen of Deltafina, Dimon, Transcatlab and Toscana Tabacchi met.<sup>90</sup> The agenda of the meeting indicates that the companies wanted to discuss, *inter alia*: 1) prices to agents and farmers, and 2) bids for an auction of tobacco by AIMA.<sup>91</sup> An internal Dimon Memorandum dated 2 October 1995 reports that on that occasion the processors exchanged information and indicated the quantities, qualities and prices of the Burley and Bright tobaccos that they had purchased as well as the commission fees they had paid to intermediaries. The report mentions that “*Transcatlab and Dimon should have a better cooperation*”.<sup>92</sup>

#### 1.5.3.2. As to the allocation of third packers and sharing out of quantities

- (111) Another internal Dimon Memorandum dated 3 October 1995 reports that Deltafina, Dimon and Transcatlab had met on an unspecified date at the offices of Dimon in Rome and that the companies had agreed not to compete with each other for the acquisition of tobacco from third packers (“*è stato stabilito che le tre ditte cercheranno di non farsi concorrenza nell’acquisto di tabacchi da terzi*”).<sup>93</sup> On the

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<sup>88</sup> See Dimon’s submission of 4 April 2002 [Doc. 38281/751].

<sup>89</sup> See Dimon’s reply to SO, page 6.

<sup>90</sup> Toscana Tabacchi is another Italian processor that went bankrupt in 1997 according to information provided by Deltafina. For Dimon’s hand-written minutes of the meeting *see* Doc. 38281/2513-2514.

<sup>91</sup> Azienda di Stato per gli Interventi nel Mercato Agricolo, the Italian agency responsible for intervention in the agricultural market, now AGEA. For the agenda of the meeting *see* Doc. 38281/2576.

<sup>92</sup> Doc. 38281/823, 2575. For another example of exchange of information in 1995, *see* Doc. 38281/1339-1342, and the description of it made by Transcatlab [Doc. 38281/1274] according to which processors exchanged information on the estimated quantities of Burley and Bright that would be available for the following year.

<sup>93</sup> Doc. 38281/757 and Doc. 38281/2561.

same occasion, Deltafina communicated the name of the third packers from which it had sourced Burley and Bright tobacco and the prices it had paid to them. On 6 or 7 December 1995, the purchasing managers of Deltafina, Dimon and Transcatab met in an unspecified location to have a preliminary discussion on how to allocate suppliers and quantities jointly.<sup>94</sup> An internal Deltafina fax from its purchasing manager to its chairman dated 29 November 1995 contains a list of processors and their allocated suppliers in preparation for the meeting.<sup>95</sup> Each producer is allocated to one or more processors.<sup>96</sup> The document indicates the dates of the forthcoming meeting (6 December 1995 afternoon/7 December 1995 morning) and lists the names of the purchasing managers that would attend such meeting.

- (112) On 19 December 1995, Dimon sent to Deltafina, Transcatab and Latina Tabacchi (a company linked to the Universal Group) a document agreed between Deltafina, Dimon and Transcatab indicating the quantities allocated to each processor.<sup>97</sup> This document was discussed during a different meeting in 1995 among the chairmen of Deltafina, Dimon and Transcatab.<sup>98</sup>
- (113) The document described in recital (112) above contained also a list of third packers for Burley, Bright and DAC indicating which of them had already been approached or would be approached by a specified processor on a preferential basis. Quantities of tobacco that would be supplied on this basis to the preferred processor are also indicated therein. For certain packers, it was agreed that buying from them was not interesting for any of the processors at the time being. However, should any processor reconsider it and wish to make an offer, this processor was obliged, according to the document, to consult the other processors first (*“Non interessa in questo momento – Chiunque ci ripensa deve consultare gli altri”*). Moreover, for certain third packers, it was agreed that Dimon or Transcatab would negotiate on behalf of the other members of the group (*“DMN tratta per conto del gruppo”*, *“TCATAB tratta per conto del gruppo”*).
- (114) Transcatab submitted to the Commission that in 1995 Deltafina, Dimon, Transcatab, Trestina<sup>99</sup> and Romana Tabacchi also agreed to consult each in order to share among themselves quantities of tobacco from new suppliers entering the market.<sup>100</sup>

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<sup>94</sup> See Deltafina submission of 26 March 2002 [Doc. 38281/606].

<sup>95</sup> Doc. 38281/422.

<sup>96</sup> Romana Tabacchi is indicated as Intabex, due to its relationship of agent, as explained above.

<sup>97</sup> Doc. 38281/816-821, Doc. 38281/1273, Doc. 38281/1284-1291, for a slightly different version of the same document, with different handwritten annotations, *see* Doc. 38281/424-426.

<sup>98</sup> Doc. 38281/606. Deltafina dates the document back to 1995 without specifying the date of the document and was not able to determine the date of the meeting in which it was discussed either.

<sup>99</sup> Trestina was established in 1971. It was part of the Universal Corporation group, to which also Deltafina belongs, until 1999. In 1999, Trestina Azienda Tabacchi SpA was acquired by the Italian Garinei family. In its reply to the SO, Trestina has denied its participation in this instance as well as to all other significant instances of the processors' cartel.

<sup>100</sup> See Transcatab submission of 9 April 2002 [Doc. 38281/1274].

### 1.5.3.3.As to prices and the buying conditions to third packers

- (115) The document described in recital (112) above also indicates that those processors that were interested in sourcing tobacco from certain third packers, which represent a large number of those on the list, should make an offer at a price agreed among the processors themselves (“*Gli interessati faranno offerta concordata*”). The document indicates also that (i) the processors would impose a diminution in price to penalise the presence of strings in the bales (“*Presenza di spaghi: penalizzazione di 350 Lit/kg*”); (ii) payment would be effected after delivery at the end of each month (“*Pagamento dopo consegna a fine ogni mese*”); (iii) Deltafina and Transcatab had offered 1 950 and 1 800 ITL per Kg (“*DF 1.950, Transcatab 1.800*”); and (iv) other conditions would affect the price (“*Prezzi ROC medio alto lavorato senza F.G. (C3) al 13% senza cartoni FCO stabilimento*”). The document indicates also that Deltafina had offered to buy 1 400 tons from certain third packers at ITL 1 950 per kilogram and would communicate by 18 December 1995 whether the offer was accepted or not (“*DF offerto X 1.400 T at 1.950 – comunica il 18/12 se offerta accettata o meno*”).
- (116) According to the same document, another meeting was scheduled for 15 January 1996 and before such a date no offers should have been made by the processors to certain third packers (“*Salvo quanto sopra nessuna offerta prima della prima della prossima riunione (15.01.96)*”).<sup>101</sup>

### 1.5.4. The year 1996

- (117) In 1996 meetings and discussion between processors took place at different times in connection with, *inter alia*, maximum prices for Burley and surplus production. Similarly to what had already happened the previous year, contacts appear to have become more frequent during the last quarter of that year, that is to say, at the time when purchases are made.<sup>102</sup>

#### 1.5.4.1.On-going contacts between processors in preparation of the campaign

- (118) An internal Dimon memorandum dated 13 March 1996 regarding the “1997 Crop Exports” refers to a conversation in which the chairman of Deltafina “*was very keen on the idea of a get together*”<sup>103</sup> and encloses a draft document to be discussed at an upcoming meeting among processors. The enclosed draft document, entitled “*The Future of Italian Exports*”, states that “*The time has come for a restricted group of those exporting to major manufacturers to meet and consider the fact that, if the prices at which we must export cause manufacturers to abandon Italy as a source of*

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<sup>101</sup> Doc. 38281/816-821, Doc. 38281/1273, Doc. 38281/1284-1291, for a slightly different version of the same document, submitted by Deltafina with different handwritten annotations, *see* Doc. 38281/424-426.

<sup>102</sup> See par. 1.4.2

<sup>103</sup> Doc. 38281/804, 2592-2593.

*supply, with no intervention, our industry will die. The questions that we must ask ourselves are: [...] What price do Italian farmers need in order for them to continue growing tobacco? How much of our cost of the tobacco is going to the farmer and how much to agents and middle men? Without agreeing on strict rules of behaviour which, after confirmation, nobody respects, what can we do to ensure that both the farmer and the exporting packer can eliminate their dependence on the parasites of the trade in farmers' bales? One of our problems is that, recently strained relations between some of us have made constructive communication difficult. For this reason it is proposed that the following people make every effort to be at a meeting at ... hrs on the .... at the offices of APTI, who have been kind enough to let us use their facilities for the private and informal meeting".<sup>104</sup>*

#### 1.5.4.2. Maximum prices for Burley

- (119) An internal Deltafina memorandum dated 5 November 1996, signed by Deltafina's chairman, and regarding "*Burley Raccolto 96*", gives a report of a meeting that took place at Deltafina's factory in Bastia Umbra on the same day between the chairmen of Deltafina, Dimon and Transcatàb, at which the three companies discussed the market situation for the 1996 harvest of Burley.<sup>105</sup> The companies decided that, in view of the poor market forecasts, they would try to prevent fierce competition among certain traders from causing Italian Burley to become too expensive for the cigarette manufacturers ("*DI e TC concordano con DF che le previsioni del mercato non consentono facili ottimismo e s'impegnano ad adoperarsi affinché insieme si possa impedire che la concorrenza sfrenata e scorretta di alcuni commercianti non comporti rischi che il Burley italiano diventi non competitivo sui mercati internazionali*")<sup>106</sup>). To this end, they unanimously set at 350 ITL/Kg the maximum price at which they would purchase Burley from producers for the 1996 crop ("*A tal fine si ritiene unanimemente che un prezzo di 350 Lit/Kg per i coltivatori della campagna 1996 sia il massimo che il mercato possa sopportare*").<sup>107</sup>

#### 1.5.4.3. Surplus production

- (120) At the same meeting, the processors considered that it was very dangerous that the habit of producing more than the Community production quotas be allowed to be continued, as it was happening in those years. Thus, and in order to restore the limits of the Community quotas, they had already communicated to their producers that they would not buy a proportion of surplus production that was higher than 5% of the

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<sup>104</sup> Doc. 38281/805.

<sup>105</sup> Doc. 38281/428.

<sup>106</sup> Doc. 38281/428, 1274, 1344.

<sup>107</sup> For the signed version of the document submitted by Deltafina *see* Doc. 38281/428, for the same version of the document but without signature, submitted by Transcatàb, *see* Doc. 38281/1344.

quantity contracted (*“Le ditte inoltre ritengono molto pericoloso il costume degli ultimi anni di produrre tabacco al di là della quota di produzione e, al fine di ritornare alla produzioni previste, hanno già comunicato ai loro coltivatori che il massimo che verrà accettato all’acquisto è un 5% di tabacco prodotto in più della quota contrattata”*<sup>108</sup>). Indeed, another internal Dimon memorandum referring to the *“Fuori Quota Crop ‘96”* reports that *“At the time of receiving the 1996 crop the BoD [of Dimon] decided to buy 5% of the fuori quota (FQ) crop of each agent calculated on his contracted quota”*.<sup>109</sup>

#### 1.5.4.4. Implementation and monitoring

- (121) On the same occasion, the three companies also agreed that they would try to persuade other processors to join their efforts so as to maintain the competitiveness of Italian Burley on the global market. The memorandum of 5 November 1996 also reports that Deltafina announced that it would reduce its purchased quantities and indicates the quantities and the suppliers from which Deltafina would buy Burley tobacco that year.<sup>110</sup> According to the memorandum, Deltafina undertook not to buy more than the quantities indicated.<sup>111</sup>
- (122) Transcatab submits that in order to monitor compliance with the agreement, the companies would send each other the invoices received from their respective suppliers.<sup>112</sup> In a fax dated 26 February 1998 from Deltafina to Dimon, the chairman of Deltafina complained that Dimon had violated the agreement on the 1996 crop of Burley to which both had subscribed. The reason is that Dimon apparently offered producers in the Caserta region different conditions from those agreed with Deltafina.<sup>113</sup> In a reply from Dimon to Deltafina two days later, dated 28 February 1998, Dimon confirmed that it had indeed complied with the memorandum *“Burley Raccolto 96”* and that everyone was satisfied with Dimon’s behaviour (*“La società che rappresento ha rispettato appieno i termini di quel memorandum ed il raccolto è stato interamente consegnato, con soddisfazione di tutti”*<sup>114</sup>).

#### 1.5.4.5. Co-ordination at purchasing managers level in respect of prices and quantities for Bright in Umbria and Lazio.

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<sup>108</sup> Doc. 38281/428, Doc. 38281/1274, Doc. 38281/1344.

<sup>109</sup> The memorandum is undated but was received by the recipient on 7 October 1997 [Doc. 38281/2511].

<sup>110</sup> Doc. 38281/428.

<sup>111</sup> See Deltafina’s submission of 26 March 2002 [Doc. 38281/607].

<sup>112</sup> See Transcatab submission of 9 April 2002 [Doc. 38281/1274].

<sup>113</sup> Doc. 38281/2552.

<sup>114</sup> Doc. 38281/756 and Doc. 38281/2553.

(123) On 5 November 1996, the same day on which the agreement reported in the memorandum “*Burley Raccolto 96*” was reached, another meeting took place in the afternoon between the purchasing managers of the same three processors (Deltafina, Dimon and Transcatàb) in Bastia Umbra.<sup>115</sup> During the meeting, the purchasing managers exchanged extensive information about their purchasing policies, prices and suppliers. In particular, they discussed and tried to fix their purchasing prices for Bright in Umbria and Lazio. Finally, they agreed to meet again on 15 November 1996 to exchange information on the delivery prices paid (“*informazioni sui prezzi pagati*”).<sup>116</sup> A series of tables in the minutes of the meeting show the tobacco quantities that the processors expected to buy in 1996 with an indication of their respective suppliers. Another table indicates the quantities of Burley bought by each processor in 1996.<sup>117</sup> Additional examples of very detailed exchanges of information by suppliers for Burley, Bright, DAC and Kentucky in 1996 can be found in the file.<sup>118</sup>

### 1.5.5. 1997

#### 1.5.5.1. New Deltafina proposal for an agreement on common conduct

(124) A document drafted by Deltafina in October 1997 in the aftermath of a meeting between the chairmen of Deltafina, Dimon, Transcatàb and Romana Tabacchi, which most likely took place at the beginning of the same month, contains an invitation to Dimon, Transcatàb and Romana Tabacchi to meet and discuss together on 11 October 1997 at the Hotel Parco dei Principi in Rome (the meeting actually took place on 14 October).<sup>119</sup> The proposed agenda for the meeting provided, *inter alia*, for the joint determination of maximum prices and other contractual conditions for producers and third packers, “*so that our suppliers cannot pay higher prices to their growers than Exporters, nor invest money in other means of increasing market shares (e.g. through “intermediaries”*”).<sup>120</sup> Deltafina suggested that a practical step to take at the meeting was also to “[d]etermine market shares for sourcing from third parties; after preparing a list of eligible non-exporting packers, jointly determine appropriate prices and side conditions, considering the relative commercial background of each supplier” and [a]ct against any external market disruption”. The processors were

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<sup>115</sup> Transcatàb submits that also Boselli was present. See list of meetings submitted by Transcatàb during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>116</sup> Doc. 38281/430-432, Doc. 38281/521, Doc. 38281/607.

<sup>117</sup> Doc. 38281/1351, for the comments of Transcatàb on these tables see Doc. 38281/1274.

<sup>118</sup> Doc. 38281/1346-1349.

<sup>119</sup> Doc. 38281/521 and 608.

<sup>120</sup> See undated document Italian Tobacco Crop 1997 “The need to protect our export market” [Doc. 38281/434].

finally invited by Deltafina to fill in tables and bring information by variety on their respective prices, quantities and suppliers for their “1996 sourcing”.<sup>121</sup>

- (125) An internal Dimon memorandum dated 9 October 1997 and prepared by Dimon’s chairman discusses the proposal made by the chairman of Deltafina. This memorandum sets out the arguments for and against the proposal. Among the arguments in favour of reaching an agreement with the other processors was the fact that the chairman of Deltafina “insists that regular meetings during the season to examine every serious complaint would bring the accused back into line at once. If not ‘à la guerre comme à la guerre’” and that “Our refusal to join Universal’s flock of sheep will be communicated to every major customer within 24 hours and probably the negative PR effects will not only be confined to Italy”. The memorandum therefore recommended that either “We accept the proposal in good faith with the sincere intention to do all we can to make it work” or “we present the meeting with valid, defensible reasons why we consider such a proposal inappropriate for resolving Italy’s problems (without saying that we consider our competition untrustworthy)” and concluded that “In no case should we say “yes” [to an agreement] with the intention of secretly encouraging its failure”.<sup>122</sup>

#### 1.5.5.2. The actual agreement covering maximum prices to suppliers, suppliers allocation, joint purchases and surplus production

- (126) Eventually, the meeting called for by Deltafina took place on 14 October 1997 at the hotel Parco dei Principi in Rome between the chairmen of Deltafina, Dimon, Transcatab and Romana Tabacchi<sup>123</sup>, as recorded by an internal Dimon report written on the same day. The meeting was also included in the list of meetings submitted by Transcatab to the Commission.<sup>124</sup> According to the report and other contemporary written sources,<sup>125</sup> the processors:

- (i) agreed on that occasion on the maximum prices to be paid to suppliers (the prices were to remain at the level of the previous year),
- (ii) allocated their suppliers and the respective quantities to be supplied, and

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<sup>121</sup> See undated document Italian Tobacco Crop 1997 “The need to protect our export market” [Doc. 38281/435].

<sup>122</sup> Doc. 38281/2701-2702.

<sup>123</sup> The presence of Trestina at this meeting was also alleged by Transcatab but not by the other Leniency applicants see footnote 124. In its reply to the SO, Trestina has denied its participation in this instance as well as all other significant instances of the processors’ cartel.

<sup>124</sup> Doc. 38281/443 and 522, 808, 608. See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>125</sup> See hand-written notes of the managing director of Deltafina and the description submitted by Deltafina, Doc. 38281/443 and 608).

(iii) decided that they would buy from ATI only jointly.

- (127) The companies also discussed and exchanged information regarding quantities of surplus production to be acquired from producers, in particular the percentage of surplus production allowed for purchase and its price. It was also agreed that the purchasing managers of every company would exchange information every week.<sup>126</sup>

#### 1.5.5.3. Further agreements and contacts in respect of Bright and information exchange on Burley

- (128) On 20 October 1997, the purchasing managers of Deltafina, Dimon, Transcatab and Romana Tabacchi met in Nicotiana House (Romana Tabacchi's office in Rome) to discuss the situation of receiving of Bright in Umbria and Lazio. They discussed their own strategies and the respective prices for each producer, and informed each other whether or not they had started receiving tobacco, when they would do so, and the prices at which and from whom they would buy or had bought tobacco.<sup>127</sup> At the end of the meeting, they agreed on average and maximum prices for each geographical district of Umbria and Lazio and a handwritten resumé of the agreement was made and, probably, distributed to the other participants by the purchasing manager of Deltafina.<sup>128</sup>
- (129) On 29 October 1997, the purchasing managers of Deltafina, Dimon, Transcatab, and Romana Tabacchi met again in Rome to discuss each other's strategies for the purchase of Bright and the beginning of deliveries of Burley from producers.<sup>129</sup> The processors also indicated their preferred suppliers.<sup>130</sup> Transcatab submitted to the Commission that in order to monitor compliance with the agreement, the processors sent each other the invoices from their respective suppliers. This is confirmed by an invoice faxed from Deltafina to Transcatab in December 1997.<sup>131</sup>

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<sup>126</sup> Doc. 38281/443 and 522. For the fact that figures for surplus production for the 1996 crop were discussed during the meeting *see* also the internal Dimon memorandum of 9 October 1997 [Doc. 38281/2509].

<sup>127</sup> For Deltafina's handwritten notes of the discussion *see* Doc. 38281/573, for the explanation of the document by Deltafina *see* Doc. 38281/592 and 608. Deltafina has also alleged the presence of Boselli at this meeting. In its reply to the SO, Boselli has denied its participation in this instance as well as to all other significant instances of the processors' cartel.

<sup>128</sup> For the document itself, headed "*Accordo*" *see* Doc. 38281/575, for the explanation of the document by Deltafina *see* Doc. 38281/592 and 608.

<sup>129</sup> *See* handwritten notes by Deltafina of the meeting dated 29 October 1997 [Doc. 38281/577 and 592]. For the notes taken by Transcatab of the same discussions, which are probably incorrectly dated 30 October 1997, *see* Doc. 38281/1356 and 1357.

<sup>130</sup> For a detailed list submitted by Transcatab reporting the quantities and the suppliers from which the processors would have bought Burley in 1997 *see* Doc. 38281/1359.

<sup>131</sup> Doc. 38281/1275 and Doc. 38281/1362.

### 1.5.6. 1998

#### 1.5.6.1.Processors' scepticism in respect of their maintaining a common conduct

- (130) In the letter from Dimon to Deltafina dated 28 February 1998 mentioned above at recital (122), the chairman of Dimon stated that for the 1997 harvest it considered itself free to offer producers the price best suited for the industry (“*ci consideriamo liberi di offrire ai nostri coltivatori le condizioni che riteniamo siano nel miglior interesse dell’industria a cui apparteniamo*”).<sup>132</sup> In addition, Dimon seemed to share Deltafina’s view that meetings in which competitors met were not useful for participants as each of them would try to interpret what had been decided for its own benefit (“*Condivido il tuo punto di vista che riunioni di questo tipo non risultano utili a nessuna delle parti poiché ciascuna tende ad interpretare le conclusioni a proprio uso e consumo*”).<sup>133</sup>

#### 1.5.6.2.The Villa Grazioli agreement on prices for Burley, Bright and DAC

##### 1.5.6.2.1.Negotiations and conclusion

- (131) On 29 May 1998, Romana Tabacchi invited by fax the chairmen of Deltafina, Dimon, and Transcatab (but not Trestina) to a meeting to take place on 4 June 1998 at the hotel Villa Grazioli in Grottaferrata.<sup>134</sup> On 4 June the planned meeting took place at Villa Grazioli between the chairmen of Deltafina, Dimon, Transcatab and Romana Tabacchi, and on 11 June 1998 Romana Tabacchi transmitted to Dimon and the other processors “*the draft related to the meeting held on the 4<sup>th</sup> of June which is in force for all the future discussions*” and communicated that the next meeting would take place on 2 July 1998.<sup>135</sup> According to information submitted during the inspection of 18 April 2002 by Transcatab, a meeting took place on 2 July 1998 between the chairmen and purchasing managers of Deltafina, Dimon, Transcatab, Romana Tabacchi and Trestina<sup>136</sup>. However, it is very likely that this meeting actually took place on 4 July, as stated by the other participants (*see* (132) below).
- (132) On 4 July 1998, at Villa Grazioli, the chairmen and purchasing managers of Deltafina, Dimon, Transcatab and Romana Tabacchi concluded a written agreement, which, according to Dimon,<sup>137</sup> had been prepared by Romana Tabacchi (the “*Villa Grazioli*

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<sup>132</sup> Doc. 38281/756.

<sup>133</sup> Doc. 38281/756.

<sup>134</sup> Doc. 38281/1364.

<sup>135</sup> Doc. 38281/758, for the invitation sent by fax on 26 June 1998 to the chairmen of Deltafina, Dimon, and Transcatab with the details for this next meeting *see* Doc. 38281/1365.

<sup>136</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>137</sup> See Dimon’s submission of 4 April 2002 [Doc. 38281/752].

*agreement*” or “*accordo di Villa Grazioli*”).<sup>138</sup> Deltafina submitted to the Commission that the main principles of the agreement were agreed upon on a different date, namely 22 September 1998 and that the parties subsequently asked the representative of Romana Tabacchi to put the agreement in writing. According to Deltafina, the agreement was finally initialled on 8 October and not on 4 July as submitted by Dimon.<sup>139</sup> Transcatab did not provide the Commission with an exact date for the agreement. A fax sent by Transcatab to Deltafina, Dimon and Romana Tabacchi on 14 September 1998 and proposing a meeting on 23 September 1998 also with the purchasing managers seems to confirm that a definite agreement had not yet been reached in July (“*Come concordato nell’ultima seduta, dobbiamo incontrarci per confermare quanto discusso. Suggestirei di riunirci mercoledì 23/9/98 a pranzo a Roma, anche con i nostri responsabili degli acquisti*”).<sup>140</sup> The meeting was then re-scheduled for 22 September 1998 at Villa Grazioli.<sup>141</sup>

- (133) The main thrust of the Villa Grazioli agreement, which is initialled by officers of Deltafina, Dimon, Transcatab, Romana Tabacchi<sup>142</sup>, consists of fixing purchasing prices of raw tobacco (for the varieties Burley, Bright and DAC) to be acquired from producers, producers’ association and from third packers.
- (134) Deltafina submitted to the Commission that the Villa Grazioli agreement was in reality not implemented<sup>143</sup> and Dimon stated to the Commission<sup>144</sup> that “*this Agreement was never enforced and the parties never respected the principles agreed upon. In addition, the companies never renewed or extended the agreement to any subsequent crop. Any particular mechanism to exchange information between the companies was structured [sic]*”.

#### 1.5.6.2.2.As to Burley prices

- (135) For Burley, the agreement recalled in its preamble, first, that it was necessary to act in order to guarantee a differentiation of prices so as to induce the producers and the third packers who wanted to obtain the highest prices to improve the quality and the

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<sup>138</sup> For the text of the agreement *see* Doc. 38281/406.

<sup>139</sup> See submission by Deltafina of 19 March 2002 [Doc. 38281/522]. For a slight different previous version but with annotation by Deltafina and the negotiations *see* Doc. 38281/445-450, for the invitation sent by fax on 15 September 1998 to the chairmen of Deltafina, Dimon, and Transcatab for the meeting of 22 September 1998 *see* Doc. 38281/1366. *See* Doc. 38281/2515-2516 for a fax that was sent to the chairman of Dimon while he was attending the meeting at Villa Grazioli.

<sup>140</sup> Doc. 38281/2543.

<sup>141</sup> See fax by Dimon to Romana Tabacchi dated 15 September 1998 [Doc. 38281/2548] and fax by Romana Tabacchi to Deltafina, Dimon and Transcatab of 15 September 1998 [Doc. 38281/2549].

<sup>142</sup> Initials of a fifth undertaking also appear but the Commission does not possess any evidence corroborating the leniency applicant statements whereby these can be referred to Trestina.

<sup>143</sup> Deltafina’s submission of 19 February 2002 [Doc. 38281/403].

<sup>144</sup> See Dimon’s declaration of 4 April 2002 [Doc. 38281/752].

presentation<sup>145</sup> of their tobacco and that it was also necessary to reduce the price of tobacco so as to follow the global market trend.

- (136) For Burley, it was agreed that the price to be paid to producers was ITL 300 per kilogram with a possible premium to reward quality of up to ITL 200 per kilogram. This premium could not be calculated in any event on more than 40% of the total amount purchased (“*Si stabilisce: 1. il prezzo da pagare ai coltivatori in Lit./kg. 300. Allo scopo del miglioramento della qualità si potrà riconoscere ai migliori coltivatori un premio fino a Lit./kg 200 che comunque potrà essere applicato ad un massimo del 40% dell’intero quantitativo ritirato*”). For Burley, it was also agreed that the price to be paid to third packers for tobacco in parcels for the entire delivery, with or without supply to the Italian monopoly, was ITL 2200 per kilogram with a possible premium to reward quality of up to ITL 100 per kilogram (“[*Si stabilisce:*] 2. *che il prezzo per il tabacco in colli ai trasformatori terzi per l’intera partita, con o senza fornitura al Monopolio Italiano, sia di Lit./kg 2.200. Al fine del miglioramento della qualità e per premiare le migliori aziende trasformatrici di cui alla premessa, verrà riconosciuto un sovrapprezzo fino ad un massimo di Lit./kg. 100*”). The processors also agreed on the price for tobacco in bales for the average quality of the entire delivery (“*run of the crop*”) loaded on trucks and classified (“*un prezzo per i tabacchi in balle di Lit./Kg 1.400 classificato e caricato su camion per l’intera partita (run of the crop)*”) and not to buy bales of low quality tobacco (“*Le balle di C3 vengono respinte*”).

#### 1.5.6.2.3.As to Bright prices

- (137) For Bright, the text of the memorandum recalled, first, that no minimum prices were agreed in negotiations with producers for the 1998 crop (“*Premesso che per la campagna 1998 non sono stati garantiti prezzi minimi in sede di contrattazione con i coltivatori*”). The agreement classified producers and third packers in two categories according to geographic location of the supplier (“*Area Italia Centrale*” and “*Area Verona*”) and determined the average price to be paid for each category, distinguishing between (i) tobacco bought from producers, (ii) tobacco processed by co-operatives or third packers, and (iii) tobacco bought in bales. Unlike Burley, there was no provision for any premium to reward quality. .

#### 1.5.6.2.4.As to DAC prices

- (138) For DAC, the companies decided that given their insignificant presence in the market for direct DAC tobacco (that is to say, DAC tobacco bought directly from producers) it would not be meaningful to determine prices for purchases directly from producers (“*Considerato che la nostra presenza sul mercato dello sciolto è poco significativa, non è efficace indicare dei prezzi in tale fase*”) and therefore determined only the maximum price for tobacco in parcels purchased from third packers, which was set at

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<sup>145</sup> “*Allestimento*” (or presentation of tobacco in English) refers to tobacco put in bales according to its leaf position but without being selected according to quality.

ITL 1 600 per kilogram (“*Si stabilisce un prezzo massimo per l’intera partita in colli da trasformatori terzi in Lit./kg 1.600*”).

#### 1.5.6.2.5.As to quantities and suppliers

- (139) For Burley, Bright and DAC the companies also jointly determined the minimum quantities of direct tobacco to be acquired in bulk directly from producers (“*sciolto/acquisti diretti*”) and indirect tobacco or tobacco to be acquired in parcels from third packers (“*in colli da terzi*”) that were guaranteed for each processor.<sup>146</sup> They also jointly established a list of preferred third packers (“*aziende terze ritenute fornitrici preferenziali*”, listed in Annex 2 to the Agreement)<sup>147</sup> from which these quantities would be sourced, allocating for each supplier a certain portion of the total quantity allocated to each processor. Each third packer in the list would be treated as a preferential supplier of such processor. If one processor wanted to purchase from a third packer not included in the list, it first had to consult and agree with the other processors (“*in caso di particolari esigenze, si potranno concordare volta per volta acquisti da fornitori al di fuori di quelli elencati previa consultazione reciproca*”). Previous versions of the agreement also classified Burley third packers in three categories (A, B, and C) depending on the quality of their tobacco and differentiated the price to be paid for each of these three categories by grade (AB, C and C2/C3).<sup>148</sup> Dimon submitted to the Commission that “*the agreement referred to (i) the classification of third packers in three categories (‘A’, ‘B’, and ‘C’) depending on the quality of their tobacco and the possible commission of illegal practices by such packers; and (ii) the purchase prices to be paid to the packers of each category for the 1998/1999 crop*”<sup>149</sup>.

#### 1.5.6.2.6.Exchange of information

- (140) For Burley, Bright and DAC, the parties to the Villa Grazioli agreement also decided to have close co-ordination through an exchange of information on market trends (“*[si prende atto inoltre:] di mantenere una stretta collaborazione attraverso uno scambio di informazioni sui vari movimenti di mercato*”) and always to control their respective employees so as to avoid them taking any action without the necessary co-ordination (“*[si prende atto inoltre:] di mantenere sempre sotto controllo l’operato dei collaboratori onde evitare che vengano prese iniziative senza la necessaria coordinazione*”).

#### 1.5.6.2.7.Supplies from Romana Tabacchi

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<sup>146</sup> These quantities are listed in Annex 1 to the Agreement of Villa Grazioli [Doc. 38281/408].

<sup>147</sup> Doc. 38281/409.

<sup>148</sup> Doc. 38281/761 and 1378.

<sup>149</sup> Doc. 38281/752.

- (141) Dimon and Transcatab also agreed in the final and initialled version of the agreement to source their Oriental tobaccos from Romana Tabacchi, as did Deltafina for the quantities exceeding its direct sourcing from producers. For DAC, Romana Tabacchi was also willing to make available its own supplies (“*DM and TC si impegnano ad approvvigionarsi dei tabacchi orientali attraverso RT come anche DF per le quantità oltre il proprio approvvigionamento diretto. [A]nche per il DAC la RT è disponibile a mettere a disposizione propri quantitativi*”).

#### 1.5.6.3. Agreement on surplus production

- (142) On 22 September 1998, at Villa Grazioli, the chairmen and purchasing managers of Deltafina, Dimon, Transcatab and Romana Tabacchi also discussed the need to reach an agreement within the interprofessional association on surplus production, as well as the prices and modalities of delivery and payment for surplus production in the absence of such agreement.<sup>150</sup> A handwritten note made by the purchasing manager of Deltafina, dated 22 September 1998 and headed “*Villa Grazioli*”, reports the following wording “*Agreement with interprofessional association. –1- surplus production will be received after the purchase of in quota production –2- price (non defined) – when to divulge the price –3- timing*”. (“*Accordo con ass. interprofessionale. –1- il fuori quota solo per quest’anno si ritirerà dopo l’acquisto di quello in quota. –2- prezzo (non definito) – quando diramare il prezzo -3- tempi.*”)<sup>151</sup>
- (143) In this context, an internal memorandum of Dimon dated 16 September 1998 reveals that both Deltafina and UNITAB proposed a meeting with the major producers associations and UNITAB to “*propose a ceiling (lit. 1,300 per kilo?) and invite packers to observe it*” for their 1998 surplus production and “[*h*]aving the farmers’ political backing the idea is that the major packers meet to agree how best to comply with the political wish of the farmers”.<sup>152</sup>

#### 1.5.6.4. Follow-up to the Villa Grazioli and the surplus production agreements

- (144) On 8 October 1998 another meeting took place at Villa Grazioli between the chairmen and purchasing managers of Deltafina, Dimon, Transcatab and Romana Tabacchi.<sup>153</sup>

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<sup>150</sup> See handwritten notes by Deltafina of meeting taking place on 22 September 1998 [Doc. 38281/450], for the invitation sent by fax on 15 September 1998 to the chairmen of Deltafina, Dimon, and Transcatab for this meeting *see* Doc. 38281/1366. *See* Doc. 38281/2515-2516 for a fax that was sent to the chairman of Dimon while he was attending the meeting at Villa Grazioli.

<sup>151</sup> Doc. 38281/450.

<sup>152</sup> Doc. 38281/827 and 2586.

<sup>153</sup> For the internal fax by Deltafina dated 2 October 1998 announcing that the meeting has been anticipated from 13 October 1998 to 8 October 1998 *see* Doc. 38281/452. For Deltafina’s handwritten notes of the meeting *see* Doc. 38281/454. For Transcatab’s handwritten notes about the meeting *see* Doc. 38281/1374. *See* also Deltafina submission of 19 March 2002 about the meeting [Doc. 38281/522]. The Commission does not possess any contemporaneous evidence corroborating the leniency statements indicating Trestina’s involvement.

(Deltafina submits that it was on that occasion that the Villa Grazioli Agreement was initialled and one copy made for each party).<sup>154</sup> The companies started to discuss the implementation of the Villa Grazioli agreement and discussed prices, quantities to be supplied for Burley and Bright (both for normal in quota production and for surplus production). From Deltafina handwritten notes of that meeting, it would also appear that for certain suppliers they decided to wait and then buy and divide their production among themselves (“*Lasciamolo nel freezer poi divideremo il tabacco*”<sup>155</sup>).

#### 1.5.6.4.1.As to Bright prices

- (145) On 16 October 1998, the purchasing managers of Deltafina, Dimon and Transcatab, presumably with other processors, met at Deltafina’s offices in Bastia Umbra to discuss and fix purchase prices by grade for Bright and discuss the beginning of the delivery of Bright in Umbria, Tuscany, Lazio and Verona.<sup>156</sup> The companies agreed on average and maximum prices to be paid to suppliers in those regions and to exchange information by fax each week on the upcoming deliveries.<sup>157</sup> An internal memorandum of Dimon Italia dated 20 October 1998 suggested that all the processors wanted to observe the agreement (most probably the Villa Grazioli agreement).<sup>158</sup> However, according to that memorandum, Romana Tabacchi was deemed to have violated the agreement by buying Bright from Vast-Sit.
- (146) On 23 November 1998, the chairmen and the purchasing managers of Deltafina, Dimon, Transcatab and Romana Tabacchi met at Villa Grazioli to discuss purchase of Burley and the situation in the Bright market.<sup>159</sup> The same companies also met on the same day at the Hotel Umbria in Attigliano and discussed and fixed quantities, prices and suppliers for Bright in Umbria and Lazio during the afternoon.<sup>160</sup> On 2 December

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<sup>154</sup> See Deltafina submission of 19 March 2002 [Doc. 38281/522].

<sup>155</sup> See Deltafina’s handwritten notes of the meeting [Doc. 38281/454].

<sup>156</sup> See internal Dimon memorandum of 20 October 1998 reporting on the meeting [Doc. 38281/768]. See also list of meeting submitted by Deltafina on 26 March 2002 [Doc. 38281/610]. The meeting had been scheduled during the meeting of 8 October 1998 as stated in Deltafina’s handwritten notes of that meeting [Doc. 38281/454].

<sup>157</sup> See handwritten notes of the agreement [Doc. 38281/1383-1393]. See also the description of the meeting submitted by Deltafina on 19 March 2002 [Doc. 38281/522].

<sup>158</sup> Doc. 38281/768 and 2588.

<sup>159</sup> See Deltafina’s handwritten notes of the meeting [Doc. 38281/462]. For a description by Deltafina of this meeting see its submission of 19 March 2002 [Doc. 38281/523] and its submission of 26 March 2002 [Doc. 38281/610]. For Transcatab’s handwritten notes of the same meeting see Doc. 38281/1375-1376. For the invitation sent by fax on 17 November 1998 by the chairman of Romana Tabacchi to the chairmen of Deltafina, Dimon, and Transcatab and Trestina see Doc. 38281/1367.

<sup>160</sup> Doc. 38281/463-466. For a description by Deltafina of this meeting see its submission of 19 March 2002 [Doc. 38281/523] and its submission of 26 March 2002 [Doc. 38281/610]. See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

1998, Deltafina, Dimon, Transcatlab, Romana Tabacchi met at the level of purchase managers at Nicotiana House in Rome.<sup>161</sup>

- (147) A Dimon newsletter dated December 1998 reported that “*In recent years some Burley packers have paid higher than normal market prices to compensate the lack of the premium in view of the farmers’ threat not to renew their contract for the following crop if he refused to take up his surplus ... The Farmers’ Union is therefore advising its members to hold back their surplus production to enable them to auction it off after the quota tobacco has been all sold*”.<sup>162</sup>

#### 1.5.6.4.2. Surplus production

- (148) Discussion took place in respect of timing and modalities of payment and delivery as well as an agreed price for surplus production.<sup>163</sup> Hand-written notes taken by the representatives of Deltafina and Transcatlab make it clear that an agreement was reached for Burley on the principle that before picking up surplus production an official price should have been agreed among the processors.<sup>164</sup> It was also agreed that the final instalment for the payment of surplus production would not be effected before 1 June 1999 (“*Pagamento non prima del 1/6/99! OK*“ and “*Concord (2) pagamento della integrazione di prezzo sul fuori quota sarà a giugno 99*”<sup>165</sup>) and that surplus production should be received after that in quota (“*Ricevimento del FQ a continuazione di quello in quota*” used identically by both hand-written notes).<sup>166</sup> Most importantly, an agreement on the price was reached. The price for surplus production was set at ITL 1 800 per kilogram without tare and including VAT (“*Fissato £ 1800 al netto di tare \*IVA compresa*” and “*PREZZO 1800/TARA*” where “/” means “without”). The hand-written notes of the meeting also suggest that there was an agreement on boycotting lower qualities. This can be inferred from the fact that the notes report the wording “*BALLATELLE FUORI*” which means that the lowest quality bales would not be received.<sup>167</sup>

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<sup>161</sup> See diary of Transcatlab’s manager [Doc. 38281/3572]. See list of meetings submitted by Transcatlab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>162</sup> Doc. 38281/2584.

<sup>163</sup> See Deltafina’s handwritten notes of the meeting [Doc. 38281/455]. For similar discussions in 1998, without no precise date see Doc. 38281/457, 459, and 1369-1373, which also include discussions on strings and small plants to be provided to the producers.

<sup>164</sup> “*Prima del ritiro FQ ci deve essere un prezzo ufficiale*” in Transcatlab’s handwritten notes [Doc. 38281/1374] and almost exactly the same words but with the addition of the word “Agreed” underlined “*Concord (1) prima de [sic] ritiro del F.Q. ci deve essere un prezzo ufficiale*” in Deltafina’s handwritten notes [Doc. 38281/455].

<sup>165</sup> Doc. 38281/1374 and Doc. 38281/455.

<sup>166</sup> Doc. 38281/1374 and Doc. 38281/455.

<sup>167</sup> See Deltafina’s handwritten notes of the meeting [Doc. 38281/455].

- (149) A meeting among unspecified processors of DAC was scheduled for 17 November 1998 in Benevento. The position of these processors for the meeting was that no surplus production should be bought.<sup>168</sup>

#### 1.5.6.5.Co-ordination of bids for ATI tender

- (150) An internal Dimon memorandum dated 3 July 1998 reveals that Deltafina, Dimon, Transcatab and Romana Tabacchi had agreed on 2 July 1998 “*on a maximum price*” for the bid for the purchase of tobacco in connection with an auction organised by the Italian monopoly ATI and that each of them could “*place the bid up to the maximum or do not bid*”.<sup>169</sup>

#### 1.5.6.6.Joint-negotiation with suppliers

- (151) On 14 October 1998, chairmen/representatives of Deltafina, Dimon and Transcatab entered into an agreement setting the purchase prices for in quota Burley tobacco and for surplus production, as well as modalities of delivery and payment to be proposed and negotiated with the producers associations in a meeting that took place on 20 October 1998, as explained in the following recital. Dimon submitted to the Commission that “*the agreed purchase prices would be proposed to Unions and growers’ representatives as a common position in the negotiations for the 1998/1999 crop*” and that other processors entered into the agreement, however, the Commission does not possess decisive evidence on this last point.<sup>170</sup> A meeting on DAC surplus production was scheduled for 7 November 1998.<sup>171</sup>
- (152) A Dimon internal memorandum dated 22 October 1998 reports that a meeting took place on 20 October 1998 in Caserta to discuss the agreement reached among processors on 14 October at the Grand Hotel Telese with the producers association. According to the memorandum, Coldiretti, Confagricoltura, UNITAB (assisted by Coldiretti and Confagricoltura), Deltafina, Dimon and Transcatab were present at this meeting. The Commission does not possess decisive evidence confirming the identities of the participants. According to the memorandum, the price for surplus production and the price for in quota production were negotiated but timing of payment and modalities were not decided.<sup>172</sup> The next meeting was scheduled for 29 October 1998 in Rome.
- (153) During a meeting at APTI’s offices on 11 November 1998, the chairmen of Deltafina, Transcatab, Dimon and other processors (whose participation is not corroborated by

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<sup>168</sup> See internal Dimon memorandum of 12 November 1998 [Doc. 38281/2827].

<sup>169</sup> Doc. 38281/829.

<sup>170</sup> Doc. 38281/753. For the description of the meeting and the agreement reached *see* Dimon internal memorandum of 15 October 1998 [Doc. 38281/765-766].

<sup>171</sup> See internal Dimon memorandum dated 12 November 1998 [Doc. 38281/767 and 2827].

<sup>172</sup> See internal Dimon memorandum dated 22 October 1998 [Doc. 38281/769 and 2755].

decisive evidence) agreed on the prices for Burley as the basis for negotiating an agreement with the producers' associations.<sup>173</sup> The main features of the processors' position were that the maximum price for the 1998 production in quota would be ITL 300 per kilogram, with a minimum tare of 5% and with an integration price up to ITL 200 per kilogram to be paid in June 1999 on the condition that the tobacco bought had no plastic strings, was not tied with a surplus production purchase, was well presented and had a normal moisture level. The position agreed by the processors was also that production in quota and surplus production for the 1998 crop would be received at the same time. The price for surplus production for the 1998 crop would be the same as that for in quota plus an integration price that would be paid in June 1999. Surplus production for the 1999 crop was to be paid in total ITL 1 000 per kilogram, while surplus production for the 2000 crop was to be paid the same as that in quota. Negotiations went on with the producers' associations in November 1998 without reaching an agreement.<sup>174</sup>

- (154) On 12 December 1998 Deltafina sent a fax to Dimon Italia, Transcatab, and Trestina calling for a meeting to discuss the 1998 Burley crop on 14 December 1998, also in view of the upcoming meeting with the producers' associations.<sup>175</sup>
- (155) Transcatab submitted to the Commission that a meeting took place on 14 December 1998 in Caserta at Transcatab's offices between the purchasing managers of Deltafina, Dimon, Transcatab, Romana Tabacchi and Trestina.<sup>176</sup> Then, in the late afternoon, a meeting took place at the Hotel Serenella in Caserta in which third packers also participated to discuss interprofessional agreements.
- (156) A letter of intent for the conclusion of an interprofessional agreement for Burley for the 1998 crop was drafted in December 1998 ("*LETTERA D'INTENTI [a]i fini della stipula di un ACCORDO INTERPROFESSIONALE PER IL TABACCO BURLEY Campagna 1998*").<sup>177</sup> The letter set out a compromise between the parties (on the one hand, UNITAB, assisted by the agricultural organisations Coldiretti, CIA and, on the other hand, the processing firms – whose names are not spelt out in the document) on the problem of surplus production. The letter states that a minimum and a maximum price for surplus production would be fixed by 15 January 1999 and that the price would be paid by the processors by 30 April 1999. With the letter, the parties undertook to eliminate surplus production for the future crops while, as an exceptional measure, surplus production for the 1998 crop would be sold only through an auction

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<sup>173</sup> See internal Dimon memorandum dated 12 November 1998 [Doc. 38281/767 and 2827]. See also Doc. 38281/3567.

<sup>174</sup> See internal Dimon memorandum dated 12 November 1998 [Doc. 38281/767 and 2827]. See also Doc. 38281/3567.

<sup>175</sup> Doc. 38281/825, 2589.

<sup>176</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>177</sup> For the text of the letter of intents see Doc. 38281/1397. See also Transcatab description of the letter of intent in its submission of 9 April 2002 [Doc. 38281/1276].

system. The Commission does not possess decisive evidence proving who drafted the letter of intent and whether it was finally agreed upon.

### 1.5.7. 1999

#### 1.5.7.1. On-going discussion and co-ordination

- (157) Deltafina, Dimon Italia and Transcatab maintained informal contacts on a regular basis to discuss forecasts and evolution of purchase prices in Italy. In the middle of January 1999, producers of Bright and Burley in Umbria, Lazio, Toscana and Abruzzo, appeared to be unhappy about the decrease in prices effected by Dimon.<sup>178</sup>

#### 1.5.7.2. January agreement on surplus production of 1998 Burley crop

- (158) On 18 January 1999 a large number of processors met at the Hotel Novotel in Caserta.<sup>179</sup> A document initialled on that occasion by the representatives of Deltafina, Dimon and Transcatab set out an agreement in detail concerning the surplus production of the 1998 crop of Burley.<sup>180</sup> Pursuant to this agreement, processors would buy surplus production for the 1998 crop of Burley at three different prices depending on the date of purchase. The agreement also set out the condition that processors would buy surplus production from their respective allocated producers only and would not pay the producers an integration price if the latter switched to another processor after being paid the first instalment (“A) *I pagamenti di integrazione verranno pagati se esiste la continuità del rapporto; B) I trasformatori acquisteranno solo il tabacco fuori quota dei propri coltivatori*”). The processors decided to communicate their common position to the professional associations in order to discuss it with them. The Commission does not possess any evidence that, apart from Deltafina, Dimon and Transcatab, other processors entered into the agreement.

#### 1.5.7.3. February agreement on pricing and purchasing conduct

- (159) At the beginning of February 1999 and on 19 February 1999, two meetings took place in Rome, between the chairmen and the purchasing managers respectively of Deltafina, Dimon and Transcatab (possibly together with representatives of other processors whose presence cannot, however, be clearly established) to discuss the 1999 crop of Burley and in particular how to reduce or eliminate the cost of intermediaries, and to fix prices, identify the suppliers in list C (those with very low quality/prices) as well as to decide the strategies to eliminate surplus production for

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<sup>178</sup> See internal report by Dimon purchase managers dated 15 January 1999 [Doc. 38281/2711].

<sup>179</sup> See the list of attendees (“*Lista di presenza*”) of the meeting of 18 January 1999 with the names and actual signatures of the attendees [Doc. 38281/1570-1571].

<sup>180</sup> For the text of the agreement see Doc. 38281/1572.

1999.<sup>181</sup> They also discussed the interprofessional agreements and the creation of a joint purchasing committee, “*commissione d’acquisto*”, which was later to be called COGENTAB (this is explained in greater detail below<sup>182</sup>). More specifically, the handwritten notes of these meetings taken by the purchasing manager of Deltafina report the following entries for the 1999 crop of Burley: “1) *Ridurre costo procacciatori Lit. 300 + X per servizi*. 2) *Blocco procacciatori*. 3) *aumento prezzi*. 4) *modulazione* 5) ... 6) *Lista C*. 7) *Fuori quota*. 8) *Eliminazione buchi* [“1) Reduce intermediaries’ costs LIT. 300 + X for services. 2) Stop intermediaries. 3) increase prices. 4) modulation. 5)...6) C list 7) surplus; elimination of blanks” *i.e.*, elimination of the empty quotas which had been attributed to individuals not engaged in reality in the production of tobacco]. For Bright, the notes also suggest that an agreement was reached on not buying Bright before AMS would buy (the Amministrazione dei Monopoli di Stato) and to consult in any case with each other (“*non comprare prima di AMS. Sentirsi comunque*”).<sup>183</sup> On Burley, in conformity with the Villa Grazioli agreement, it was decided that a premium could be given only to maximum 40% of the total amount of surplus production purchased.

#### 1.5.7.4. February Interprofessional Agreements on surplus production of 1998 Burley crop

- (160) On 3 February 1999, APTI and UNITAB signed an interprofessional agreement for the 1998 crop of Burley (“*Accordo Interprofessionale Tabacco Burley Campagna 98*”). This agreement did not fix prices for the tobacco produced within the quota as it left the determination of such prices to the cultivation contracts. Instead, the text of the agreement referred generically to the fact that the price should cover (at least) the cost of production. The agreement stated that given exceptional circumstances arising in relation to the 1998 crop and by way of derogation from what was provided for by the cultivation contracts already signed, surplus production was to be accepted by processors in the same fashion as that produced in quota. The agreement fixed the price for the surplus production at 2 300 ITL per Kilogram, VAT included. (“*Vista l’eccezionalità della produzione della campagna 98 ed in deroga a quanto previsto nel contratto di coltivazione, il tabacco fuori quota verrà ritirato dalle imprese di trasformazione con le stesse modalità previste dal contratto di coltivazione. Il valore corrisposto, dalle imprese di trasformazione sarà pari a Lire 2.300/kg IVA compresa*”).<sup>184</sup>

#### 1.5.7.5. The Framework Interprofessional Agreement

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<sup>181</sup> See Deltafina’s handwritten notes of the meeting of 19 February 1999 [Doc. 38281/470]. For a description by Deltafina of these meetings *see* its submission of 26 March 2002 [Doc. 38281/611].

<sup>182</sup> See recital (182).

<sup>183</sup> See Deltafina’s handwritten notes of the meeting of 19 February 1999 [Doc. 38281/471].

<sup>184</sup> For a signed copy of the agreement *see* Doc. 38281/1407.

- (161) In January 1999, APTI was negotiating an interprofessional agreement with UNITAB and the producers' associations agreed amongst themselves on a common position to be proposed for the interprofessional agreement.<sup>185</sup> On 6 May 1999 APTI and UNITAB concluded a framework interprofessional national agreement for the 1999-2000-2001 crops of bulk dried raw tobacco ("*Accordo Quadro Interprofessionale Nazionale per il tabacco greggio allo stato secco sciolto produzione 1999-2000-2001*").<sup>186</sup> While APTI and UNITAB are the only parties to the agreement, UNITAB was assisted by the Agricultural Professional Organisations COLDIRETTI, CIA and CONFAGRICOLTURA.ConfCooperative and ANCA/Lega (two confederations of co-operatives of producers belonging to ASSINTABAC) are said in the text of the agreement to "*participate*" in it, but did not sign it.
- (162) This agreement, as well as the implementing varieties agreements described which were subsequently concluded, were submitted for information to the Ministry and to AGEA and published in the specialised press.<sup>187</sup> According to its text, the agreement is aimed at (a) better regulating the quantities produced by making them conform to market demand, (b) improving the quality of bulk tobacco, (c) ensuring great transparency in the commercialisation of production and (d) establishing criteria for production and fixing the price of raw tobacco.
- (163) Article 3 of the agreement indicates the necessary elements of a cultivation contract. First, the contract must include all the elements provided for by Regulations (EEC) No 2075/92 and (EC) No 2848/98. Second, the contract must include the classification levels for raw tobacco. Third, the contract must indicate the price for each level. Article 4 of the agreement provides that the price indicated must exclude all compensation for the services provided (for example, transport or other technical assistance).<sup>188</sup>

#### 1.5.7.6. Interprofessional Agreement for the 1999 crop of Burley

- (164) On 8 March 1999, Interburley met to discuss, *inter alia*, the criteria by which to determine the prices for the 1999 crop of Burley. These criteria included the setting out of quality ranges with a technical description (A1, A2, B1, B2, C), an analysis of the statistical data for these ranges indicating the percentage of each range bought by each of Deltafina, Dimon, Transcatlab and Trestina separately, and attribution of a price to each range taking into account modulation. It was also discussed how many interprofessional committees for the grading of Burley were needed and in particular, their costs, appropriate means and personnel.<sup>189</sup>

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<sup>185</sup> See letter by processors to Unitab of 15 January 1999 re: National agreement for Burley [Doc. 38281/1409] and the draft proposal of the producers' associations [Doc. 38281/1411-1412].

<sup>186</sup> For a signed copy of the agreement *see* Doc. 38281/1425-1431 and Doc. 38281/195-201.

<sup>187</sup> See Unitab's reply of 13 February 2002 to Commission's request for information [Doc. 38281/127].

<sup>188</sup> This is in conformity with what provided for by Article 9(g) of Regulation 2848/98.

<sup>189</sup> See memorandum on the meeting of 8 March 1999 sent by Dimon to Transcatlab on 16 March 1999 [Doc. 38281/1580-1588]. *See also* handwritten notes of the meeting [Doc. 38281/1595-1604].

- (165) Transcatab submitted to the Commission that during these negotiations the position of APTI was strongly conditioned by Deltafina, Dimon, Transcatab and Trestina, who would usually meet in advance to define a common position among themselves, which they would then support within APTI.<sup>190</sup> Indeed, Dimon explained in its submission of 4 April 2002 that Deltafina, Dimon and Transcatab “*have negotiated and agreed a common proposal on purchase prices prior to the negotiations between APTI and UNITAB regarding the Varieties Agreements. Attendants do not draft minutes of these preparatory meetings*”.<sup>191</sup> On 12 May 1999, for example, Dimon sent a fax to Transcatab asking for a meeting between the major exporters to agree on a common position in view of a meeting of APTI to take place on 18 May 1999.<sup>192</sup>
- (166) On 16 June 1999, APTI and UNITAB reached a framework interprofessional variety agreement for the 1999 crop of dried Burley in bulk (“*Accordo quadro interprofessionale varietale per il tabacco greggio allo stato secco sciolto gruppo varietale 02 Varietà Burley Produzione 1999*”).<sup>193</sup> The agreement was entered into and signed solely by APTI and UNITAB.
- (167) The aims of the agreement are the same as those of the national framework agreement described in recital (162) above. Article 3 of the agreement indicates that the cultivation contract must contain all the elements provided for by Regulations (EEC) No 2075/92 and (EC) No 2848/98. The parties must adopt a standard contract for all their contractual relationships. Thereafter, Article 3 of the agreement provides that in relation to the classification levels and the prices for each level, the cultivation contracts concluded by the members of the signatories associations (namely UNITAB and APTI) must have regard to the classification levels and prices provided for in Annex 1A and 1B to the agreement.
- (168) Annex 1A to the agreement indicates that the classification levels are the following: AA, AB, ABM, C, CM, D, E.
- (169) Annex 1B to the agreement indicates the prices that must be paid by processors to the associations of producers. This price varies according to the classification level. The prices are indicated in the following Table 2:

**Table 2**

Classification level	Contractual price
AA	1 000 LIT/Kg
AB	750 LIT/Kg

<sup>190</sup> See declaration in this sense of 9 April 2002 by Transcatab [Doc. 38281/1278].

<sup>191</sup> Doc. 38281/754.

<sup>192</sup> For a copy of the fax, *see* Doc. 38281/1526.

<sup>193</sup> For a signed copy of the agreement *see* Doc. 38281/214.

ABM	650 LIT/Kg
C	450 LIT/Kg
CM	250 LIT/Kg
D	40 LIT/Kg
E	30 LIT/Kg

(170) Article 3 also provides that if the members of the associations that concluded the agreement sign a cultivation contract with undertakings which have not adhered to the agreement, the classification levels and the prices for each level will be those indicated in Annexes 1A and 1B.

#### 1.5.7.7. Interprofessional Agreement for the 1999 crop of Bright

(171) On 2 July 1999 UNITAB and APTI concluded a framework variety interprofessional agreement for the 1999 crop of dried Bright tobacco in bulk (“*Accordo quadro interprofessionale varietale per il tabacco greggio allo stato secco sciolto produzione 1999 Varietà Bright*”).<sup>194</sup> The aims of the agreement are the same as those of the national framework agreement described in recital (162) above. Article 2 of the agreement indicates that the cultivation contract must contain all the elements provided for by Regulations (EEC) No 2075/92 and (EC) No 2848/98. The parties must adopt a standard contract for all their contractual relationships. Thereafter, Article 2 of the agreement provides that in relation to the classification levels and the minimum prices for each level, the cultivation contracts concluded by the members of the signatory associations to the agreement (that is to say, the producers’ associations and the processors’ association) must have regard to what is provided for in Annex 2 to the agreement.

(172) Annex 2 to the agreement indicates the prices that must be paid by processors to the associations of producers. This price varies according to the classification level and, for the three highest levels, the agreement also provided for a maximum price by level so that the result was to have for a price range for each of the three levels, within which the actual price should be comprised. The prices are indicated in the following Table 3:

**Table 3**

Classification level	Contractual price
A	1 700 – 2 400 LIT/Kg
B	1 100 – 1 500 LIT/Kg

<sup>194</sup> For a signed copy of the agreement see Doc. 38281/1442-1452 and Doc. 38281/203.

C	1 400 – 2 000 LIT/Kg
D	900 LIT/Kg
E	600 LIT/Kg
F	400 LIT/Kg
G	100 LIT/Kg

(173) Article 2 also provides that if the members of the associations that concluded the agreement sign a cultivation contract with undertakings which have not adhered to the agreement, the classification levels and the minimum prices for each level will be those indicated in Annex 2.

(174) Article 3 of the agreement provides that the price indicated must exclude all compensation for the services provided (for example, transport or other technical assistance).<sup>195</sup>

#### 1.5.7.8. Interprofessional Agreement for the 1999 crop of Havannah

(175) On 6 July 1999 UNITAB and APTI concluded a framework interprofessional variety agreement for the 1999 crop of I.B.G. – Havannah tobacco dried and in bulk (*“Accordo varietale quadro interprofessionale per il tabacco greggio allo stato secco sciolto produzione 1999 Gruppo varietale 03 I.B.G. – Havanna*).<sup>196</sup>

(176) The aims of the agreement are the same as those of the national framework agreement described in recital (162) above. Article 2 of the agreement indicates that the cultivation contract must contain all the elements provided for by Regulations (EEC) No 2075/92 and (EC) No 2848/98. The parties must adopt a standard contract for all their contractual relationships. Thereafter, Article 2 of the agreement provides that in relation to the classification levels and the minimum prices for each level, the cultivation contracts concluded by the members of the signatory associations to the agreement must have regard to what is provided for in Annex 2 to the agreement.

(177) Annex 2 provides that the classification levels are the following: A, B, B1, B2, and C. Annex 2 to the agreement indicates the prices that must be paid by processors to the associations of producers. This price varies according to the classification level. The prices are indicated in the following Table 4:

**Table 4**

Classification level	Contractual price
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<sup>195</sup> This is in conformity with what provided for by Article 9(g) of Regulation 2848/98.

<sup>196</sup> For a signed copy of the agreement *see* Doc. 38281/1454-1463.

A	800 LIT/Kg
B	400 LIT/Kg
B1	200 LIT/Kg
B2	50 LIT/Kg
C	10 LIT/Kg

(178) Article 2 also provides that if the members of the associations that concluded the agreement sign a cultivation contract with undertakings which have not adhered to the agreement, the classification levels and the minimum prices for each level will be those indicated in Annex 2.

#### 1.5.7.9. Interprofessional Agreement for the 1999 crop of Kentucky

(179) On 6 July 1999 also UNITAB and APTI concluded a framework interprofessional variety agreement for the 1999 crop of dried Kentucky tobacco in bulk (“*Accordo quadro interprofessionale varietale per il tabacco greggio allo stato secco sciolto produzione 1999 Varietà Kentucky*”).<sup>197</sup> The aims of the agreement are the same as those of the national framework agreement described in recital (162) above. Article 2 of the agreement indicates that the cultivation contract must contain all the elements provided for by Regulations (EEC) No 2075/92 and (EC) No 2848/98. The parties must adopt a standard contract for all their contractual relationships. Thereafter, Article 2 of the agreement provides that in relation to the classification levels and the minimum prices for each level, the cultivation contracts concluded by the members of the signatory associations to the agreement must have regard to what is provided for in Annex 2 to the agreement.

(180) Annex 2 to the agreement indicates the prices that must be paid by processors to the associations of producers. This price varies according to the classification level. The prices are indicated in the following Table 5:

**Table 5**

Classification level	Contractual price
A1	10 500 LIT/Kg
A2	9 500 LIT/Kg
A3	6 500 LIT/Kg

<sup>197</sup> For a signed copy of the agreement see Doc. 38281/1464-1472.

R1P	3 500 LIT/Kg
R1L	2 500 LIT/Kg
T1P	1 500 LIT/Kg
T1L	800 LIT/Kg
T2	100 LIT/Kg
R2P	3 300 LIT/Kg
R2L	2 200 LIT/Kg
RV	800 LIT/Kg
C1	1 000 LIT/Kg
C2R	100 LIT/Kg

(181) Article 2 also provides that if the members of the associations that concluded the agreement sign a cultivation contract with undertakings which have not adhered to the agreement, the classification levels and the minimum prices for each level will be those indicated in Annex 2.

#### 1.5.7.10.COAGENTAB

(182) Pursuant to the Interprofessional agreement for the 1999 crop of Burley, APTI and UNITAB created a civil law association named COAGENTAB (“*Comitato di Gestione Nazionale del Tabacco Burley*”) in October 1999. This association was created with the aim to operate expert committees, the members of which were appointed by the associations of producers and by the processors. Each committee had the function of (i) assessing whether the tobacco received complied with the qualitative characteristics agreed under the individual cultivation contracts, and (ii) determining to which category, among those predefined at the interprofessional level, the tobacco received would belong. Since prices per category were established in the interprofessional agreement, the classification by COAGENTAB indirectly determined the price to be paid to the producers for each delivery.

(183) Eighteen processors and fifteen associations of producers representing about 43% of national production of Burley adhered to COAGENTAB for the 1999 crop.<sup>198</sup> For the 2000 crop, the percentage of producers of Burley that adhered to COAGENTAB was higher than 80%.<sup>199</sup> ATI joined COAGENTAB in 2001.<sup>200</sup>

<sup>198</sup> See document submitted by Transcatlab [Doc. 38281/1489].

<sup>199</sup> Doc. 38281/1490. For an example of a mandate by which Transcatlab delegated to COAGENTAB all the operation of grading for all the 1999 crop of burley that Transcatlab would buy *see* p. 1484.

- (184) On 25 October 1999, the chairmen/representatives of Deltafina, Dimon, Transcatab, Trestina, ATI and ETI met to agree on the operative principles of the COGENTAB project.<sup>201</sup> To this end, they decided to nominate technical experts for each tobacco variety to evaluate the correct application of the principles by each processor, in particular as regards the quality of the product, the presence of foreign matter in the product and the control of surplus production.
- (185) Deltafina, Dimon and Transcatab announced that they would not buy from third packers that did not adhere to COGENTAB. However, “[i]n actual fact all 3 multinational packers needed volume and bought from non Cogentab packers”.<sup>202</sup>

1.5.7.11.Processors’ October agreement on prices for Burley and Bright, allocation of third packers and boycott of third packers not belonging to COGENTAB

- (186) In October 1999, Deltafina, Dimon and Transcatab agreed on a memorandum on Bright and Burley, which is very similar in its structure and content to the Villa Grazioli agreement<sup>203</sup>. Transcatab indicated that Trestina was also a party to this agreement. In its reply to the SO Trestina denied however having taken part in any such agreement<sup>204</sup>. The main thrust of the agreement consisted of fixing purchasing prices of raw tobacco (Burley and Bright) from third packers, allocating third packers with defined quantities to each processor and boycotting those third packers that had not joined COGENTAB.

1.5.7.11.1.As to Burley prices

- (187) For Burley, the memorandum first recalled that it was necessary to act on the price level in order to guarantee a differentiation of prices and to reduce to the minimum the power of intermediaries so as to again create a direct link with producers (“*E’ necessario agire sul livello dei prezzi da pagare ai coltivatori onde permettere una forbice tale da consentire il miglioramento della qualità e dell’allestimento*” and “*E’ necessario ridurre al minimo il potere degli intermediari così da ricreare il contatto diretto con i produttori*”). The memorandum also stated that it was necessary to put in place a system that would make “*100% of tobacco pass on a grading conveyer belt*” (“*nastro di perizia*”) before being acquired. The memorandum states that in order to reach these aims, COGENTAB was created as an interprofessional body.

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<sup>200</sup> See Dimon’s Crop Report of May 2001 [Doc. 38281/2473].

<sup>201</sup> See minutes of the meeting submitted by Transcatab [Doc. 38281/1487 and ff.].

<sup>202</sup> See the document, undated, found during the inspection at Romana Tabacchi [Doc. 38281/3208].

<sup>203</sup> For the text of the agreement *see* Doc. 38281/1519-1524. *See* also Transcatab’s submission of 9 April 2002 describing the agreement [Doc. 38281/1278].

<sup>204</sup> See Trestina’s reply to SO, page 24.

- (188) The memorandum also stated that it was necessary, in general, not to increase the price of tobacco so that it would remain compatible with the market level (“*è necessario non incrementare, in linea generale, il prezzo del prodotto in colli per mantenerlo compatibile al livello di mercato*”). For Burley, it was agreed that the price to be paid to third packers was to be in proportion to the quality level as determined by the COGENTAB experts at the moment at which the third packer bought the tobacco. The price to be paid to the third packer would be based on such a price and increased by 15% to take into account the decrease in certain processing costs and by ITL 1 850 per kilogram to take into account its costs for collection, its global processing costs and its profit (“*[Si stabilisce:] Di riconoscere ai trasformatori terzi un prezzo per il tabacco in colli per l’intera partita commisurato direttamente al livello di qualità in acquisto (stabilito dai periti COGENTAB). Tale prezzo sarà composto dal prezzo di acquisto green incrementato del calo di lavorazione in TLL del 15% al quale verrà sommato un valore forfettario di Lit./Kg. 1850 a fronte del costo di campagna, del costo globale della trasformazione e dell’utile*”).
- (189) It was also agreed that the price to be paid to third packers for bales for the entire delivery, classified and loaded on trucks, was to be in proportion the quality level as determined by the COGENTAB experts at the moment of its purchase by the third packer. The price to be paid to the third packer should therefore have included the price paid by the packer itself plus an increase of ITL 900 per kilogram to take into account its costs for collection and receiving costs and their profit (“*[Si stabilisce:] Di riconoscere ai trasformatori terzi un prezzo per il tabacco in balle relative all’intera partita, classificato e caricato su camion, commisurato direttamente al livello di qualità in acquisto (stabilito dai periti COGENTAB). Tale prezzo sarà composto dal prezzo di acquisto green al quale verrà sommato un valore forfettario di Lit./Kg. 900 a fronte del costo di campagna, di ritiro e dell’utile*”).

#### 1.5.7.11.2.As to Bright prices

- (190) For Bright, the text of the memorandum recalled, first, that no minimum prices had been agreed in negotiations with producers and their associations for the 1999 crop (“*Premesso che per la campagna 1999 non sono stati garantiti ai coltivatori prezzi minimi in sede di contrattazione*”), despite the conclusion of the Interprofessional Agreement discussed in recitals (171) to (174) above. The agreement classified producers and third packers in two categories according to geographic location of the supplier (“*Italia Centrale*” and “*Nord Italia*”) and determined the average price to be paid for each category, distinguishing between tobacco bought from producers, processed tobacco and tobacco in bales bought from third packers. For central Italy, a further differentiation was introduced as they agreed to pay growers an average price of 650 ITL per kilogram, but while growers in Umbria and Abruzzo were to receive 750 ITL/kg, prices for those in Lazio could be not more than 300 ITL/Kg higher or lower than that amount. The mechanism for determining the price to be paid to third packers for processed tobacco for the entire delivery (with or without the grades that were usually sold to ETI)<sup>205</sup> was similar to that used for Burley as the price should have comprised the original cost for the third packer, a 10% increase for the decrease

<sup>205</sup> This refers to the fact that the Italian monopoly used to buy the best grades of the crop thanks to the fact that, given its vertical integration into manufacturing, it was able to offer higher prices than other processors.

in certain processing costs as well as an increase of ITL 1 000 per kilogram to take into account the acquisition and processing costs and profit. The price to be paid to third packers for bales for the average quality of the entire delivery (“*run of the crop*”), classified and loaded on trucks should have included the price paid by the packer and an increase of ITL 500 per kilogram to take into account the costs for collection, and receiving costs and profit (“[*Si stabilisce:*] *Di riconoscere ai trasformatori terzi un prezzo per il tabacco in colli per l’intera partita (con o senza i gradi tradizionalmente acquistati da ETI) composto dal prezzo di acquisto green incrementato del calo di lavorazione in TLL del 10% al quale verrà sommato un valore forfettario di Lit/Kg. 1.000 a fronte del costo di campagna, del costo globale della trasformazione e dell’utile. Di riconoscere ai trasformatori terzi un prezzo per il tabacco in balle relative all’intera partita. classificato e caricato su camion, composto dal prezzo di acquisto green al quale verrà sommato un valore forfettario di Lit./Kg. 500 a fronte del costo di campagna, di ritiro e dell’utile*”). The price to be paid to third packers was the same regardless of their location.

#### 1.5.7.11.3.As to suppliers

- (191) For Burley supplies, the exporters agreed very clearly not to buy tobacco from third packers who had not joined COGENTAB (“[*Si stabilisce:*] *Che i trasformatori esportatori si impegnano in maniera inequivocabile a non acquistare tabacco da fornitori terzi non aderenti a COGENTAB*”). Purchases from third packers who were not part of COGENTAB had to be agreed upon in advance, case by case, after reciprocal consultation and after an accurate determination of timing, modalities and prices to be charged (“[*Si stabilisce:*] *Che si potranno concordare, anche volta per volta, acquisti da fornitori fuori della sfera COGENTAB previa consultazione reciproca e attenta scelta dei tempi, dei modi e dei prezzi da praticare*”).
- (192) The processors also agreed on their preferential third packers and determined the quantities that each of them would source from third packers, allocating precise quantities by third packer, and indicating the quantities of direct tobacco needed by each processor. (“*I trasformatori esportatori necessitano di quantità minime da trasformare e da commercializzare come da Allegato 1*”). Allegato [Annex] 1 contains a list of third packers with an indication of the quantities allocated to each of them by exporter.
- (193) For Bright, the processors agreed on their preferential third packers and determined the quantities that each of them would source from third packers, allocating precise quantities by third packer, and indicating the quantities of direct tobacco needed by each processor. They also agreed that purchases from third packers who were not in the list had to be agreed upon in advance, case by case, upon reciprocal consultation. (“[*Si stabilisce inoltre:*] *Che in caso di particolari situazioni si potranno concordare volta per volta acquisti da fornitori al di fuori di quelli elencati nell’allegato 2 previa consultazione reciproca*”). Allegato [Annex] 2 contains a list of third packers with an indication of the quantities allocated to each of them by exporter).

#### 1.5.7.11.4.As to exchange of information

- (194) For both Burley and Bright, the processors also decided to have a close co-ordination through an exchange of information regarding market trends (“[*si stabilisce inoltre:] di mantenere una stretta collaborazione attraverso uno scambio di informazioni sui vari movimenti di mercato*”) and always to control their respective employees so as to avoid them taking any action without the necessary co-ordination (“[*si prende atto inoltre] di mantenere sempre sotto controllo l’operato dei collaboratori onde evitare che vengano prese iniziative senza la necessaria coordinazione*”).

1.5.7.12. Follow-up to the October agreement on Burley and Bright and further discussion

- (195) On 5 November 1999, a meeting took place between the purchasing managers of Deltafina, Dimon, and Transcatab.<sup>206</sup> According to Deltafina’s submission of 26 March 2002, they discussed the behaviour to be taken vis-à-vis certain co-operatives for Bright in Umbria. They also made a list or “map” of Burley third packers and discussed their relationship with Romana Tabacchi, ATI and other processors. Deltafina’s statement is supported by a document submitted by Deltafina, a handwritten note made up by a purchasing manager of Deltafina, headed “*Riunione Esportatori*” and dated “*5/11/99*”.<sup>207</sup> The document lists the following items that were discussed at the meeting: “*Comportamento con COOP Bright Alta Umbria = mappatura*”, “*Mappatura Terzi Burley*”, “*Rapporti con Romana Tabacchi, ATI, Smito*”, “*Discussione su Aste*”.
- (196) Another meeting took place at the offices of Dimon in Grottaferrata on 9 November 1999 between the chairmen/purchasing managers of Deltafina, Dimon, Transcatab and a fourth processor, Latina Tabacchi, in which purchasing quantities, prices and suppliers for Bright, Burley and DAC were discussed as well as COGENTAB. They also discussed their difficult relations with Romana Tabacchi.<sup>208</sup>
- (197) On 11 November 1999 Transcatab sent a fax to Dimon Italia, Deltafina and Trestina to request an urgent meeting to discuss Burley.<sup>209</sup> Transcatab requested that the persons responsible for buying also be present at the meeting (in addition to the chairmen of the companies concerned).
- (198) On 15 November 1999 the chairmen and purchasing managers of Deltafina, Dimon and Transcatab<sup>210</sup> met in Rome to again discuss their problems with Romana

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<sup>206</sup> For a description by Deltafina of this meeting *see* its submission of 26 March 2002 [Doc. 38281/611].

<sup>207</sup> Doc. 38281/473, 475.

<sup>208</sup> For Deltafina’s handwritten notes of the meeting *see* Doc. 38281/478. For a description by Deltafina of this meeting *see* its submission of 26 March 2002 [Doc. 38281/611]. For Dimon’s fax of 3 November 1999 to Deltafina, Transcatab and Latina Tabacchi with the invitation to the meeting *see* Doc. 38281/2517.

<sup>209</sup> Doc. 38281/831 and 2590.

<sup>210</sup> Trestina denied having taken part in this meeting.

Tabacchi, the problems of sourcing from third packers, COGENTAB, the purchase of Bright and surplus production and exchanged information on sales and inventories.<sup>211</sup>

- (199) On 22 November 1999 the purchasing managers of Deltafina, Dimon, Transcatab and Romana Tabacchi met at APTI to discuss purchasing quantities and COGENTAB as well as the availability of Romana Tabacchi to negotiate an agreement similar to the 1998 Villa Grazioli Agreement (“*disponibilità di R.T. a sedersi intorno al tavolo per ricreare l'accordo del '98*”) and Romana Tabacchi’s ability/willingness to make its suppliers adhere to COGENTAB.<sup>212</sup> Deltafina declared, in its submission of 19 March 2002<sup>213</sup>, that Romana Tabacchi said that it would be willing to negotiate an agreement similar to that of 1998, but no agreement was actually reached. According to Deltafina, in that meeting the processors agreed only to a non-aggression pact and to respect the allocation of third packers.
- (200) On 25 November 1999, the purchasing managers of Deltafina, Dimon and Transcatab (possibly with Trestina and Boselli) met at Hotel Umbria in Attigliano to monitor and fix prices, allocate suppliers and discuss timing for deliveries for Bright.<sup>214</sup>
- (201) Transcatab reports that the purchasing managers of Deltafina, Dimon and Transcatab met in Caserta on 17 November and 14 December 1999.

### 1.5.8. The year 2000

#### 1.5.8.1. On-going discussions and co-ordination

- (202) Transcatab submitted to the Commission that the purchasing managers of Deltafina, Dimon and Transcatab met in Caserta on 6 and 30 March 2000 and on 12 April 2000. The chairmen and the purchasing managers of the three companies also met together on 19 May 2000 at the offices of Deltafina in Rome<sup>215</sup>.
- (203) A fax sent on 27 June 2000 by Dimon to Deltafina and Transcatab reveals that Deltafina, Dimon and Transcatab had agreed to meet on 3 July 2000 and had made a

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<sup>211</sup> For Deltafina’s handwritten notes of the meeting *see* Doc. 38281/480. For a description by Deltafina of this meeting *see* its submission of 26 March 2002 [Doc. 38281/612].

<sup>212</sup> For Deltafina’s handwritten notes of the meeting *see* Doc. 38281/482. For Transcatab’s fax dated 17 November 1999 to Deltafina, Dimon, Romana Tabacchi and Latina Tabacchi with the invitation to the meeting *see* Doc. 38281/586. For Transcatab’s fax dated 18 November 1999 to the same addressees changing the location of the meeting to the APTI headquarters *see* Doc. 38281/588 and 3160. For a description by Deltafina of this meeting *see* its submission of 25 March 2002 [Doc. 38281/592].

<sup>213</sup> Doc. 38281/523.

<sup>214</sup> For Deltafina’s handwritten notes of the meeting *see* Doc. 38281/484-486. For a description by Deltafina of this meeting *see* its submission of 19 March 2002 [Doc. 38281/524] and that of 26 March 2002 [Doc. 38281/612].

<sup>215</sup> *See* list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

reservation for that date at the Grand Hotel Palazzo della Fonte in Fiuggi.<sup>216</sup> According to Transcatab, this meeting took place on 3-4 July 2000 between the chairmen and purchasing managers of the three companies at the Grand Hotel Fiuggi.<sup>217</sup>

- (204) On 21 September 2000, Deltafina, Dimon and Transcatab met at the offices of Deltafina in Rome at the level of chairmen and purchasing managers of the companies, to discuss and agree target increases to producers of Burley and Bright and to create a co-ordination mechanism “*tavolo di concertazione*” between the processors at the level of purchasing managers.<sup>218</sup> The price to be paid to growers for selecting the tobacco (“*pagamento costo cernita*”) was also discussed.<sup>219</sup>

#### 1.5.8.2. Interprofessional Agreement for the 2000 crop of Burley

- (205) On 3 October 2000, UNITAB and APTI concluded a framework interprofessional variety agreement for the 2000 crop of Burley tobacco, dried and in bulk (“*Accordo quadro interprofessionale varietale per il tabacco greggio allo stato secco sciolto produzione 2000 Varietà Burley*”).<sup>220</sup> The aims of the agreement are the same as those of the national framework agreement described in recital (162) above.
- (206) Article 3 of the agreement provides that in relation to the classification levels and the prices for each level, the cultivation contracts concluded by the members of UNITAB and APTI must have regard to what is provided for in Annex 1A and 1B to the agreement. Annex 1A to the agreement indicates that the classification levels are the following: AA, AB, ABM, C, CM, D, E. Annex 1B to the agreement indicates the prices that must be paid by processors to the associations of producers. This price varies according to the classification level. The prices are indicated in the following Table 6 and represent an increase with respect to the prices provided for in the corresponding variety agreement signed in 1999.

**Table 6**

Classification level	Contractual price
AA	1,250 LIT/Kg

<sup>216</sup> For the version of the fax received by Transcatab see Doc. 38281/1576 and 2519. For the version of the fax received by Deltafina see Doc. 38281/2544.

<sup>217</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>218</sup> See Deltafina’s handwritten notes of this meeting [Doc. 38281/590] as well as Deltafina’s description of the meeting in its submission of 25 March 2002 [Doc. 38281/593] and in its submission of 26 March 2003 [Doc. 38281/613]. Trestina’s involvement in this instance could not be established.

<sup>219</sup> For evidence of other meetings and discussions see [Doc. 38281/1932], [Doc. 38281/488 and Doc. 38281/490/493], [Doc. 38281/524], [Doc. 38281/613], [Doc. 38281/1574] and [Doc. 38281/3490-3493].

<sup>220</sup> For a signed copy of the agreement see Doc. 38281/245.

AB	1,000 LIT/Kg
ABM	850 LIT/Kg
C	600 LIT/Kg
CM	350 LIT/Kg
D	40 LIT/Kg
E	30 LIT/Kg

- (207) Article 3 provides also that if the members of UNITAB and APTI sign a cultivation contract with undertakings that have not adhered to the agreement, the classification levels and the prices for each level will be those indicated in Annexes 1A and 1B.

### 1.5.9. The year 2001

#### 1.5.9.1. On-going discussions and co-ordination

- (208) Transcatab submitted to the Commission that the purchasing managers of Deltafina, Dimon and Transcatab met at the offices of Deltafina in Rome and in Caserta on 5 February and 5 June 2001 for an operational meeting<sup>221</sup>.
- (209) On 10 May 2001, the chairman of Dimon called for a meeting to be held at Dimon's offices on 24/25 May 2001. The proposed agenda for the meeting discussed internally within Dimon included the following points: "*burley agents – tare to increase, burley third suppliers, burley auction, FCV farmer prices, Romana Tabacchi/ATP*".<sup>222</sup> On 17 May 2001, Deltafina, Dimon and Transcatab met to discuss prices, quantities, and suppliers for Bright and Burley. They also discussed COGENTAB.<sup>223</sup>
- (210) On 25 May 2001 the President of UNITAB informed the Italian tobacco associations that the processors had not yet agreed to an interprofessional agreement for the 2001 crop and recommended that the associations negotiate directly with the processors. In particular, he recommended that for Bright there be an average increase in prices of 30% (compared to the 2000 prices), and for Burley he indicated that the processors belonging to the Consorzio di Tutela e Valorizzazione Tabacco Burley Campano intended to double the prices of the previous year (while the members of APTI wanted

<sup>221</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>222</sup> See internal Dimon email dated 10 May 2001 and concerning the meeting of 24/25 of May [Doc. 38281/2928].

<sup>223</sup> See Deltafina's handwritten notes of this meeting [Doc. 38281/498] as well as Deltafina's description of the meeting in its submission of 19 March 2002 [Doc. 38281/524] and in its submission of 26 March 2003 [Doc. 38281/614]. Trestina's involvement in this instance could not be clearly established.

prices to stay the same). For DAC, Kentucky and Orientals he recommended that the price be increased in proportion with the increase in the production prices.<sup>224</sup>

- (211) On 29 May 2001, Deltafina informed Romana Tabacchi of the price at which it would sign the cultivation contracts for Bright with the producers' associations.<sup>225</sup>
- (212) On 14 September 2001, Dimon sent Deltafina and Transcatab the proposed agenda for a meeting to be held on 18 September 2001 in which the following items would be discussed (i) their relationship with each other; (ii) purchases from third packers; (iii) their relationship toward ATI/ETI and Romana Tabacchi; (iv) their strategies for the future; (v) interprofessional agreement between APTI and UNITAB on Burley and Bright and their prices; (vi) modalities of receiving tobacco; (vii) COGENTAB and the relations with the newly created processors' association Consorzio di Difesa del Burley, which was buying tobacco at higher prices; and (viii) auctions or alternative solutions.<sup>226</sup> Transcatab informed the Commission that a meeting between the chairmen and purchasing managers of Deltafina, Dimon and Transcatab took place in Rome and in Caserta on 18 September 2001<sup>227</sup>.
- (213) On 16 November 2001, a meeting was scheduled between the chairmen of Romana Tabacchi and Dimon.<sup>228</sup> Transcatab informed the Commission that a meeting between the chairmen of Deltafina, Dimon, Transcatab and Romana Tabacchi took place at the offices of APTI in Rome on 16 November 2001.<sup>229</sup> The purpose of the meeting was *"to establish objectives in order to minimize inefficiency in the Italian market and consequently increase the income to farmers"*. The presentation discussed at APTI and prepared by Dimon set out as market objectives, *inter alia*, the following: (i) Bright co-operatives in the centre of Italy should give up processing, (ii) big farms could be made pay 0,13 EUR/Kg for the cleaning of tobacco, (iii) auction of producers' contracts should be implemented for Burley from crop 2002 or alternatively *"inform agents to cut their fees"* immediately and *"inform all suppliers to reduce their prices by the same amount of the cut"* and *"agree within exporters to have a performance guarantee"*.<sup>230</sup>

#### 1.5.9.2. Interprofessional Agreements for the 2001 crop of Burley

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<sup>224</sup> See letter by the president of UNITAB to the growers associations dated 25 May 2001 [Doc. 38281/3374].

<sup>225</sup> See fax by Deltafina to Romana Tabacchi dated 29 May 2001 [Doc. 38281/495] and Deltafina description of its contents in its submission of 19 March 2002 [Doc. 38281/524].

<sup>226</sup> See Doc. 38281/1578.

<sup>227</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>228</sup> See letter from Romana Tabacchi to Transcatab dated 8 November 2001 [Doc. 38281/3782].

<sup>229</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>230</sup> For the text of the presentation see Doc. 38281/2851-2860.

- (214) On 15 February 2001, UNITAB and APTI concluded a framework interprofessional variety agreement for the 2001 crop of Burley tobacco, dried and in bulk (“*Accordo quadro interprofessionale varietale per il tabacco greggio allo stato secco sciolto produzione 2001 Varietà Burley*”).<sup>231</sup>
- (215) The aims of the agreement are the same as those of the national framework agreement described in recital (162) above. Article 3 of the agreement indicates that the cultivation contract must contain all the elements provided for by Regulations (EEC) No 2075/92 and (EC) No 2848/98. The parties must adopt a standard contract for all their contractual relationships.
- (216) Article 3 of the agreement provides that in relation to the classification levels and the prices for each level, the cultivation contracts concluded by the members of UNITAB and APTI must have regard to what is provided for in Annex 1A and 1B to the agreement.
- (217) Annex 1A to the agreement indicates that the classification levels are the following: AA, AB, ABM, C, CM, D, E.
- (218) Annex 1B to the agreement indicates the prices that must be paid by processors to the associations of producers. This price varies according to the classification level. The prices are indicated in the following Table 7 and represent a doubling of the prices provided for in the corresponding variety agreement signed in 2000 (with the exception of the last two classification levels, D and E).

**Table 7**

Classification level	Contractual price
AA	2,500 LIT/Kg
AB	2,000 LIT/Kg
ABM	1,700 LIT/Kg
C	1,200 LIT/Kg
CM	700 LIT/Kg
D	40 LIT/Kg
E	30 LIT/Kg

- (219) Article 3 also provides that if the members of UNITAB and APTI sign a cultivation contract with undertakings which have not adhered to the agreement, the classification levels and the prices for each level will be those indicated in Annexes 1A and 1B.

<sup>231</sup> For a signed copy of the agreement see Doc. 38281/256.

- (220) On 28 November 2001, UNITAB and APTI concluded a second version of the framework interprofessional variety agreement for the 2001 crop of Burley tobacco, dried and in bulk (“*Accordo quadro interprofessionale varietale per il tabacco greggio allo stato secco sciolto produzione 2001 Varietà Burley*”).<sup>232</sup> This second version of the agreement differs from the first version just described in that the prices contained in Annex 1B were set back to the levels provided for in the agreement for the 2000 crop of Burley. This possibility was provided for in the first version only for the case in which an auction system could not be implemented by the time of delivery.
- (221) Transcatab informed the Commission that a meeting to discuss interprofessional agreements took place between the purchasing managers of Deltafina, Dimon and Transcatab at the offices of APTI in Rome on 28 November 2001.<sup>233</sup>

#### 1.5.10. 2002

- (222) Transcatab informed the Commission that a meeting between the purchasing managers of Deltafina, Dimon and Transcatab took place in Rome on 7 January 2002 and that another meeting took place at the offices of Romana Tabacchi (Nicotiana House) on 8 January 2002<sup>234</sup>
- (223) On 21 February 2002 a meeting of about 9-10 people, organised by Dimon, was supposed to take place at Villa Grazioli.<sup>235</sup> On 1 March 2002 the Board of Directors of Deltafina decided that it was necessary to stop anti-competitive behaviour and to that end it would supervise the actions of those reporting to it.<sup>236</sup>

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<sup>232</sup> For a signed copy of the agreement see Doc. 38281/267.

<sup>233</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>234</sup> See list of meetings submitted by Transcatab during the inspection of 18 April 2002 [Doc. 38281/3490-3493].

<sup>235</sup> See the fax of booking by Dimon to the hotel Villa Grazioli [Doc. 38281/2787]. No mention is made of participants.

<sup>236</sup> See official minutes of the meeting of Deltafina’s board of directors of 1 March 2002 [Doc. 38281/526-528].

## 2. LEGAL ASSESSMENT

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

(224) Article 81(1) of the Treaty states that: "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

- (225) Deltafina, Dimon, Transcatab and Romana Tabacchi are or form part of undertakings (see recitals (325) and following) within the meaning of Article 81(1) of the Treaty.
- (226) The Italian association of processors, APTI, is an association of undertakings within the meaning of Article 81(1) of the Treaty.
- (227) The Italian association of producers, UNITAB, is an association of associations of undertakings to which Article 81(1) of the Treaty applies<sup>237</sup>.

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

- (228) 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.
- (229) 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>238</sup> the Court of First Instance stated that "it is well established in the case law that for there to be an agreement

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<sup>237</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, paragraph 256.

<sup>238</sup> [1999] ECR II 931 at par. 715.

*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”.*

- (230) 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>239</sup>
- (231) 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>240</sup>
- (232) 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>241</sup>
- (233) 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.

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<sup>239</sup> Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619 at par.64.

<sup>240</sup> Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663 at 173.

<sup>241</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.

- (234) In its *PVC II* judgment<sup>242</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 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”.
- (235) 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.
- (236) 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>243</sup> it follows from the express terms of Article 81(1) of the 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

- (237) The Commission considers that the conducts described in the factual part of this Decision, consisting of agreements and/or concerted practices and/or decisions in the sense of Article 81 of the Treaty, present all the characteristics of three single and continuous infringements.
- (238) The first single and continuous infringement was carried out by the largest and most important Italian processors of raw tobacco. It consisted of a complex of practices aimed at coordinating the purchasing strategy of each of them (including price fixing and the allocation of suppliers and quantities of raw tobacco) which are described in recitals (240) and following below.
- (239) The other two single and continuous infringements consisted of the decisions by which, from the beginning of 1999 until the end of 2001, APTI fixed the contract prices<sup>244</sup> which it would negotiate with UNITAB for the conclusion of Interprofessional Agreements, and the decisions by which, during the same years, UNITAB fixed the selling prices for its members which it would negotiate with APTI for the conclusion of the same Interprofessional Agreements.

#### 2.1.3.1. The processors’ infringement

- (240) From 1995 until the beginning of 2002 Deltafina, Dimon, Transcatab and Romana Tabacchi entered into agreements and/or participated in concerted practices aimed at

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<sup>242</sup> Cited above, at par. 696.

<sup>243</sup> [1999] ECR I-4125, at par.81.

<sup>244</sup> For an explanation of the expression “contract prices” see recital (91).

fixing their trading conditions for the purchase of raw tobacco in Italy in respect of both direct purchases from producers and purchasers from third packers, including:

- (a) The setting of common purchase prices which processors would pay at the delivery of tobacco<sup>245</sup> and other trading conditions;
  - (b) the allocation of suppliers and quantities;
  - (c) the exchange of information to co-ordinate their competitive purchasing behaviour;
  - (d) the determination of quantities and prices in respect of surplus production; and
  - (e) the co-ordination of bids for public auctions in 1995 and 1998.
- (241) As described in the factual part of this Decision, Deltafina, Dimon, Transcatab and Romana Tabacchi regularly held meetings at which they exchanged information and reached, or tried to reach, agreements on the prices to be paid to producers and third packers, on the quantities to be purchased by each processor, on the non-aggression of their suppliers and other trading conditions. These meetings were concentrated in spring, in view of the signing of the cultivation contracts and in fall, in view of the receiving of tobacco.
- (242) The meetings used to take place at two different levels: at the level of the chairmen of the companies and at the level of the purchasing managers. The latter meetings were aimed at implementing the agreements reached by the chairmen of the companies and at exchanging information about the conditions of buying in the market.

#### 2.1.3.1.1. The setting of common final purchase prices and other trading conditions.

- (243) Price co-ordination among processors started at least in 1995 and continued until the end of February 2002. In 1995 it appears that prices were co-ordinated by way of exchange of information (see recital (115)). From 1996, prices to producers and third packers began to be agreed at a set level in respect of different varieties, mainly Burley and Bright, but also DAC (see recitals (119), (126), (136), (137), (138), (159), (187), (190) and (212)). Agreed prices, irrespective of quality grade, could refer to average price or maximum prices per kilo to be paid at delivery, depending on the variety or the crop. Agreement was also reached in relation to other price elements such as a premium to reward quality (to be awarded within certain quantity thresholds) (see recitals (136) and (159)) and target increases to producers of Burley and Bright (see recital (204)). It also appears that more detailed pricing for certain geographical areas was regularly agreed (see recitals (123), (128), (145), (146) and (190)), mainly at the level of purchasing managers.
- (244) It is also apparent from the factual part of this Decision that even after 1999, the year from which Interprofessional Agreements started to be negotiated between APTI and UNITAB, processors continued to co-ordinate their prices beyond the scope of the Interprofessional Agreements, by agreeing, in particular, maximum prices and target

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<sup>245</sup> For an explanation of the expression “delivery prices” see recital (92).

increases for producers and third packers (see recitals (186) and ff and (208) and ff). At the same time, the processors' co-ordination was also aimed at conditioning APTI's conduct (see recitals (143), (151) to (153), (158) and (165)). Such co-ordination constituted in those years an important element of the processors' cartel strategy.

- (245) Agreement on other specific trading conditions (such as tare, timing for making offers, for delivery and for payment and costs of collection) was part of the overall co-ordination of the processors' commercial conduct and was supposed to strengthen its effectiveness both in terms of obligations and in terms of monitoring (see recitals (159), (188), (189) and (209)).

#### 2.1.3.1.2. The allocation of suppliers and quantities and the sharing thereof

- (246) In an attempt to eliminate the risk of producers' and third packers' shopping around for the highest prices, processors agreed to allocate suppliers (including third packers) between themselves and the quantities which processors should buy from each allocated supplier. It appears that such allocation was initially based on a non aggression pact in respect of pre-existing relationships that the various processors had with suppliers. However it also extended to new suppliers. (See recitals (111), (113), (114), (126), (129), (139), (191) to (193), (199) and (212) ).
- (247) Agreements were also entered into by some processors with a view to sharing particular sources of supply (see recital (141)).
- (248) As part of their overall strategy, processors would also agree to act as a single buying entity at an agreed price. This happened, for example, in respect of purchases from ATI (see recitals (113), (126), (151) and (152))
- (249) Within the same context, they agreed to refuse to purchase from low grade suppliers (see recitals (139), (148) and (159)) and to boycott suppliers which were not members of COGENTAB (see recital (187)). Specific agreements in respect of groups of suppliers in specific areas (covering both prices and allocation) were also adopted (see recital (195)).

#### 2.1.3.1.3. The setting-up of regular exchanges of information and reciprocal consultation to co-ordinate their competitive behaviour

- (250) Essential to the functioning of the cartel was the continuing consultation between the processors and the cross-monitoring of their respective behaviour. It appears from the evidence at hand that, by doing so, processors were in a position to co-ordinate their commercial purchasing conduct (including pricing) even in the absence of or further to specific agreements (see recitals (122), (123), (126), (129), (140), (194), (198) and (204)). Co-ordination and monitoring would include the submission of invoices received from suppliers (see recitals (122) and (129)), weekly meetings between purchasing managers (see recital (126)) and control over the respective employees so as to avoid them taking uncoordinated action (see recital (117)).

#### 2.1.3.1.4. The determination of quantities and prices in respect of surplus production

- (251) Since 1996, processors tried to curb the marketing of surplus production, that is to say, production which, since not benefiting from the payment of premiums, would be sold at higher prices. For this purpose, they agreed between themselves (also in the context of interprofessional agreements) to limit their purchase of surplus production within set percentages of the annual crop or otherwise by reference to quantities, price and other conditions which would minimise surplus production purchases and their effects on prices (see recitals (120), (142), (143), (145), (149), (153) and (160)).

#### 2.1.3.1.5. Co-ordination of bids for public auctions in 1995 and 1998.

- (252) In respect of AIMA's auction of 1995 (see recital (110)) and ATI's auction of 1998 (see recital (150)) the main purpose was to maintain bids within a certain maximum price agreed between the processors.

#### 2.1.3.2. APTI's infringement

- (253) From 1999 until 2001, for the purpose of concluding Interprofessional Agreements with UNITAB, APTI determined its negotiating position in respect of prices for each quality grade of each tobacco variety. Interprofessional Agreements were concluded for Burley crops until 2001 (see recitals (166) ff, (205) ff and (214) ff). In 1999, Interprofessional Agreements were also entered into for Bright (see recitals (171) and following), Havannah (see recitals (175) and following) and Kentucky crops (see recitals (179) and following). The object of these agreements was determined in accordance with the applicable Italian Law (Law 88/88) which provides for the inclusion of contract prices in the form of "minimum prices" (see recital (68)). In 1999 APTI also concluded an Interprofessional Agreement with UNITAB setting the price for the surplus production of Burley in respect of the 1998 crop (see recital (160)). APTI's behaviour was adopted under the decisive influence of Deltafina, Dimon and Transcatab (see recitals (143), (151) to (153), (158) and (165)). However, APTI was ultimately responsible for its decisions, within the meaning of Article 81 of the Treaty, aiming at fixing common contract prices for the different varieties of raw tobacco (for inclusion in cultivation contracts) from 1999 to 2001 and, in 1999, prices for the purchase of surplus production.
- (254) APTI has argued that its negotiating position, determined prior to the conclusion of Interprofessional Agreements, was not the result of price-setting decisions on its part but rather of the actions of a pool of negotiators which were delegated *ad hoc* by APTI's Managing Committee. The proposals of these negotiators would then only be ratified by APTI's Managing Committee<sup>246</sup>. In the Commission's view the specific modalities through which APTI reached a common negotiating position are not capable of ruling out its liability for behaviour which, in fact, was carried out on APTI's behalf and ultimately resulted in the determination of common prices to be

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<sup>246</sup> See letter from APTI to the Commission of 6 October 2005.

negotiated for all APTI's members. Nor can the Commission accept that APTI's behaviour exclusively consisted of fulfilling procedural requirements set out under Italian Law<sup>247</sup>.

#### 2.1.3.3. UNITAB's infringement

- (255) From 1999 until 2001 UNITAB determined its negotiating position in respect of prices for each quality grade of each tobacco variety to be agreed with APTI in the context of the conclusion of the Interprofessional Agreements which are referred to at recital (253). UNITAB negotiated and concluded annual interprofessional agreements with the association of processors, APTI, fixing prices for each quality grade of Burley crops. In 1999, UNITAB negotiated and concluded framework agreements fixing minimum prices for each quality grade of Bright, Kentucky and Havannah. Furthermore, in 1999 UNITAB also concluded an Interprofessional Agreement with APTI setting the price for the surplus production of Burley in respect of the 1998 crop.

#### 2.1.4. *Single and continuous infringements: general principles*

- (256) The Commission considers that the conduct described in the factual part of this Decision presents all the characteristics of three single and continuous infringements, the first by the processors (which also includes the conduct of APTI) and the other two by APTI and UNITAB for the reasons set out below.
- (257) A complex cartel may properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty.
- (258) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating, may occur, but will not, however, prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.
- (259) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anticompetitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in

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<sup>247</sup> See *amplius* sections 2.3 and 2.6.2.

question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of it and was prepared to take the risk.<sup>248</sup>

- (260) In fact, as the Court of Justice stated in its judgement in *Commission v. Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty.<sup>249</sup>
- (261) The fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 81(1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the level of the fine to be imposed on that undertaking.
- (262) Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.
- (263) Finally, it may be noted that an undertaking may at any time adhere to an agreement which has already been formed between other undertakings; some participants may drop out and others may join in the course of the unlawful venture but it nevertheless remains a single continuing agreement.

#### 2.1.4.1. The processors' conduct constitutes a single and continuous infringement

- (264) The Commission considers that the processors' practices as described in section 2.1.3.1 constitute agreements, decisions and concerted practices forming part of an overall scheme which laid down the lines of their action in the market and restricted their individual commercial purchasing conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices in the market for raw tobacco and to control supplies by their allocation.

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<sup>248</sup> See judgement of the Court of Justice in *Commission v Anic*, cited above, at paragraphs 78 ss and 203.

<sup>249</sup> See judgement of the Court of Justice in *Commission v Anic*, cited above, at paragraphs 78-81, 83-85 and 203.

- (265) The Commission considers that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which manifested itself in agreements, decisions and concerted practices.
- (266) More specifically, the cartel had the same objectives during the entire period, namely those of fixing the purchase prices of raw tobacco, allocating suppliers and quantities as well as determining other accessory trading conditions. Secondly, the participants to the cartel were the same from 1995 with the exception of Romana Tabacchi, which joined the cartel in 1997 and suspended its participation in the cartel from November 1999 to May 2001. Thirdly, the cartel presents the same structure over time and the same mechanisms, namely meetings at the level of the chairmen and operating meetings at the level of purchasing managers mainly aimed at monitoring the agreements reached at the superior level by exchanging very detailed information on pricing and quantities.
- (267) Although Article 81 of the Treaty does not refer explicitly to the concept of single and continuous infringement, it is settled case-law of the Courts that *“an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel.”*<sup>250</sup>
- (268) Thus, even if Deltafina, Dimon, Transcatab and Romana Tabacchi did not all participate at each and every meeting of the cartel, it is clear that each of them knew or should have known, that its own unlawful conduct was part of an overall plan which included collusion on prices as well as, through the mechanism of allocating supplies, collusion on the market shares of the major processors. The overall scheme was subscribed by Deltafina, Dimon, Transcatab and Romana Tabacchi, it was implemented over a period of several years employing the same mechanisms and pursuing the same common purpose of preventing, restricting or distorting competition.
- (269) Therefore, the Commission considers that the processors’ agreements and concerted practices described in section 2.1.3.1 of this Decision constitute a single and continuous infringement of Article 81(1) of the Treaty.

#### 2.1.4.2. APTI’s conduct constitutes a single and continuous infringement

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<sup>250</sup> See the judgments of the Court of First Instance in Cases, T-295/94 *Buchmann v. Commission* [1998] ECR II-813, par. 121; T-304/94 *Europa Carton v. Commission* [1998] ECR II-869, par. 76; , and T-348/94, , T-310/94 *Gruber + Weber v. Commission* [1998] ECR II-1043, par. 140; ,, T-311/94 *Kartonfabriek de Eendracht v. Commission* [1998] ECR II-1129, par.237, T-334/94 *Sarrió v. Commission* [1998] ECR II-1439, par. 169 and *Enso Española v. Commission*[1998] ECR II-1875, par. 223 . See also the judgment of the Court of First Instance on 20 March 2002 in case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG v. Commission* [2002] ECR II- 1487, par. 231.

- (270) APTI cannot be held responsible for the processors' single and continuous infringement. In fact, there are no elements in the Commission's file indicating that APTI subscribed or was aware of the overall plan pursued by the processors (which aimed at co-ordinating the entirety of their purchasing behaviour).
- (271) Therefore, APTI's liability must be limited to its decisions on contract prices for different varieties of raw tobacco that it would then negotiate with UNITAB, from 1999 to 2001, for the purpose of concluding Interprofessional Agreements.
- (272) Such decisions were part of APTI's overall plan aiming at determining purchase prices of different varieties of raw tobacco in favour of its members. Such overall scheme was implemented over a period of several years employing the same mechanisms and pursuing the same common purpose of preventing, restricting or distorting competition on the purchase prices of raw tobacco on the Italian market.
- (273) Therefore, the Commission considers that APTI's behaviour described in section 2.1.3.1 of this Decision constitutes a single and continuous infringement of Article 81(1) of the Treaty.

#### 2.1.4.3. UNITAB's conduct constitutes a single and continuous infringement

- (274) UNITAB's conduct consisted of decisions on contract prices for different varieties of raw tobacco that it would then negotiate with APTI, from 1999 to 2001, for the purpose of concluding Interprofessional Agreements.
- (275) Such decisions were part of UNITAB's overall plan aiming at determining selling prices of different varieties of raw tobacco in favour of its members. Such overall scheme was implemented over a period of several years employing the same mechanisms and pursuing the same common purpose of preventing, restricting or distorting competition on the selling prices of raw tobacco on the Italian market.
- (276) Therefore, the Commission considers that UNITAB's behaviour described in section 2.1.3.1 of this Decision constitutes a single and continuous infringement of Article 81(1) of the Treaty.

#### 2.1.5. *Restriction of competition*

- (277) Article 81(1)(a) of the Treaty gives as an example of a restriction of competition 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".
- (278) These are the essential characteristics of the single and continuous infringements described in this Decision.
- (279) With regard, in fact, to the single and continuous infringement implemented by the processors, this includes the following conduct (see section 2.1.3.1 of this Decision):

- (a) the setting of common purchase prices which processors would pay to producers at the delivery of tobacco<sup>251</sup> and other trading conditions;
  - (b) the allocation of suppliers and quantities;
  - (c) the exchange of information to co-ordinate their competitive purchasing behaviour;
  - (d) the determination of quantities and prices in respect of surplus production; and
  - (e) the co-ordination of bids for public auctions in 1995 and 1998.
- (280) The agreements between processors mainly had the objective of setting average price or maximum prices per kilo of tobacco to be paid at delivery as well as average prices paid to third packers (see recital (243)). The impact of this aspect of the infringement on competition was significant as purchase price is a fundamental aspect of the competitive conduct of any undertaking operating in a processing business and is also, by definition, capable of affecting the behaviour of the same companies in any other market in which they compete, including downstream markets. This is particularly so in cases like this, where the product affected by the buying cartel (raw tobacco) constitutes a substantial input of the activities carried out by participants downstream (the first processing and sale of processed tobacco in this case).
- (281) By fixing volume quotas and allocating suppliers, the processors were prevented from competing for market shares and might have gradually succeeded in preventing or limiting the increase of purchase prices given that each allocated supplier would not be able to play buyers one against each other as happens in the normal competitive market. In other words, allocation of suppliers is a strategy to prevent price increases as a supplier allocated to a specific processor would not be able to sell to other processors and would find itself price-constrained by its allocated processor. In addition, by fixing purchasing quotas, the processors limited and controlled the suppliers' production and the production of their competitors.
- (282) By doing so, the processors' purchasing cartel had the potential to affect the producers' willingness to generate output and thus reduce global tobacco production to the ultimate detriment of consumers. In this respect, the existence of a premium and quota system in the Community in the raw tobacco sector does not eliminate the potential restrictive effect on output of a purchasing cartel. Although the price paid by the processors only forms 20% of the growers income (see recital (85)), its marginal effect on the profitability of the growers' activity is significant, in respect of both in-quota and (even more so) in respect of surplus tobacco. An appreciable decrease in prices paid by processors could therefore result in a significant decrease in profitability and, in turn, in an incentive for producers to produce less tobacco.
- (283) As explained above (see sections 2.1.4.2 and 2.1.4.3 of this Decision), the conduct of APTI and UNITAB formed two separate single and continuous infringements aimed, respectively, at determining purchase and selling prices for different varieties of raw tobacco for the purpose of concluding Interprofessional Agreements.

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<sup>251</sup> For an explanation of the expression "delivery prices" see recital (92).

- (284) It is settled case-law that price fixing and market sharing have by their very nature the object to restrict competition within the meaning of Article 81(1). Similarly, it is also settled case law that for the purpose of application of such provision there is no need to show the actual effects of an agreement, decision or concerted practice when it has as its object the prevention, restriction or distortion of competition within the common market.<sup>252</sup>
- (285) In this case, it is clear that the agreements and/or concerted practices of the processors, as well as the decisions adopted, respectively, by APTI and UNITAB have by their very nature the object to restrict competition within the meaning of Article 81(1) as they shelter processors and producers of raw tobacco in Italy from full exposure to market forces. By eliminating the autonomy of strategic decision-making and competitive conduct, they prevent such undertakings from competing on the merits and enhancing their position on the market vis-à-vis the less efficient firms. The result could be reduced pressure to control costs, to improve quality and to innovate, thereby limiting productive and dynamic efficiencies.
- (286) The specific facts the processors have put forward in respect of the role played by intermediaries are not capable of altering these conclusions (see section 1.4.3 above)<sup>253</sup>.
- (287) In summary terms, according to some processors, by their conduct they were striving to eliminate the power that intermediaries could enjoy on the basis of their illegal activities. In particular, the intermediaries' illegal control of certain production quotas would create a serious situation of inefficient distribution. Through the co-ordination of their commercial conduct, processors enhanced their market position vis-à-vis producers and undermined the intermediaries' control on tobacco production.
- (288) Some processors also claim that they co-operated in order to establish a transparent auction system for the sale of tobacco which would have made the purchase of raw tobacco more efficient and significantly reduced the role of intermediaries<sup>254</sup>.
- (289) These arguments cannot be accepted. Serious infringements of Article 81(1) of the Treaty, such as those described in this Decision, cannot be justified by the aim to counteract third parties' allegedly illegal conduct. It is clearly not the task of undertakings to take steps contrary to Article 81(1) of the Treaty to counteract behaviour which, rightly or wrongly, they regard as illegal and/or contrary to their own interests.<sup>255</sup>

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<sup>252</sup> Case T-141/94 *Thyssen Stahl AG v Commission*. [1999] ECR II-347, par. 272 and 277; Case T-62/98 *Volkswagen AG v. Commission*, [2000] ECR II-2707, paragraph 178.

<sup>253</sup> In its reply to the SO, Transcatlab has pointed out to potential links between the activities of intermediaries in the raw tobacco sector and organised crime in certain Italian regions (pages 11-15). To the same effect, see Deltafina's reply to the SO, points 20-22.

<sup>254</sup> See Transcatlab's and Deltafina's replied to the SO, quoted above.

<sup>255</sup> See, by analogy, Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439, paragraph 118. Also the principle upheld by the Court of First Instance in Case T-141/89, *Tréfileurope Sales SARL v Commission*, judgment of 6 April 1995, [1995] ECR II-791, par. 58, applies in this case by analogy. In that case, the Court of First Instance rejected the claim that the fact that participation by a party into a cartel was allegedly due to

- (290) Moreover, many of the processors' collusive behaviour described in this Decision appears totally unrelated to the intermediaries' allegedly illegal conducts. In fact, the processors' infringement also concerns the fixing of the purchase price for raw tobacco produced in Italian regions which are not affected by the intermediaries' allegedly illegal activities, as well as the fixing of the purchase price for tobacco purchases directly from producers and from third packers (the latter not being affected by the intermediaries' activities). The allocation of producers and of quantities among processors, as well as the coordination of bids for public auctions, also appear to be totally unrelated to the alleged aim of counteracting the intermediaries' activities.
- (291) Had the processors genuinely intended to justify their behaviour on sound economic and legal arguments, they should have invoked the application of Article 81(3) of the Treaty.
- (292) In any event, there are no elements in the Commission's file indicating that Article 81(3) of the Treaty could apply to the infringements described in this Decision.

#### 2.1.6. *Appreciable effect on trade between Member States*

- (293) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market.
- (294) According to the case law of the Court of Justice "*in order that an agreement 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 that it may have influence, direct and indirect, actual or potential, on the pattern between Member States*".<sup>256</sup> In any event, Article 81(1) of the Treaty "*does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect*".<sup>257</sup>
- (295) The application of Articles 81(1) of the Treaty to a cartel is not, however, limited to that part of the members' sales that actually involve the physical transfer of goods from one Member State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.<sup>258</sup> The fact that by their nature

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pressure from other market participants could not be considered to rule out liability especially when notification to the competent authorities remained possible. See also Case T-149/89, *Sotralentz v Commission*, judgment of 6 April 1999, [1999] ECR II-1127, par. 53 and Case T-308/94, *Cascade v Commission*, judgment of 14 May 1998, [1998] ECR II, 925, par. 122

<sup>256</sup> C-215/96 and C-216/96, *Bagnasco*, judgment of 21 January 1999, [1999] ECR I-135, paragraph 47 and 48.

<sup>257</sup> C-306/96 *Javico*, judgment 28 April 1998, 1998 ECR 1983, paragraphs 16 and 17; see also point 136 of Case T-374/94, *European Night Services*, judgment 15 September 1998, 1998 ECR II-3141.

<sup>258</sup> See the judgement of the CFI in Case T-13/98, *Imperial Chemical Industries v. Commission* [1992] ECR II-1021, at point 304.

products are easily traded across borders provides a good indication as to whether trade between Member States is capable of being affected. Finally, it derives from the existing case-law that a cartel extending to the whole territory of a Member State is, by its very nature, capable of consolidating the compartmentalisation of the Community markets impeding thereby the economic interpenetration aimed at by the Treaty<sup>259</sup>.

- (296) In this case, the illegal conduct was put in place by the largest and most important processors of raw tobacco in Italy<sup>260</sup>, by the association (APTI) representing most of those processors and by a producers' association (UNITAB) representing about 75% of Italian producers and covering a substantial proportion of the Italian production of raw tobacco.
- (297) As demonstrated in the "Cross-border trade" section in Part 1.4 of this Decision (see recital (102)), the market for raw tobacco, after first processing, is characterised by a substantial volume of trade between Member States and the cartel arrangements covered a large amount of Italian raw tobacco traded, after first processing, throughout the Community.
- (298) There is also an influence on patterns of trade between Member States in cases where the agreements or practices concerned relate to an intermediate product which is used in the supply of a final (or other intermediate) product which is traded<sup>261</sup>.
- (299) Moreover, the existence of price-fixing and allocation of supplier mechanisms must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.<sup>262</sup>
- (300) For these reasons, the processors' cartel, as well as APTI's and UNITAB's conduct, were capable of having an appreciable effect upon trade between Member States.

### 2.1.7. Duration of the infringements

- (301) The Commission will, for the purposes of this case, limit its assessment under Article 81 of the Treaty and the application of any fines to the following periods:

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<sup>259</sup> Case T-29/92 *SPO e.a./Commission*, judgment of 21 February 1995, 1995 II-289, paragraph 146.

<sup>260</sup> See Transcatab's presentation for 1998 purchases [Doc. 38281/3516-3520], which gives an indication of the market shares, by variety, held by Deltafina, Dimon and Trascatab in respect of purchases of tobacco in 1998. Their combined market share would exceed 50% for most varieties with a peak of 77% in respect of Burley purchases. According to the estimates given by the parties, Deltafina, Dimon, Transcatab and Romana Tabacchi would still represent in 2001 more than 55% of the total purchases of raw tobacco, including direct purchases from producers and purchases from third packers see part 1.2.1).

<sup>261</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>262</sup> See the judgement of the ECJ in Joined Cases 209 to 215 and 218/78, *Van Landewyck and others v. Commission* [1980] ECR 3125, point 170.

(a) From 29 September 1995 until 19 February 2002 in respect of the agreements and/or concerted practices among processors. 19 February 2002 is the date on which Deltafina applied for leniency under the terms of the Leniency Notice and presumably brought the processors' infringement to an end (see recital(4)).

(b) From 3 February 1999 until 28 November 2001 for APTI's and UNITAB's conduct consisting of decisions which were determined prior to the conclusion of Interprofessional Agreements. 28 November 2001 is the date of the conclusion of the last Interprofessional Agreement considered in this Decision.

(302) According to the evidence in the Commission's file, Romana Tabacchi joined the processors' cartel in October 1997. It suspended its participation in the cartel from 5 November 1999<sup>263</sup> to 29 May 2001 and rejoined the cartel from 29 May 2001 until 18 February 2002.<sup>264</sup>

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

### 2.2.1. Council Regulation No 26

(303) Council Regulation No 26 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products <sup>265</sup> states that Article 81 of the Treaty 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.

(304) As an exception, it states that Article 81 does not apply in the following three situations<sup>266</sup>, none of which apply in this case::

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<sup>263</sup> 5 November 1999 is the date of the document Doc. 38281/473 indicating that Romana Tabacchi had already left the cartel. The reason why Romana Tabacchi left the cartel is that it did not agree with the establishment of COGENTAB (see Transcat tab written declaration of 18 April 2002 submitted during the inspection [Doc. 38281/3488-3489]) and the fact that, after the acquisition of Intabex by Dimon, its relationship with the latter had worsened. The fact that Romana Tabacchi suspended its participation in the cartel is confirmed by an internal memorandum written by the chairman of Romana Tabacchi and dated 2 October 2001 revealing that Romana Tabacchi had not participated in any meeting with the three multinational exporters in the previous 2-3 years and that indeed Romana Tabacchi was being discredited by the three multinationals in their talks with the cigarette manufacturers as a maverick in the market (Doc. 38281/3780-3781) ("*Noi negli ultimi 2-3 anni non siamo stati mai chiamati dalle 3 multinazionali, a nessun tavolo dove sono state prese decisioni, anche importanti, in merito alle strategie di mercato. Inoltre, da quanto percepito durante l'incontro col presidente dell'APTI e da quanto riferitoci da alcune importanti manifatture, noi veniamo segnalati a quest'ultimo, sempre dalle 3 multinazionali, come elementi di disturbo e di conflitto*").

<sup>264</sup> On 29 May 2001, Deltafina informed Romana Tabacchi of the price at which it would sign the cultivation contracts for Bright with the producers' associations (see recital (211)).

<sup>265</sup> OJ 30, 20.4.1962, p. 993/62. Regulation as amended by Regulation No 49 (OJ 53, 1.7.1962, p. 1571/92).

<sup>266</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*

- (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>267</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."
- (305) In this case, the exception referred to in point (a) cannot apply, as raw tobacco is covered by a common market organisation.
- (306) The exception in point (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, Article 2 of Regulation No 26 must be interpreted strictly in the case of an exception<sup>268</sup>.
- (307) According to the case law, the exception in point (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.
- (308) 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 agricultural population concerned"<sup>269</sup>. It may be seen that the restrictive practices in question are in no way included among the means indicated by Regulation 2075/92<sup>270</sup>.

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*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>267</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>268</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).

<sup>269</sup> Second recital to Regulation (EEC) No 2075/92

<sup>270</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

- (309) Also, the contention made by both APTI and UNITAB in their replies to the Statement of Objections<sup>271</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 reform of the CMO in 1992 (and to an even greater extent, in 1998) was clearly designed to stimulate the production of better quality raw 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.
- (310) In this context, the determination of common prices (in the form of price brackets or minimum 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.
- (311) In addition, Article 2 of Regulation No 26 must be interpreted as 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 this 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 of 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 Treaty only in very exceptional circumstances. As the Court of Justice recently recalled, "*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>272</sup>.
- (312) The exception in point (c) does also not apply with respect to the two infringements at issue. First, the restrictive practice engaged in by the processors involves parties other than producers and is designed, among other things, to fix prices. Second, the restrictive practice engaged in by the representatives of the producers is also designed to fix prices. Accordingly, the exception in point (c) cannot apply to any of the infringements at issue.
- (313) It follows from all of these factors that neither the processors' 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.

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*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>271</sup> See pages 15-18 of APTI's reply and pages 15-17 of UNITAB's reply to the SO.

<sup>272</sup> Case C-137/00 *Milk Marque Ltd.*, [2003] ECR I-7975, at paragraphs 57 and 61.

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

- (314) Lastly, mention should be made of Regulation (EEC) No 2077/92 [recital (60)]. That 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 agreements concluded between APTI and UNITAB for the period 1999-2001, as well as the decisions adopted by such associations in order to conclude such agreements, cannot benefit from that derogation where those organisations were not recognised by Italy or by the Commission as being "inter-branch organisations" within the meaning of Regulation (EEC) No 2077/92. In any event, APTI's and UNITAB's decisions which were determined prior to the conclusion of such agreements, in so far as they are designed primarily to fix the contract prices, cannot benefit from the derogation provided for in that Regulation.

### 2.3. Effects of Italian regulatory framework

- (315) 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>273</sup>.
- (316) As illustrated under section 1.3.2 of this Decision, Law 88/88 establishes a detailed legislative framework for the conclusion of Interprofessional Agreements in agriculture. This framework found application in several agricultural sectors, including raw tobacco.
- (317) It is particularly relevant, for the purposes of this Decision, to observe that one of the objectives sought by Law 88/88 is to determine in advance the prices of the products or the criteria for determining those prices (see Article 2(1)(d) of Law 88/88). More specifically, Article 5(1)(b) of Law 88/88 provides for the inclusion within Interprofessional Agreements of minimum prices (or in case of pluriannual agreement, the criteria for its determination).
- (318) According to Law 88/88 agricultural aid is to be granted as a matter of preference to members of associations which have concluded cultivation contracts in accordance with the terms of Interprofessional Agreements.

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<sup>273</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.

- (319) Ministerial circulars further acknowledged that the price indicated in cultivation contracts may also be determined on the basis of sectoral agreements between associations of producers and associations of processors (see recital (82)).
- (320) Conclusion of Interprofessional Agreements is one of the fundamental aims of both APTI and UNITAB. In 1999, they concluded a framework agreement for the 1999-2000-2001 crops of bulk dried raw tobacco and the Interprofessional Agreements by individual varieties which followed in 1999, 2000 and 2001 expressly under the terms and for the purposes of Law 88/88. In 1999 APTI and UNITAB also concluded an Interprofessional Agreement on surplus production of 1998 Burley crop (discussed in recital (160)). That agreement, although not making an express reference to Law 88/88, appears to have been inspired by the same principles and was concluded at a time when APTI and UNITAB were also negotiating an Interprofessional Agreement for the 1999 Burley crop. It can therefore be concluded that, in that context, APTI and UNITAB were also acting under the influence of the Italian regulatory framework.
- (321) However, the conclusion of such agreements by APTI and UNITAB remained optional. During the years in respect of which they did not enter into Interprofessional Agreements, neither they nor their members appear to have suffered any legal prejudice. Nor can it be said that the decision in 1999, 2000 and 2001 to enter into Interprofessional Agreements was the result of any compulsion which might have been exercised by the Ministry or any other State body on either APTI or UNITAB.
- (322) It can therefore be concluded that in this case neither the national rules nor administrative practice were such as to preclude application of Article 81(1) of the Treaty to the conduct of APTI and UNITAB insofar as they aimed at the conclusion of Interprofessional Agreements. 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>274</sup>. Consequently, the decisions of, respectively, APTI and UNITAB concerning minimum prices or price ranges which they adopted for the purpose of negotiating and concluding Interprofessional Agreements are caught by Article 81(1) of the Treaty.
- (323) *A fortiori*, the processors' cartel remains fully subject to the application of Article 81(1) of the Treaty as it fell totally outside the provisions of Law 88/88, insofar as its main purpose was to determine maximum or average delivery prices as well as the sharing of quantities and suppliers.
- (324) Under these circumstances, it has to be concluded that the anti-competitive conduct of the parties in question that constitutes the three infringements at issue in this case are caught by the prohibition laid down in Article 81(1) of the Treaty.

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

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<sup>274</sup> Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) and Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-8055, at par. 56.

- (325) 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>275</sup>.
- (326) In order to identify the addressees of this Decision, it is therefore necessary to identify the undertakings that are responsible for the illegal conduct and the legal entities within those undertakings to which the Decision should be addressed<sup>276</sup>.
- (327) It is established by the facts as described in part I of this Decision that Deltafina, Dimon (which, in the meantime has changed its name into Mindo, see recital (34)), Transcatab and Romana Tabacchi, as well as APTI and UNITAB, for the respective periods, have directly participated in the infringements found in this Decision and should therefore be addressees of this Decision.
- (328) During the period of the infringement, Deltafina was a wholly owned subsidiary of Universal, Dimon was a wholly owned subsidiary of Dimon Inc. and Transcatab was a wholly owned subsidiary of SCC.
- (329) Parent companies can be considered liable for the infringements to Article 81(1) committed by their subsidiaries, when the latter are not able to determine autonomously their behaviour on the market.<sup>277</sup>
- (330) According to established case-law, when a parent company owns the totality (or almost the totality) of the shares of a subsidiary, at the time the latter commits an infringement to Article 81(1), it can be presumed that the parent exercised a decisive influence on the conduct of such subsidiary.<sup>278</sup>
- (331) In the case of Deltafina, Dimon and Transcatab, lack of autonomy on the part of the subsidiary can therefore be presumed given that they are (or, in the case of Dimon, was) wholly owned by their respective parent companies.

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<sup>275</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>276</sup> As the Court of First Instance has held, the Commission's task is to "determine the undertaking within the meaning of Article [85] of the Treaty that ha[s] committed the infringement and to indicate the natural or legal persons who, as the addressee of the decision, [is] to answer for the infringement committed by that undertaking" – Case T-31/99, *ABB Asea Brown Boveri Ltd v. Commission* [2002] ECR II-1881, at par. 60.

<sup>277</sup> Case 48/69 *Imperial Chemical Industries v. Commission*, judgment of 14 July 1972, [1972] ECR 619, paragraphs 132-133; case 170/83 *Hydrotherm* [1984] ECR 2999, at par. 11; case T-102/92, *Viho v. Commission* [1995] ECR II-17, at par. 50.

<sup>278</sup> Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50; Case C-310/93P, *BPB Industries & British Gypsum v. Commission* [1995] ECR I-865, at par. 11; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, at paragraph. 80; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and others v. Commission* (PVC II), [1999] ECR II-931, at paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 at paragraph 290; Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published) at paragraphs 59-60).

- (332) In their replies to the SO, Universal, SCC and Dimon Inc. have contested this interpretation of the case law of the Court of Justice and the Court of First Instance as well as of the ensuing practice of the Commission, mainly adducing that, even in cases of wholly owned subsidiaries, further elements must subsist indicating that the parent company is exercising decisive influence over its subsidiary.
- (333) The Commission does not agree with this interpretation and sees no reason why it should depart from its own interpretation and practice in this case.
- (334) Any presumption of decisive influence in cases of wholly owned subsidiaries remains rebuttable. However, it is up to the party wishing to rebut the presumption to produce solid evidence to support such a rebuttal. General assertions unsupported by convincing evidence are not sufficient to rebut the presumption.
- (335) In their replies to the SO, Universal, SCC and Dimon Inc. have to different degrees pointed out that the local management was fully responsible for the activities of the respective subsidiaries. According to them, this assertion is supported by the local character of the business which requires daily contacts with various producers and other market operators and a strong understanding of local ways of doing business. According to these companies, the scope for intervention in their subsidiaries' business was practically non-existent and their shareholders' rights were only exercised in order to carry out statutory functions (such as the approval of annual financial accounts and appointment of directors).
- (336) More particularly, both Dimon Inc and SCC have pointed out that after the acquisition of full ownership of their respective Italian subsidiary (on 3 August 1995 for Dimon Inc. and 29 November 1994 in the case of SCC) they left in place the existing management. As for Transcatab, the board delegated the ordinary and extraordinary management of the company to the CEO by way of Board resolution.
- (337) Dimon Inc. also indicated that none of the members of the board or managers of their respective Italian subsidiaries sat on the board of or filled executive positions in other group companies.
- (338) This type of arguments fails to rule out the exercise by Universal, SCC and Dimon Inc. of their decisive influence on their respective Italian subsidiaries. The entrustment of day-to-day business to the local management of a wholly owned subsidiary is a common feature in many sectors. It would actually be surprising if a parent company, having set up a wholly owned subsidiary for the carrying out of a certain activity, continued to remain involved in the daily management of that subsidiary.
- (339) Universal, SCC and Dimon Inc. have more generally failed to substantiate any specific feature within their group which would have rendered the activities of their Italian subsidiaries independent, to a significant extent, from their influence.
- (340) In this respect, the credibility of their defence is further undermined by the fact that Deltafina, Dimon and Transcatab are linked to their respective groups by solid economic links. These groups are the biggest tobacco leaf merchants worldwide (see recitals (30), (32) and (36) above) and they often acquire and trade the tobacco bought by their Italian subsidiaries. Deltafina also acts as the European manager of the

Universal Group. It is therefore clear that from an economic point of view the Italian subsidiaries constitute an economic unity with the rest of their group.

- (341) As for the more specific arguments put forward by Dimon Inc. and SCC, it is observed that, before they acquired full ownership of Dimon and Trascatab they were already jointly controlling them with their respective Italian partners. The fact that they did not change the management at the time they acquired full control cannot therefore be taken as evidence of the fact that the same management was independent from their influence after they acquired full ownership. In the case of Dimon, it also appears from its reply to the SO that after 1995 the board only comprised appointees of the Dimon group and that one of them was fully involved in the daily management of the company.
- (342) Also, concerning the delegation of executive powers to Trascatab's CEO (who, in the absence of evidence to the contrary, can be reasonably presumed to be an appointee of SCC), this apparently did not prevent other members of the board (which also can be presumed to have remained under the control of SCC;<sup>279</sup>) from holding executive positions and exercising executive functions, including in respect of Trascatab's purchasing policy<sup>280</sup>.
- (343) Dimon Inc. and SCC also contest the existence of lines of communications between themselves and their subsidiaries. Apart from not being credible, this argument is further contradicted by the file which includes instances of communication between the Italian subsidiaries and the higher levels of the groups.
- (344) In the case of Trascatab/SCC, in particular, documents in the file indicate that the activities of Trascatab were treated as being the own activities of SCTC (a holding company within the SCC group, also wholly owned by SCC, which acted as the operational holding company within the group; Trascatab is alternatively referred to in the documents in the file as part of the SCC group or as an SCTC company) and were analysed within the scope of the group's activities, including SCC group's sales to cigarettes manufacturers<sup>281</sup>. It is therefore clear that the results of Trascatab's activities were reported in detail to higher levels within the group and consolidated thereon.
- (345) As for Dimon Inc., it is noted that Dimon drafted periodic crop reports which give details of the results achieved by Dimon in Italy.<sup>282</sup> These reports, which were drafted in English and contained confidential information on Dimon's strategy and results,

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<sup>279</sup> In this respect SCC's contention that its role was limited to the formal nomination of the individuals selected by the Managing Director remains fundamentally unsubstantiated.

<sup>280</sup> See doc. 3495 and 3496 proving that Mr Metidinis, Executive Vice President was holding weekly meetings with all heads of department, including the head of the purchase-department.

<sup>281</sup> See [Doc. 38281/3498-3521]. This report is drafted in English and it can be presumed that it was prepared for the benefit of SCTC. See also [Doc. 38281/3522-3563]. This report analyses the competitive position of SCC's within the Italian market. Again, reference is made directly to SCC rather than Trascatab.

<sup>282</sup> See [Doc. 38281/2471-2476] and [Doc. 38281/2477-2480]. See also a Dimon Country Profile – Italy January 2000 which was ostensibly made for the benefit of other group companies [see Doc. 38281/2948-2959].

were addressed to those companies within the Dimon group which were buying from Dimon (and which are generally referred to as “clients”). Other documents indicate a direct intervention by the management of Dimon International Inc. and other companies of the Dimon group in the activities of Dimon. Dimon International Inc. is the operational arm of the Dimon group; Dimon is often referred to as a Dimon International Inc. company, to signify that this latter company was actually operating at the highest level in the group on behalf of the ultimate parent. There can therefore be no doubts as to the existence of reporting lines between Dimon and Dimon Inc. (although this occurred through the intermediation of Dimon International Inc.)<sup>283</sup>.

- (346) Dimon has also observed that Dimon Inc. was not the direct parent company of Dimon. Intabex Netherlands BV was in fact in that position. In making that claim Dimon Inc. does not clarify the role of this Intabex and the reporting lines between, on the one hand, Intabex Netherlands BV and Dimon, and, on this other, between Intabex Netherlands BV and Dimon Inc.. The elements set out above indicate in any event that lines of communication existed between Dimon and Dimon International Inc. and clarify the direct link between the latter company and Dimon Inc.. In addition, it appears that Intabex Netherlands BV merely acted as a financial intermediate holding and maintained no link with the operational aspects of Dimon's activities.
- (347) Finally, with regard to Universal, its approval of the budget and the operating plan of Deltafina, as well as the communication to it of quarterly/semi-annual reports on the general development of Deltafina's business operations, the financial results and any extraordinary developments that would significantly affect the business operations in Europe,<sup>284</sup> further confirms its exercise of decisive influence on the wholly controlled subsidiary.
- (348) The Commission is aware that in a previous decision Universal was not held liable for the infringement committed by its wholly owned subsidiary Deltafina<sup>285</sup>. However the Commission considers that in this case the conditions for the imputation of liability to the mother company established by the case law of the Community Courts have been satisfied and Universal can therefore be considered liable in this Decision.
- (349) With regards to the groups to which Transcatlab and Dimon respectively belong or used to belong during the duration of the infringement, namely SCC and Dimon Inc., they have ceased to exist following their merger on 13 May 2005 into a new entity called Alliance One International, Inc. which is their legal successor. This Decision should therefore be addressed to Alliance One International, Inc.<sup>286</sup>

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<sup>283</sup> See [Doc. 38281/2893-2892] prepared by Dimon International Inc. comparing Dimon's and Transcatlab's facilities and [Doc. 38281/2929] which includes an assessment by Dimco International Inc. of the activities of Dimon and an indication of the future steps to take. See also communications between Dimon and Gustav Stangl (a representative of the Dimon group) including detailed information given out by Dimon on its activities and instructions received by Dimon on certain commercial activities [See Doc. 38281/2918; 38281/2851, 38281/2861 and 38281/2928].

<sup>284</sup> This was confirmed by Universal Corporation in its reply to the SO.

<sup>285</sup> See Commission Decision of 20 October 2004 *Raw Tobacco Spain* (Case COMP/38.238/B.2), available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38238/en.pdf>.

<sup>286</sup> Case T-6/89 *Enichem Anic v Commission* [1991] ECR II-1695.

- (350) In the case of Dimon, following its sale by Intabex Netherlands B.V. to four Italian individuals on September 2004 and the change of the company name into Mindo, this Decision should also be addressed to Mindo<sup>287</sup>.
- (351) On the basis of the above considerations, the Commission considers that Deltafina, Universal, Mindo, Transcatlab, Alliance One International Inc., Romana Tabacchi, APTI and UNITAB should bear responsibilities for the infringements and be addressees of this Decision.

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

- (352) 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.
- (353) In this case, Deltafina, Dimon and Transcatlab have declared to the Commission that they have stopped their anticompetitive conduct.<sup>288</sup>
- (354) However, under the current circumstances it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings and the associations of undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which might have the same or similar object or effect.
- (355) The prohibition should also apply to secret meetings and multilateral or bilateral contacts as well as activities of the undertakings in APTI and UNITAB and any other trade association insofar as they might go beyond collecting and diffusing aggregated statistics or promoting the general interests of the industry and could lead the members to concert their market behaviour, in particular regarding prices and supplies.

## **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*

- (356) 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

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<sup>287</sup> See in this respect Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published) at paragraphs 387-393.

<sup>288</sup> See statement by the chairman of Deltafina and the official minutes of the meeting of Deltafina's board of directors of 1 March 2002 [Doc. 38281/526-528]. See also the statement by the chairman of Transcatlab dated 4 April 2002 [Doc. 38281/890] and Dimon's reply to the SO, p. 60.

turnover in the preceding business year. An identical provision is contained in Article 23(2) of Regulation (EC) No 1/2003.

- (357) 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.

#### *2.6.2. Fines imposed in respect of APTI's and UNITAB's infringements*

- (358) The infringements committed by APTI and UNITAB consisted in decisions on contract prices for different varieties of raw tobacco that they would then negotiate for the purpose of concluding Interprofessional agreements.
- (359) As explained in recitals (316) and following, the conclusion of Interprofessional Agreements under the terms of Law 88/88 was not mandatory and, in fact, no Interprofessional Agreement was entered into for several years. However, Law 88/88 (as further applied in the administrative practice of the Ministry), created incentives for the conclusion of Interprofessional Agreements containing minimum prices (or, in case of pluriannual agreement, the criteria for its determination). In other words, in order to benefit from the advantages provided for in Law 88/88, UNITAB and APTI were to agree on minimum prices.
- (360) Law 88/88 had found application in several instances in the agricultural sector before the conclusion of the Interprofessional Agreements discussed in this Decision, including in the tobacco sector, and the behaviour of the parties negotiating them had never been challenged under either national or Community law, notwithstanding the fact that these agreements were in the public domain and communicated to the Ministry (see in particular recital (162)).
- (361) On this basis, the Commission accepts that the legal framework surrounding the collective negotiation of Interprofessional Agreements could engender a considerable degree of uncertainty as to the legality of APTI's and UNITAB's conduct and strongly encouraged them to adopt the decisions which are the subject matter of this case. For the reasons set out in recital (320), the same conclusion applies to the conclusion in 1999 of an Interprofessional Agreement on surplus production of 1998 Burley crop.
- (362) In these circumstances, the imposition of a fine of only EUR 1 000 on UNITAB and APTI, respectively, appears to be appropriate in this case. Consequently, the consideration of other criteria for setting fines becomes irrelevant with respect to the fines to be imposed on APTI and UNITAB.

#### *2.6.3. Fines imposed in respect of the processors' infringement*

- (363) Processors secretly agreed on several aspects relating to price and quantities to be transacted, in particular maximum and/or average delivery price for each variety of raw tobacco (mainly Burley, but also Bright and DAC) and the volumes of raw tobacco to be bought by each processor, together with the respective sources of supply. Their cartel also extended to bid-rigging in respect of tobacco which was publicly auctioned in 1995 and 1998.

- (364) As far as the processors are concerned, the Commission will take account of the gravity and duration of their infringement when setting the amount of the fine.

#### 2.6.3.1.Gravity of the infringement

- (365) 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.
- (366) The production of raw tobacco in Italy accounts for some 38% of the Community in-quota production. The overall value of this production was EUR 67,338 million in 2001 (last full year of the infringement<sup>289</sup>) (see recitals (83) and (84)).<sup>290</sup>
- (367) The nature of the processors' infringement is considered very serious, since it concerns the fixing of the purchase prices of the varieties of raw tobacco in Italy and the sharing of purchased quantities.
- (368) As explained above in section 2.1.5, buying cartels can distort producers' willingness to generate output as well as limit competition amongst processors in downstream markets. This is particularly so in cases like this, where the product affected by the buying cartel (raw tobacco) constitutes a substantial input of the activities carried out by participants downstream (the first processing and sale of processed tobacco in this case).
- (369) On the basis of those considerations, the Commission concludes that the processors' infringement must be qualified as very serious.

#### 2.6.3.2.Individual weight and deterrence

- (370) In cases which involve several undertakings, the specific weight of each of the undertakings involved and the likely effect of its unlawful behaviour should be considered in determining the starting amount of the fine.
- (371) Bearing this in mind, the Commission considers that fines should be set in consideration of the market position enjoyed by each party involved.
- (372) As Deltafina appears to be the biggest purchaser with a market share of around 25% in 2001 (full last year of the infringement) (see recital (31)), starting amount of the fine to be imposed on that company should be the highest.

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<sup>289</sup> Commission internal information.

<sup>290</sup> The processors' behaviour also extended to purchases from "third packers" (see recital (28), (243) and (246) of the Decision), i.e. intermediaries which can only provide initial treatment for tobacco (through reduction of raw tobacco into "loose leaves"). The cost of the services provided by third packers amounted on average to 60% of the price paid to third packers, the other 40% being the cost for raw tobacco as paid by third packers to producers. It can therefore be assumed that the value of the purchases involved in this case was higher than the mere value of raw tobacco produced in Italy.

- (373) In consideration of their smaller shares in the market for raw tobacco in Italy (around 9-11 % in 2001), Transcatab, Dimon and Romana Tabacchi should be grouped together and the starting amount of the fine to be imposed on them should be lower.
- (374) A starting amount merely reflecting the market position would, however, not be a sufficient deterrent in respect of Deltafina, Dimon (Mindon) and Transcatab. In fact, despite their relatively small turnovers, these three companies belong (or, in the case of Dimon/Mindon, used to belong) to multinational groups of considerable economic and financial strength<sup>291</sup>, representing the biggest tobacco merchants in the world and operating at different levels of business in the tobacco industry and in different geographic markets. In particular, the consolidated turnover of Universal (ultimate parent company of Deltafina) amounted, for the year ended 31 March 2005, to USD 3 276 million. The turnover of Dimon Inc. (ultimate parent company of Dimon during the infringement, now merged into Alliance One International) amounted, for the same year to, to USD 1 311 million, while the consolidated turnover of Standard Commercial Corporation (ultimate parent of Transcatab during the infringement, now merged into Alliance One International) amounted, for the same year, to USD 896 million.
- (375) On this basis, the application of a multiplying factor of 1.5, in respect of the starting amount of the fine to be imposed on Deltafina, and 1.25, in respect of the starting amount of the fine to be imposed on Dimon (Mindon) and Transcatab, appears appropriate.
- (376) For these reasons, the starting amount of the fines in this case should be set as follows:

- Deltafina	EUR	37 500 000
- Transcatab	EUR	12 500 000
- Dimon (Mindon)	EUR	12 500 000
- Romana Tabacchi	EUR	10 000 000

### 2.6.3.3. Duration of the infringement

- (377) The restrictive practice involving the processors began on 29 September 1995 and ceased to exist, according to the statements made by the processors, on 19 February 2002 (see recital (301)). Therefore the processors' infringement lasted for approximately 6 years and 4 months. In consideration of the long duration of the infringement the starting amount of the fines to be imposed on Deltafina, Dimon (Mindon) and Transcatab should be increased by 60%.

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<sup>291</sup> The application of a multiplying factor in respect of Mindon's fine is justified on the basis of the joint and several liability of Alliance One International. As far as Mindon's own liability is concerned, the application of a multiplying factor to it would not be equally justified as it has severed all ties with its previous shareholder. However, in view of the capping of Mindon's liability within the 10% of its turnover (for which see recital (404) of this Decision) the separate calculation of a starting amount in its respect becomes unnecessary.

(378) Romana Tabacchi joined the processors' cartel in October 1997. It suspended its participation in the cartel from 5 November 1999 to 29 May 2001 and rejoined the cartel from 29 May 2001 until 19 February 2002 see recital (302)). Its participation in the infringement is therefore considered to have lasted for more than 2 years and 8 months. The fine to be imposed on Romana Tabacchi should therefore be increased by 25 %

#### 2.6.3.4. Basic amount

(379) For these reasons, the basic amount of the fines to be imposed in this case should be set as follows:

- Deltafina	EUR	60 000 000
- Transcatab	EUR	20 000 000
- Dimon (Mindon)	EUR	20 000 000
- Romana Tabacchi	EUR	12 500 000

#### 2.6.3.5. Attenuating circumstances

(380) Romana Tabacchi did not take part in certain aspects of the cartel (mainly those relating to direct purchases from producers from whom it only started buying small quantities in 2000). Furthermore, at the time it joined the cartel in 1997 (see recital (124)), Romana Tabacchi was establishing itself as an independent buyer (see recital (39)). Its market position was therefore particularly weak (in 1997 Romana Tabacchi's market share amounted to some 2%<sup>292</sup>). Also, its behaviour often disrupted the purpose of the cartel to the point that the other participants jointly discussed how to react to Romana Tabacchi's conduct (for the details see recitals (145), (195), (196), (198), (199), (209) and (212)). In consideration of these elements, the basic amount of the fine to be imposed on Romana Tabacchi should be reduced by 30%.

(381) The establishment of the processors' cartel (which started, at the latest, in 1995) had no link (whether legal or factual) with the conclusion of Interprofessional Agreement by APTI. The Commission has already recognised the effect that the Italian regulatory framework had on APTI's conduct (see section 2.6.2) and does not accept that the Italian regulatory framework otherwise encouraged the processors' behaviour. On this basis, the fines to be imposed on Deltafina, Dimon and Transcatab should not benefit from further reduction.

(382) In their replies to the SO, the parties have also claimed that termination by them of the infringement before the intervention of the Commission should further be considered as having a mitigating effect on the fine. The Commission cannot accept this claim. In cases of serious infringements of competition rules, like in this case, where the parties knew or should have known that they were fundamentally illegal, termination

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<sup>292</sup> Romana Tabacchi's own estimate.

before the intervention of the Commission should not, as a matter of principle, attract any award (in terms of reduction) when calculating the fine<sup>293</sup>.

- (383) Nor can the Commission accept that the cartel was never implemented and that a further reduction of the fine should apply for this reason. In fact, it is apparent from the description of the facts in this case that the parties secured the implementation of the cartel through, in particular, their participation at regular meetings as well as regular exchanges of information regarding prices and quantities during the buying period (for a summary see for instance recital (250)). It cannot therefore reasonably be contended that the infringement did not find any application.
- (384) In its reply to the SO, Transcatab has claimed that in setting the fine in this case the Commission should consider, in application of point 5 (b) of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ESCS Treaty<sup>294</sup> (“the 1998 Guidelines”), the specific social and economic circumstances which affect the market for raw tobacco in Italy, in particular the illegal nature of the intermediaries’ activities (see recitals (94) (95) (287)) and the situation of crisis which the whole sector is undergoing. It claims that part of the decline of the sector is also due to the reform of the CMO for raw tobacco (50). The application of point 5 (b) of the 1998 Guidelines is exceptional and was applied in the *French Beef* case <sup>295</sup>(to which Transcatab makes reference) in a situation where the infringement was limited to the public behaviour of trade associations, dramatic effects were occurring on consumption at the time the infringement was committed and public measures were proving ineffective. That specific context went beyond a straightforward crisis in the sector. None of those or similar features apply in this case. Furthermore, for the reasons explained in recitals (289) and (290), it is not accepted that the existence of illegal practices affecting the tobacco sector in certain Italian regions could have a determining effect in causing the practices at issue. As for the reform of the CMO, this will leave the situation substantially unchanged (in terms of overall aid paid to producers) until 2010 and any future effect of the reform appears to be far too remote and uncertain to justify the application of an attenuating circumstance.

*Application to Deltafina of an attenuating circumstance for its effective co-operation in the proceedings outside the scope of the Leniency Notice*

- (385) For the reasons set out in sections 2.6.3.7.1 and 2.6.3.7.2 , Deltafina has foregone any entitlement to benefit from either total immunity or a reduction in the fine under the terms of the Leniency Notice.
- (386) In cases where the Leniency Notice may find application, co-operation by undertakings which are party to the proceeding should, as a matter of principle, be assessed within the framework of the Leniency Notice.

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<sup>293</sup> See Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published (at paragraph 294)).

<sup>294</sup> OJ C 9, 14.1.1998, p. 3.

<sup>295</sup> Case COMP/C.38279/F3 *French Beef* of 2 April 2003, OJ L 209/2003, p. 12.

- (387) It is therefore only under exceptional circumstances that co-operation from one party can still be considered, pursuant to the 1998 Guidelines, as having an attenuating effect on the amount of the fine to be imposed in cases where the Leniency Notice was in principle applicable .
- (388) The Commission considers that this case does have exceptional features which require that Deltafina's co-operation be assessed for the purpose of considering whether there are attenuating circumstances applicable to it.
- (389) Deltafina was the first undertaking to apply for leniency under the terms of the Leniency Notice (only a few days after its adoption) and the first to which the Commission granted conditional immunity. This is also the first Decision to address the consequences arising from the violation of the obligations concerning co-operation set out in point 11 of the Leniency Notice which must be met by applicants for immunity.
- (390) In addition, Deltafina's contribution to the Commission's investigation was substantial. It assisted the Commission to take the necessary investigatory measures from the very beginning and continued throughout the whole procedure, with the exception of the facts which justify the withholding of final immunity.
- (391) On the basis of the above, the Commission intends to assess favourably the co-operation that Deltafina has provided to it during the procedure.
- (392) In particular, the declarations and the written evidence given in Deltafina's application for Leniency of 19 February 2002 (as subsequently supplemented) provided the Commission with decisive elements for the establishment of the objections which the Commission raised in the SO and in this Decision. This can be seen in respect of the facts set out in following recitals.
- (393) The [1998] Villa Grazioli agreement on prices for Burley, Bright and DAC [see recital (131) and following] : the copy of the agreement supplied by Deltafina<sup>296</sup> is the only version which contains autograph initials of the signatory parties to the agreement and constitutes essential evidence of the fact that the agreement was concluded. It also provided the Commission with significant elements in order to establish the number and the identity of the signatory parties.
- (394) The February [1999] agreement on pricing and purchasing conduct [see recital (159)]: Deltafina's submission provided the Commission with the only evidence (in the form of contemporaneous handwritten notes<sup>297</sup> and leniency declaration<sup>298</sup>) in respect of the February 1999 agreement. That agreement constitutes an essential element of the illegal conduct of the Italian processors throughout the year 1999.
- (395) [Year 2000] On-going discussions and co-ordination [see recital (204)]: Deltafina's submission provided the Commission with the only conclusive evidence (in the form

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<sup>296</sup> See Doc. 38281/406.

<sup>297</sup> See Doc. 38281/470.

<sup>298</sup> See Doc. 38281/611.

of contemporaneous handwritten notes<sup>299</sup> and leniency declaration<sup>300</sup>) in respect of the on-going discussions and co-ordination between Italian processors during the year 2000 (outside the ambit of negotiation of the Interprofessional agreements).

- (396) [Year 2001] On-going discussions and co-ordination [see recital (209)]: Deltafina's submission provided the Commission with the most significant evidence (in the form of contemporaneous handwritten notes<sup>301</sup> and leniency declaration<sup>302</sup>) in respect of the on-going discussions and co-ordination between Italian processors during the year 2001 (outside the ambit of the negotiation of Interprofessional agreements).
- (397) Finally, Deltafina never substantially contested the facts which are the subject matter of this decision, even after the adoption of the Addendum.
- (398) In consideration of the above and of the more general conduct of Deltafina during the procedure, it can be concluded that the fine to be imposed on Deltafina should be reduced by 50%.

#### 2.6.3.6. Resulting fines and application of the upper limit to the fine

- (399) Having taken into account the attenuating circumstances considered above, the amount of the fines to be imposed should be set as follows:

- Deltafina	EUR	30 000 000
- Dimon (Mindon)	EUR	20 000 000
- Transcatab	EUR	20 000 000
- Romana Tabacchi	EUR	8 750 000

- (400) Article 23(2) of Regulation (EC) No 1/2003 (which is equivalent in this respect to what was 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 must not exceed 10% of its total turnover in the preceding business year.
- (401) 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 undertaking (that is to say, the group) must be taken into account in order to determine the limit imposed by Article 23(2) of Regulation (EC) No 1/2003.
- (402) In this case, the fine to be imposed on Romana Tabacchi shall not exceed EUR 2,05 million.

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<sup>299</sup> See Doc. 38281/590.

<sup>300</sup> See Doc. 38281/613.

<sup>301</sup> See Doc. 38281/498.

<sup>302</sup> See Doc. 38231/614

(403) It is not necessary to reduce the other fines in consideration of the upper limit provided for in Article 23(2) of Regulation (EC) No 1/2003.

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

#### 2.6.3.7. Application of the Leniency Notice

(405) Deltafina, Dimon and Transcatab applied for leniency under the terms of the Leniency Notice (see recitals (4) to (13)).

(406) After examination of Deltafina's application for immunity from fines, the Commission informed Deltafina on 6 March 2002 that it fulfilled the conditions of point 8(b) of the Leniency Notice and granted it conditional immunity<sup>303</sup>.

(407) Upon review of Dimon's and Transcatab's applications, Commission came to the preliminary conclusion that Dimon and Transcatab were, respectively, the first and the second undertakings to submit evidence of the suspected infringement which represented, within the meaning of point 22 of the Leniency Notice, significant added value with respect to the evidence already in the Commission's possession.

##### 2.6.3.7.1. Deltafina's application for immunity

(408) The Leniency Notice makes the granting of final immunity conditional upon the fulfilment of the cumulative conditions set out in point 11 of the Notice.

(409) Of particular interest in this case is the condition set out under point 11(a) which requires undertakings (having been granted conditional immunity) to cooperate "*fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement*" and, in particular to remain "*at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned*".

(410) At the Oral Hearing of 22 June 2004 (which followed the adoption of the SO) it became apparent that Deltafina had divulged details of its leniency application at a meeting of APTI's managing committee (*consiglio direttivo*), which was also attended by representatives of Dimon, Transcatab and Trestina, before the Commission had had an opportunity to carry out the investigations referred to at recital (11) above.

(411) These facts were the subject of the objections raised against Deltafina in the Addendum (see recital (18)). They may be set out as follows.

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<sup>303</sup> At that time it was considered that the information received from APTI and UNITAB (for which see recital (3)) could constitute a sufficient basis to ground a decision to carry out inspections and that conditional immunity could no longer be granted under Point 8(a) of the Leniency Notice. (4)

(a) *Relevant facts*

(i) The meeting between Deltafina and the Commission services 14 March 2002 and the follow-up given to it.

(412) At a meeting between the lawyers acting for Deltafina and Universal and the Commission services on 14 March 2002, the issue of the confidential nature of Deltafina's immunity application was brought up by the case team and specifically discussed with Deltafina's representatives. The Commission services made it clear that inspections could not take place before 18-20 April 2002 and it was therefore necessary to ensure confidentiality until that date with a view to not alerting Deltafina's competitors and putting in danger the effectiveness of the planned inspections. At that meeting, Deltafina explained to the Commission services that it would have certain difficulties in not divulging its application for immunity until the date planned for the inspections, due to:

- (a) impending meetings with competitors within APTI during which it would be difficult to maintain confidentiality without engaging in anti-competitive discussions;
- (b) the need to make middle management within Deltafina (some 15 people) aware of the application,
- (c) the need to disclose the immunity application in the context of debt transactions involving Universal in the United States.

(413) The Commission's services minutes of that meeting report the discussion on the confidentiality point as follows:

*"2. Models of cooperation and confidentiality*

*[...] [Commission services-team] also asked Deltafina to keep confidentiality for about one more month [...]"*

*"Regarding confidentiality, DF [Deltafina] stated that it was not going to be feasible to keep secrecy for another month, in light of the approaching season for signing the 2002 contracts. In addition the (following) week of March 18, 2002 there would be a scheduled meeting among first processors at APTI (association of Italian first processors) premises. It would be almost impossible to keep the secret during such meeting without raising serious doubts and concerns among competitors. Moreover, middle management (approximately 15 more people) of DF would soon need to be informed too. [Universal] also mentioned a US law suit between DF/Dimon/Standard Commercial and Philip Morris and BAT.*

*[Commission services-team] noted the difficulty for Deltafina in keeping its immunity request secret from its competitors. [Commission services] also made it clear to Deltafina that since disclosing such information to other members to the cartel might hinder the Commission investigation, there will be a greater burden on Deltafina to provide evidence as quickly as possible to the Commission".*

- (414) At the end of that meeting “[Commission services] handed out to DF a sheet to be filled with the names of the members to the cartel each year. It was agreed that the documents would be returned to DG COMP by Monday March 18, 2002, at 6 PM”
- (415) These circumstances were acknowledged by Deltafina’s and Universal’s lawyers at the oral hearing of 22 June 2004. During the hearing Universal’s representatives read out their own notes of that meeting. They describe the content of the discussion with the Commission in the following terms:

“[Commission services] then indicated that the Commission would want Deltafina to keep strict confidentiality until April 20 2002 and only answer as innocently as possible to competitors’ requests. The Commission wanted to conduct dawn raids but would not be able to do it before that date. [ Universal] answered that Deltafina certainly had kept the co-operation as secret as possible to date. However since DF had to make sure that infringements had stopped, it would have to inform more people within the company. So far the management of DF had been able to avoid direct confrontation with the other members of the cartel but this could clearly not go on for another month. Also DF employees could not be expected to lie. [Deltafina] added that within DF at least 10 to 15 more people would have to be informed in order to guarantee that all infringements stop completely. Once that had been done it would be impossible to control the information. Also it was very likely that people at DF noticed already that something was going due to internal investigations during which management has been going through very old files for days and the presence of outside counsel and the general counsel. Furthermore, there will be a meeting of APTI next week in which DF takes part.<sup>304</sup> It would be suspicious if DF would change its behaviour in comparison to previous meetings. [Universal] added that Universal Corp. will have a debt deal scheduled to close on March 31 2002 in the US. Universal would therefore have to give information to the lenders (which include some European banks and most of which have significant debt with Universal’s two competitors on all on-going matters) that could result in liability, as part of the lenders’ due diligence process. From all these arguments [Commission services] concluded that it would be impossible to keep the co-operation of Deltafina secret and that the Commission would therefore likely not be able to conduct dawn raids.<sup>305</sup> He explained that the Commission will not be capable of mounting dawn raids before a month’s time. [Commission services] said that the Commission would then have to rely wholly on the information provided by Deltafina. He described this as the second best alternative...”. “[Universal] said that it was appreciated that the Commission understood that the co-operation could not be kept secret much longer””.

- (416) During the same meeting on 14 March 2002, the Commission’s services asked Deltafina to provide information in tabular form which had to include, for each year of the cartel, the name of the company involved in the negotiations, the person(s) involved in the negotiations at that time, the persons involved in the negotiations who were still employed at the same company, the office address of such persons, the

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<sup>304</sup> The subsequent APTI meeting actually only took place three weeks later, i.e. on 4 April 2002 (see recital (421) below)

<sup>305</sup> This statement had already been read out during the Oral Hearing of 22 June 2002 and duly reflected in the Addendum.

current address of the company and the names, position and location of offices of current top management of the company.

(417) An internal Commission services memorandum of 15 March 2002, summarises the state of play in this case after the meeting of the previous day as follows: *“Inspections: We have requested Deltafina to provide DG COMP by Monday March 18, 2002 at 6 PM a list of all alleged members to the cartel for each year from 1993 to 2001. Therefore, by Monday we should be in a position to fully proceed with organising Article 14(3) inspections. We will also be in a better position to understand how many teams would be required”*.

(418) On 19 March 2002 Deltafina submitted to the Commission an explanatory statement purporting to illustrate the content of certain documents it had supplied with the leniency application and a copy of the minutes of a meeting of the Board of Deltafina held on 1 March 2002<sup>306</sup> where it was resolved that<sup>307</sup>:

*“The Board take notice of the matters and things reported by the President and the actions taken by him in the interests of the Company, having resulted in the submission to the Directorate General of Competition of the European Commission of an application dated 19<sup>th</sup> February 2002 for immunity from fines pursuant to Notice 2002/C-45/03 (and a conditional application for reduction of such fines) in relation to certain past relevant facts affecting or involving the Company, within the context and to the ends similarly reported by the President. RESOLVED FURTHER THAT the Board take notice of the need that the behaviours referred to by the President in his report, to the extent that they should still be in whole or in part in existence, be discontinued forthwith, AND THAT those in attendance shall supervise the actions of those reporting to then accordingly. RESOLVED FURTHER, in the interests of the Company, the most rigorous confidentiality will need to be observed in relation to all matters and things reported at the instant meeting as specified by the President, AND THAT those in attendance shall conform their behaviour to such need until further communications and deliberations accordingly”*.

(419) On 21 March 2002, Deltafina supplied the information requested by the Commission services at the meeting of 14 March 2002.

(420) On 25 and 26 March 2002, 18 April 2002 and 17 May 2002, Deltafina submitted additional evidence.

(ii) Deltafina’s declarations to Dimon and Transcatab on 4 April 2002

(421) A meeting of APTI’s managing committee took place on 4 April 2002.

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<sup>306</sup> [Doc. 38281/518-534].

<sup>307</sup> Deltafina’s own translation [Doc. 38281/533]

(422) At the oral hearing of 22 June 2004, Dimon pointed to two documents in the file<sup>308</sup> consisting of handwritten notes taken by Dimon's representatives. These documents were copied during the inspections carried out by the Commission at Dimon's premises on 18 April 2002.

(423) According to Dimon, these documents record statements given by Deltafina's chairman to Dimon's purchasing and general managers and Transcatab's chairman during that APTI meeting<sup>309</sup>.

(424) The first document, drafted in Italian by Dimon's purchasing manager begins in this way:

*"The story begins in 1993 with the new CMO. Two memoranda with documents. All those undertakings which have worked or dealt with Deltafina are included. The Villa Grazioli Agreement is included [etc]"*

(425) The other document was written in Spanish by Dimon's general manager and refers to the fact that there was not a joint application for leniency (as had been the case in Spain) because of a change in the law, which occurred on 14 February 2002. This is understood as a reference to the entry into force of the Leniency Notice.<sup>310</sup>

(426) Deltafina, in a memorandum signed by Deltafina's chairman and circulated at the oral hearing of 1 March 2005, gave the following account of that meeting :

*"The Managing Committee meeting of 4 [04]<sup>311</sup>2002 was an ordinary meeting which started at 11 am approximately, as usual. At 1 pm I remember there been present, apart from me, the following people: [purchasing manager] from Dimon, [chairman] from Transcatab, [representative] from Contab Sud, [chairman] from Trestina, who were all members of the Managing Committee; [...], APTI's internal auditor, from Agrindustria and [general manager, from Dimon, in simple attendance. [...]*

*I had been informed that our decision to co-operate with the Commission could only be communicated to the other undertakings with the utmost caution and on necessitated occasions and that conditional immunity could be withdrawn in case of continuation of anticompetitive practices. This had been discussed and shared with the Commission at a meeting around mid March 2002 in Brussels, during which, among other things it had also been indicated that an upcoming APTI meeting could have rendered it impossible to keep confidentiality. As a consequence, as far as I and the Board of Directors were concerned, we had discontinued any contact with the other undertakings. It was necessary, however, to inform also the other levels within the company of the obligation to stop any anticompetitive behaviour, but that was*

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<sup>308</sup> [Doc. 38281/2606 and Doc. 38281/2607, initialled FA1 and FA2]

<sup>309</sup> However neither the notice nor the minutes of the official APTI meeting appear to contain a reference to the Commission's investigation.

<sup>310</sup> See point 28 of the Leniency Notice.

<sup>311</sup> In fact the document states 4 02 2002 but it is clear from the text that referece was intended to be made to 4 April 2002.

*impossible without informing them of what had occurred. On the other hand, it was becoming increasingly difficult to ignore the questions and the curiosity of the other implicated companies which followed the silence which had been lasting since 19.02.2002 without its continuation becoming an implicit confirmation of co-operation with the Commission. Therefore, at the meeting of APTI's managing committee of 4 April 2002, as I found myself under one the situations which had been envisaged during the March discussion with the Commission, I decided to communicate the information in the most transparent possible manner. For this reason I communicated to all the people I indicated that Deltafina had begun to co-operate with the Commission on the basis of February 2002 by sending self-incriminating documentation. I did not share with them the content of what Deltafina had communicated to the Commission [...]. My communication lasted approximately ten minutes; the meeting of APTI's managing committee continued then on other matters”.*

- (427) On the same day Dimon and Transcatlab also applied for leniency (at 4:15 pm and 6:47 pm respectively). No mention was, however, made of the declarations given by Deltafina's chairman at the APTI meeting.
- (428) On 18 and 19 April 2002, the Commission carried out investigations pursuant to Article 14(2) of Regulation No. 17 at the premises of Dimon and Transcatlab and investigations pursuant to Article 14(3) of Regulation No. 17 at the premises of Trestina and Romana Tabacchi.
- (429) Another meeting between the Commission services and Deltafina was held on 29 May 2002 in the context of which neither the Commission nor Deltafina brought up the issue of confidentiality nor did Deltafina declare that it had divulged its leniency application to Dimon and Transcatlab during the APTI meeting of 4 April 2002.

(b) Failure by Deltafina to meet the conditions set out in point 11 of Part A of the Leniency Notice

- (430) The Leniency Notice requires undertakings to which the Commission grants conditional immunity under Part A of the Leniency Notice to comply with the conditions set out in point 11 of the Leniency Notice. Failure to do so may result in a decision to withhold immunity at the end of the administrative procedure.

(i) Scope of the co-operation condition in point 11(a) of the Leniency Notice

- (431) The duty to cooperate in point 11(a) of the Leniency Notice is an essential part of the “bargain” struck between the Commission and the applicant when conditional immunity is granted under the Notice. As such, it should be interpreted in the light of the underlying rationale for the Commission's policy of granting immunity to certain

cartel members, namely their decisive contribution to the investigation or finding of the cartel infringement<sup>312</sup>.

- (432) The condition in point 11(a) is drafted widely. It is to “*cooperate fully, on a continuous basis and expeditiously throughout the Commission’s administrative procedure*” and is not limited to (although it obviously includes) the provision of evidence relating to the infringement. In view of the rationale for the Commission’s immunity policy (as stated in recital (431)), cooperation also includes refraining from taking any step which could undermine the Commission’s ability to investigate and/or find the infringement.
- (433) Where, as in this instance, the Commission has not yet carried out inspections (or other investigatory measures) and the industry is unaware of the Commission’s impending inspections, any leak of the existence of a leniency application risks undermining completely and irreparably the Commission’s ability to investigate effectively and to establish the infringement. In this respect, a leniency applicant cannot invoke a legitimate expectation to the effect that confidentiality may not be part of the condition set out at point 11(a) of the Leniency Notice for lack of express provision in the Notice. In fact, a reading of the Leniency Notice according to the principle of ‘*effet utile*’ [useful effect] requires, as a minimum, that an investigation (towards the success of which applicants for immunity are called to contribute) be not put at risk by the behaviour of the leniency applicant itself. As such, the deliberate and voluntary disclosure of such information by an applicant for immunity to its competitors should be treated as a breach of the cooperation obligation in point 11(a) of the Leniency Notice.
- (434) The situation in which an applicant for immunity freely volunteers to the other cartel participants that it has applied to the Commission for immunity, is, of course, quite different from that where the applicant is forced to take steps which may cause its co-conspirators to suspect that it has made such an application. The requirement in point 11(b) of the Notice that the applicant ends its involvement in the infringement no later than the time of its immunity application may, for example, cause the other cartel members to suspect that the undertaking has applied for immunity. This inherent tension between the requirements of points 11(a) and (b) of the Leniency Notice does, however, not license an applicant to voluntarily disclose to the other cartel members that it had applied for immunity.
- (435) By way of analogy, reference can also be made to point 32 of the Leniency Notice which states that “*the Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and the Council*”.
- (436) For all these reasons, the Commission takes the view that co-operation obligation set out in point 11(a) of the Leniency Notice includes a duty of confidentiality regarding applications for immunity and the provisional granting thereof.

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<sup>312</sup> Points 4 and 6 of the Leniency Notice

- (437) In this respect the arguments put forward by Deltafina and Universal to the effect that Deltafina's duty to co-operate could not extend to a duty to keep the Leniency application confidential cannot be accepted<sup>313</sup>.
- (438) In particular, Deltafina has pointed to the fact that in subsequent cases the Commission has started to include an express reference to a duty of confidentiality in the acknowledgement of receipt which the Commission sends upon submission of a leniency application. No confidentiality requirement was expressly stated in the acknowledgement of receipt which was sent to Deltafina, so that, according to Deltafina, the Commission could not claim that Deltafina, at the time of the relevant facts, was bound by a duty of confidentiality.
- (439) In this respect, the Commission observes that an acknowledgement of receipt, which is a simple act of an operational service, cannot introduce by itself new obligations under the Leniency Notice. The fact that the Commission's services have introduced an administrative practice consisting of spelling out in the acknowledgement of receipt the duty to keep the application confidential must therefore be considered nothing more than a reminder of the obligations which are already contained in the Leniency Notice and, in particular, of the duty to co-operate enshrined in point 11 (a) of the Notice, as explained in recitals (431) to (434) of this Decision).
- (440) Furthermore, the specific circumstances of this case, namely the Board's resolution of 1 March 2002 (see recital (418)), which imposed "*the most rigorous confidentiality*" on the issue, and its chairman's own words, according to which Deltafina's decision to co-operate with the Commission "*could only be communicated to the other undertakings with the utmost caution and on necessitated occasions*" (see recital (426)), indicate that Deltafina understood that confidentiality was part of its co-operation duties.

(ii) Deltafina's breach of condition in point 11(a) of the Leniency Notice

- (441) From the facts above (see recitals (412) to (429)), it emerges that, notwithstanding the fact that Deltafina knew that the Commission intended to carry out on-the-spot investigations around 18-20 April 2002, its chairman voluntarily disclosed Deltafina's application for immunity to its two main competitors before such on-the-spot investigations had taken place.
- (442) Deltafina's behaviour was well capable of undermining the result of those inspections and Deltafina knew or, at least, should have known that this was the case, inter alia because it had been specifically informed by the Commission of the upcoming inspections and had been requested to preserve the confidentiality of its application, so that the outcome of those inspections might not be jeopardised.
- (443) Assessing now whether any such damage to the Commission's investigation actually resulted would be impossible and should not, in any event, constitute a determining

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<sup>313</sup> See Deltafina reply to the Addendum (points 44-51). See also Universal's reply to the Addendum (pages 12-18).

factor in establishing Deltafina's liability. It is, however, significant that the inspections carried out at the premises of Trestina (whose representatives were also attending the APTI meeting) were not successful.

- (444) As is apparent from recital (413), the Commission's services acknowledged at the meeting of 14 March 2002 the practical difficulties which Deltafina might encounter in keeping its leniency application confidential.
- (445) However, contrary to Deltafina's and Universal's contentions<sup>314</sup>, the Commission services did not agree that Deltafina could disclose its immunity application at the upcoming APTI meeting.
- (446) First, the discussions between Deltafina and the Commission services during the meeting of 14 March 2002 and the Commission's behaviour following that meeting leave no doubt as to the fact that the Commission never accepted that Deltafina would inevitably disclose its leniency application to its competitors (either at the upcoming APTI meeting or otherwise) and that, therefore, inspections could no longer take place.
- (447) The Commission actually made it clear that confidentiality was necessary for another month in order to prepare inspections and requested information which was necessary for the preparation of the inspections. Preparations for the inspections started the very day after that meeting.
- (448) Certainly, inspections would have become highly unlikely, in the sense that their purpose would have been fundamentally frustrated, should Deltafina have been obliged to disclose its leniency application to its competitors<sup>315</sup>.
- (449) The fact that Deltafina never informed the Commission of the disclosure made by its chairman on 4 April 2002 further seems to indicate that in acting as it did, Deltafina was not expecting the Commission to approve its conduct.
- (450) Secondly, disclosure by Deltafina of its leniency application at the APTI meeting was in any case voluntary and unsolicited. As explained in recitals (432) - (434), such behaviour can never be justified in the context of an immunity application.
- (451) In the replies to the Addendum and during the ensuing oral hearing Deltafina claimed that, in fact, disclosure was not voluntary but rather the result of pressures which it was receiving from its competitors. According to Deltafina, several offers for meetings with competitors had to be turned down, so that suspicions were growing in the industry. This situation was also compromising long-standing personal and business relationships between Deltafina's managers and their peers in the industry and making the management of the company increasingly difficult<sup>316</sup>. In this context, an open and

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<sup>314</sup> See Deltafina's and Universal Corporation's replies to the Addendum.

<sup>315</sup> See in this sense the last part of the quotation under recital (413) and the minutes taken by Deltafina's lawyers at that meeting which were annexed to Deltafina's replies to the Addendum.

<sup>316</sup> See Deltafina's reply to the Addendum points 25 and 62 and the declarations given at oral hearing of 1 March 2005 (see, in particular Deltafina's chairman's written statement quoted under recital (426) and the oral declarations given on the same point by Deltafina's representative at that hearing).

transparent declaration at an official meeting appeared as the most suitable manner to address the problem.

- (452) As explained at recital (434), the end of the involvement in the infringement following an application for leniency may cause the other cartel members to suspect that the undertaking has applied for immunity. It may also cause practical difficulties, especially in cases where the applicant's business is strictly dependent on contacts with other competitors. These are, however, considerations which are valid in general and which immunity applicants should consider before seeking the benefits which the Leniency Notice offers to them. In this case, in addition, Deltafina has failed to prove how its legitimate commercial behaviour could be hampered by the termination of its involvement in the illegal practices and its refusal to meet its competitors.
- (453) Pressures from the environment which do not amount to impending and serious threats cannot be considered as ruling out the voluntary character of such disclosures. It is clear that at the APTI's meeting of 4 April 2002 Deltafina's chairman did not act under the effect of any compelling threat. As a consequence, it can be concluded that the disclosure of Deltafina's immunity application during that meeting was voluntary and not the result of compelling threats and therefore in breach of point 11 of the Leniency Notice.
- (454) Finally, in their replies to the Addendum<sup>317</sup>, both Universal and Deltafina revealed that, on 2 April 2002, following certain pressures from the external counsels of Dimon's and Transcatab's mother company, Universal's external counsel had called SCC's external counsel and confirmed that Deltafina had applied for leniency with the Commission.
- (455) According to Universal's external counsel's own words<sup>318</sup>:

*"In the course of that law suit<sup>319</sup>, I regularly communicated with counsel of Dimon Inc and Standard Commercial Corporation (collectively the "Other Dealers"). The Other Dealers were also named defendants in the class action law suit. On April 1, 2002, I received a telephone message from an attorney for one of the Other Dealers in the Deloach Suit. In the message, this attorney inquired about a rumour that Universal had made a leniency submission to the Directorate General Competition of the European Commission [...] concerning the activities of the Company's Deltafina subsidiary in Italy. Because I was aware of the leniency's submission, denying any knowledge of the basis for the rumour was not an option. Moreover, it would not be possible to avoid speaking to the Other Dealers' counsel given the frequent communication necessitated by the Deloach Suit. I also knew that refusing to respond to the inquiry would amount to an admission of the accuracy of the rumour. In other words, anything other than a flat-out denial would amount to a confirmation. After*

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<sup>317</sup> As clarified at oral hearing and afterwards by comments received from Standard Corporation and Dimon Inc. on 14 and 19 April 2005, respectively on which Deltafina and Universal Corporation made observations by letters of 11 May 2005.

<sup>318</sup> See Affidavit by counsel for Universal attached to Universal Corporation's reply to the Addendum.

<sup>319</sup> Mention of the existence of this suit [named *Deloach suit*] was made to the Commission's services during the meeting of 14 March 2002. See recital (413).

*consulting with representatives of Universal, it was decided that I should confirm that a submission had been made, but decline to discuss any of the substance of the submission. On April 2, 2002 I communicated this to the counsel for the Other Dealers [...]”.*

- (456) According to Deltafina and Universal, it can therefore be assumed that, at the APTI meeting of 4 April 2002, both Dimon and Transcatlab were aware of the existence of Deltafina’s application.
- (457) Even accepting that this was the case, this circumstance is not capable in itself of justifying or remedying the breach of Deltafina’s duty of co-operation which its chairman brought about by disclosing Deltafina’s leniency application. In fact no link has been established between disclosure in the US and the behaviour of Deltafina’s chairman behaviour. It is not even claimed that Deltafina’s chairman was aware that Universal had disclosed Deltafina’s application two days before the APTI meeting.
- (458) Also, the Commission cannot accept that what appears to have been a separate infringement of Deltafina/Universal’s duty to co-operate with the Commission could be used to justify a subsequent breach of the same duty (*ex iniuria non oritur ius*):
- (459) Universal and Deltafina claim that disclosure in the US was necessitated by the pressures received from SCC’s and Dimon Inc’s counsels<sup>320</sup>. However, proof of the pressures received by Universal remains limited to a voice-message which SCC’s external counsel left on the Universal’s counsel voice message. In addition, however suspicious silence might have appeared, it is surprising that Universal decided to confirm Deltafina’s application directly by calling SCC’s external lawyer. Finally, even in this instance, it is significant that Universal did not promptly inform the Commission thereafter.
- (460) For all the reasons expressed above, it must be concluded that Deltafina, by voluntarily disclosing its immunity application at the APTI meeting of 4 April 2002, breached the co-operation obligation to which it was subject by virtue of point 11(a) of the Leniency Notice. Accordingly, immunity cannot be granted to Deltafina in this Decision and a fine must be applied to it in respect of the infringements which constitute the subject matter of this Decision.

2.6.3.7.2.. Non application of a reduction of the fine to be imposed on Deltafina under Part B of the Leniency Notice

- (461) Deltafina’s application of 19 February 2002 also included an application for a reduction of the fine which would otherwise have been applicable to it in this case, strictly subject to “*rejection by DG Comp of its application for full immunity*”.

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<sup>320</sup> See recital (455) above.

- (462) As this Decision withholds final immunity from Deltafina, the issue must be addressed as to whether Deltafina may be entitled to a reduction under Part B of the Leniency Notice and, if so, at which level.
- (463) The Leniency Notice does not specifically address the issue of the applicability of a reduction of the fine under Part B to an applicant for immunity which has failed to comply with the obligations stemming from the conditional immunity status previously granted to it.
- (464) However, Section 17 of the Leniency Notice makes it clear that subsidiary applications for reduction can only be accepted in cases where the request for immunity does not comply with the requirements of points 8(a) and 8(b) of the Notice, that is to say, when the evidence submitted by the applicant is not sufficient to enable the Commission to either carry out an inspection or to find an infringement.
- (465) In cases of undertakings which were granted conditional immunity for complying with the conditions set out in point 8(a) or 8(b) of the Leniency Notice, the possibility that their initial application be reconsidered at a later stage for the purposes of receiving a reduction of the fine should therefore be considered foregone.
- (466) In fact, once conditional immunity is granted to a company, any subsidiary application for reduction of the fine which may have been included in its original application loses all purpose and legal effect.
- (467) This is further confirmed by the wording of point 19 of the Leniency Notice which, while making the granting of final immunity conditional upon meeting the conditions in point 11 of the Notice, does not envisage the possibility that, in the event of failure to meet those conditions, the same application may be considered for the purposes of the application for a reduction of the fine.
- (468) Nor could the content of point 20 of the Leniency Notice, stating that “*Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed*” lead to the any different conclusion
- (469) For the reasons explained above (see recitals (464) to (467)), such provision can only apply in cases where, at the time when the it receives an application for immunity the Commission finds that the conditions set out in point 8(a) or 8(b) are not met.
- (470) Apart from the strong express indications which can be found in the text of the Leniency Notice, it should be noted that the application of a reduction of the fine to an undertaking which has breached the requirements of point 11 would defeat the procedural logic and the material purpose of the Notice.
- (471) The Commission must assess the existence of the objective criteria which may justify the granting of conditional immunity or reduction of the fine, as the case may be, and inform the applicant thereafter, according to the order in which leniency applications are originally received (see, in this sense, points 15, 18, 23 (b) and 26 of the Leniency Notice). Consideration of a (subsidiary) application for reduction of the fine after a breach of the obligations imposed on applicants for immunity has occurred would

clearly subvert such order and would require the retrospective assessment of the conditions for eligibility for reduction of the fine.

- (472) Apart from running against the logic of the Leniency Notice, consideration at this stage of Deltafina's application for a reduction of the fine would also lead to paradoxical results.
- (473) Deltafina was the first undertaking to come forward with an application under the Leniency Notice and to provide the Commission with substantial information regarding a secret cartel between Italian first processors.
- (474) That same evidence which allowed it to qualify for conditional immunity would, by its very nature, constitute "significant added value" for the purposes of Part B of the Leniency Notice, as, at the time of Deltafina's application, the Commission did not possess any material evidence in respect of the same facts.
- (475) Deltafina would therefore qualify as the "first undertaking" for the purposes of point 23(b) of the Leniency Notice and be entitled, in principle, to a reduction of up to 50% in the amount of the fine to be imposed on it.
- (476) A first anomaly flowing from this outcome would be that, as the Commission had previously announced to Dimon the intention to apply to it a reduction within the "first undertaking" band (up to 50%) and in order to protect Dimon's legitimate expectations in this respect, the Commission would be obliged to apply the "first undertaking" band to two different undertakings, despite the fact that the Leniency Notice (see point 23) makes it sufficiently evident that the "first undertaking" band should apply to one undertaking only.
- (477) More importantly, however, the application to Deltafina of a reduction of the fine within the first band would defeat any meaningful interpretation of the co-operation obligation imposed on undertakings enjoying conditional immunity status.
- (478) At any stage of the procedure, they would find themselves in the position of having to make a calculated choice between continuing to co-operate and other options, on the basis of a simple balance of convenience (reduction of up to 50% being always available in any event). In the meantime, the Commission would have lost the opportunity to grant immunity to and expect full co-operation from a different (more committed) undertaking.
- (479) Especially in markets where complex commercial relationships between cartel participants exist, such as in this case (where Deltafina is also a customer of competing groups' subsidiaries in Spain and Greece), the risk of commercial retaliation or simple deterioration of the existing commercial relationships may well make the balance tilt in favour of loyalty to other cartel members rather than to the Commission's investigations. In the absence of a clear deterrent, all or some cartel participants could even decide to plan together the way to apply for immunity and or reduction before the Commission and share out the benefits that deriving therefrom.
- (480) Full application of Part B of the Leniency Notice to Deltafina would then become utterly bizarre, when it is considered that the last point of point 23 of the Notice, which states "(...) *if an undertaking provides evidence relating to facts previously*

*unknown to the Commission (...) the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence*”, would also apply to Deltafina. Given that the facts that Deltafina disclosed for the first time to the Commission virtually encompass the whole infringement, Deltafina could, by this means, claim total immunity in respect of the whole infringement, despite being no longer entitled to immunity pursuant to part A of the Leniency Notice.

- (481) This is a paradoxical situation that the Leniency Notice could clearly not warrant.
- (482) Furthermore, it is worth noting that in its leniency application, Deltafina made its subsidiary application for reduction of the fine conditional on *“the event of the rejection by DG COMP of its application for full immunity under items 8(b) and 13 (a) of the Commission Notice”*.<sup>321</sup>
- (483) Finally, when granting conditional immunity to Deltafina, the Commission, made it clear that failure to meet any of the requirements of Point 11 of the Notice *“may result in the loss at any stage of any favourable treatment”*<sup>322</sup>.
- (484) Deltafina cannot therefore claim any legitimate expectation concerning the application of a reduction in the fine to be imposed on it following the withholding of final immunity.

#### 2.6.3.7.3. Application of the Leniency Notice to Dimon and Transcatlab

##### (a) Non availability of immunity to Dimon – Transcatlab’s application for reduction not upgraded

- (485) It should first be assessed whether, in not granting final immunity to Deltafina, the Commission should, as a matter of principle, consider applying full immunity to Dimon and/or a higher reduction band to Transcatlab’s application for leniency.
- (486) As for Dimon, Dimon’s application of 4 April 2002 also included an application for immunity for the purposes of Part A of the Leniency Notice (see recital (7)). By letter of 9 April 2002, the Commission informed Dimon that immunity from fines was not available for the suspected infringements (see recital (8)).
- (487) The Commission considers that the possible withholding of immunity from Deltafina in the final decision does not modify the position of Dimon vis-à-vis the possible granting of immunity to it.
- (488) It is clear from points 9 and 10 of the Leniency Notice that, in order to qualify for immunity, it is necessary that the Commission did not have, at the time of the submission, sufficient evidence either to carry out an investigation or to find an infringement of Article 81 of the Treaty.

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<sup>321</sup> See [Doc. 38281/404].

<sup>322</sup> See [Doc. 38281/513].

- (489) In this case, at the time when Dimon made its submission, the Commission was already in possession of sufficient evidence to carry out an investigation and to find an infringement of Article 81 of the Treaty. The granting of conditional immunity to Deltafina for the purposes of point 8(b) of the Leniency Notice, even before Dimon made its application, is clear proof of this fact.
- (490) As this is a circumstance which could not be affected by the non application of final immunity to Deltafina, it must be concluded that immunity remains unavailable to Dimon.
- (491) For the same reasons, any question concerning the possible upgrading of Transcatab's application for a reduction in the fine (from "second" to "first" undertaking for the purposes of point 23(b) of the Leniency Notice) following the withholding of final immunity from Deltafina is deprived of any legal substance.

(b) Reduction of the fine to be imposed on Dimon and Transcatab

- (492) At the beginning of the procedure, the Commission informed Dimon and Transcatab that it intended, pursuant to point 23(b) of the Leniency Notice, to grant, at the end of the administrative procedure, a reduction of 30-50% and 20-30%, respectively, of any fine that would otherwise have been imposed with regard to any infringement(s) found as a result of the Commission's investigation, provided that they met the condition set out in point 21 of the Notice, namely, they had ended their involvement in the suspected infringement no later than, respectively, 4 and 10 April 2002 (see recitals (12) and (13)).
- (493) Both Dimon and Transcatab appear to have ended their involvement in the infringement no later than the time they submitted the evidence.
- (494) In determining the level of reduction, the Commission takes into account the time at which the evidence was submitted and the extent to which it constitutes added value. It may also take into account the extent and continuity of any cooperation provided by the undertakings following the date of their submissions
- (495) The Commission observes that both Dimon and Transcatab applied for leniency before the Commission took any active investigative measures against them. Their applications covered the entire period of the infringement and the evidence supplied corroborated in many respects evidence which the Commission already possessed.
- (496) As for Dimon, its evidentiary contribution was significant for the establishment of many aspect of the conduct of the parties between 1995 and 1997, especially insofar as the exchange of information between the parties was concerned (see recitals (109), (111), (112), (113), (118), (122)). In respect of the 1997/98 crop, Dimon provided significant evidence concerning the agreement described in recital (126). As for the year 1998/99, the evidence submitted by Dimon was particularly valuable in establishing the bid-rigging practices described in recital (150). This fact was unknown to the Commission before Dimon's submission. However its bearing on the gravity and the duration of the infringement is not significant, as it only constituted

one instance in the context of a very serious infringement of long duration for which, during each year, several other practices were put in place.

- (497) As for the documents supplied by Transcatlab, the Commission accepts that the resulting account of the facts is particularly thorough and was particularly useful in the understanding of the infringement. In relation to some elements (such as the conclusion of an Interprofessional Agreement for the 1998 surplus tobacco in 1999) it was particularly valuable. However, it cannot be said in respect of any of the facts in respect of which Transcatlab supplied evidence that they were unknown to the Commission.
- (498) Throughout the entire procedure both Dimon and Transcatlab proved co-operative with the Commission<sup>323</sup>. Furthermore they did not substantially contest the facts on which the Commission based the SO.
- (499) In consideration of the above, both Dimon and Transcatlab should receive the highest reduction of the fine within their respective band, namely 50% and 30% respectively.
- (500) By way of conclusion the amounts of the fines to be imposed pursuant to Article 23 of Regulation (EC) No 1/2003 should be as follows:

- Deltafina and Universal, jointly and severally,	EUR 30 000 000
- Dimon (Mindo) and Alliance One International, Alliance One International being responsible for the whole, Mindo only being jointly and severally liable for EUR 3,99 million	EUR 10 000 000
- Transcatlab and Alliance One International, jointly and severally	EUR 14 000 000
- Romana Tabacchi	EUR 2 050 000
- APTI	EUR 1 000
- UNITAB	EUR 1 000

HAS ADOPTED THIS DECISION:

#### *Article 1*

1. Deltafina SpA (Deltafina), Universal Corporation, Mindo S.r.l. (Mindo), Transcatlab S.p.A in Liquidazione (Transcatlab), Standard Commercial Corporation and Dimon Inc. (both now merged into Alliance One International, Inc. (Alliance Once International)), Romana Tabacchi S.p.A (Romana Tabacchi) have infringed Article 81(1) of the Treaty during the periods indicated by way of agreements and/or concerted practices in the Italian raw tobacco sector.

The duration of the infringement was as follows:

- (a) Deltafina, Universal Corporation, Mindo, Transcatlab and Alliance One International, from 29 September 1995 until 19 February 2002;

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<sup>323</sup> In fact Dimon and Transcatlab accepted the inspection and volunteered relevant information notwithstanding the inspection was carried out by simple authorisation.

(b) Romana Tabacchi, from October 1997 until 5 November 1999 and from 29 May 2001 until February 2002.

2. The Associazione Professionale Trasformatori Tabacchi Italiani (APTI), and Unione Italiana Tabacco (UNITAB) have infringed Article 81(1) of the Treaty from 3 February 1999 until 28 November 2001 by adopting decisions on prices which they would negotiate, on behalf of their members, for the conclusion of Interprofessional Agreements.

#### *Article 2*

For the infringements referred to in Article 1, the following fines are imposed:

- |     |   |                                  |
|-----|---|----------------------------------|
| (a) | Deltafina and Universal, jointly and severally,   | EUR 30 000 000                   |
| (b) | Mindo and Alliance One International<br>Alliance One International being responsible for the whole, Mindo only being jointly and severally liable for | EUR 10 000 000<br>EUR 3 990 000, |
| (c) | Transcatab and Alliance One International, jointly and severally,   | EUR 14 000 000                   |
| (d) | Romana Tabacchi   | EUR 2 050 000                    |
| (e) | APTI  | EUR 1 000                        |
| (f) | UNITAB  | EUR 1 000                        |

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 the expiry of that period, 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 is adopted, plus 3,5 percentage points, namely 5,56%.

#### *Article 3*

The undertakings, associations of undertakings and associations of associations of undertakings named in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

#### *Article 4*

This Decision is addressed to:

1. Alliance One International, Inc. (Alliance One International), 2201 Miller Road Wilson NC 27893 USA
2. Associazione Professionale Trasformatori Tabacchi Italiani (APTI), Via Collina 48 I-00187 Roma Italy
3. Deltafina S.p.A. (Deltafina), Via Donizetti Gaetano 10, I-00198, Roma Italy
4. Mindo Srl (Mindo), Via Anagnina 512, Località Morena, I-00040 Roma Italy
5. Romana Tabacchi SpA (Romana Tabacchi), Via Passolombardo 33 I-00133 Roma Italy
6. Transcatab S.p.A. in Liquidazione (Transcatab), Via Provinciale Appia I-81020 San Nicola La Strada (CE) Italy
7. Unione Italiana Tabacco (UNITAB), Via dei Redentoristi 9/11 I-00186 Roma Italy
8. Universal Corporation (Universal), 1501 N. Hamilton Street Richmond Virginia 23230 USA

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 20/X/2005

*For the Commission*

Neelie KROES

*Member of the Commission*