

COMMISSION DECISION**of 20 October 2005****relating to a proceeding under Article 81(1) of the EC Treaty****(Case COMP/C.38.281/B.2 — Raw tobacco Italy)***(notified under document number C(2005) 4012)***(Only the English and Italian texts are authentic)**

(2006/901/EC)

SUMMARY OF THE DECISION**1. Introduction**

On 20 October 2005, the Commission adopted a decision relating to a proceeding under article 81 of the EC Treaty (the 'Decision'). In accordance with the provisions of Article 30 of Regulation 1/2003, the Commission herewith publishes the names of the parties and the main content of the Decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets. A non-confidential version of the full text of the Decision can be found in the authentic languages of the case and in the Commission's working languages at DG COMP web-site at http://europa.eu.int/comm/competition/index_en.html.

From 1995 until the beginning of 2002 four major Italian processors of raw tobacco, namely Deltafina, Dimon (now renamed Mindo), Transcatab and Romana Tabacchi hereinafter collectively referred to as 'the processors') entered into agreements and/or participated into 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 price fixing and market sharing.

The Decision also considers two separate infringements, which took place at least between the beginning of 1999 and the end of 2001, consisting of the fixing by the professional association of Italian tobacco processors (*Associazione Professionale Trasformatori Tabacchi Italiani*, hereinafter 'APTI') of contract prices which it would negotiate, on behalf of its members, for the conclusion of Interprofessional Agreements with the Italian confederation of associations of raw tobacco producers, *Unione Italiana Tabacco*, ('UNITAB'), and the fixing by UNITAB, of the prices which it would negotiate, on behalf of its members, with APTI for the conclusion of the same agreements.

2. Origin of the case and procedure

Having received certain information on the existence of sector-wide agreements setting price ranges for distinct qualities of one or more varieties of raw tobacco, on 15 January 2002 the Commission addressed requests for information to the processors' and the producers' trade associations (APTI and UNITAB respectively) which replied on 12 February 2002.

On 19 February 2002, the Commission received an application for leniency from Deltafina S.p.A. ('Deltafina', the leading Italian processor) under the terms of the then newly adopted Commission notice on immunity from fines and reduction of fines in cartel cases (the 'Leniency Notice'). On 6 March 2002 the Commission granted Deltafina conditional immunity status in pursuance of point 15 of the Leniency Notice.

On 4 and 10 April 2002 the Commission received other two Leniency applications from Dimon S.r.l. ('Dimon') and Transcatab S.p.A. ('Transcatab') respectively.

On 18-19 April 2002, the Commission carried investigations at the premises of Dimon, Transcatab Trestina Azienda Tabacchi S.p.A. ('Trestina') and Romana Tabacchi s.r.l. ('Romana Tabacchi').

The Commission informed Dimon and Transcatab of its intention to apply reductions to them at the end of the procedure (within bands of 30 %-50 % and 20-30 % respectively) on 8 October 2002.

On 25 February 2004, the Commission initiated proceedings in this case and adopted a Statement of Objections (hereinafter 'SO') to which the addressees were given the opportunity to reply in writing and at the oral hearing which was held on 22 June 2004.

An Addendum to the SO of 25 February 2004 (hereinafter also referred to as 'Addendum') was adopted on 21 December 2004. A second oral hearing was thus held on 1 March 2005.

3. Parties**3.1. Processors' side**

Deltafina is the Italian wholly owned subsidiary of Universal Corporation ('Universal'), the world biggest tobacco merchant. In 2001 (the last full year of the processors' infringement), Deltafina bought some 25 % of Italian raw tobacco. Both Deltafina and Universal are addressees of the Decision

Dimon and Transcatab were, at the time of the infringement, the Italian wholly owned subsidiaries of, respectively, Dimon Incorporated ('Dimon Inc') and Standard Commercial Corporation ('SCC'), i.e. the second and third biggest tobacco merchants.

Since September 2004, Dimon has changed its name into Mindo S.r.l ('Mindo') and is no longer part of the Dimon Inc. group. Dimon Inc. and SCC have merged on 13 April 2005 to form Alliance One International Inc. ('Alliance'). In 2001, Dimon bought some 11,28 % and Transcatab 10,8 % of raw tobacco produced in Italy. Mindo, Transcatab and Alliance are addressees of the Decision.

Romana Tabacchi is a family owned company. Until 1997, it acted as the agent of an international dealer (which was then acquired by Dimon Inc.). Since 1997, it operates as an independent dealer. In 2001, Romana Tabacchi bought 9,5 % of raw tobacco produced in Italy.

APTI is the Italian association of processors of raw tobacco. APTI's members are 17, out of a total of 59 processors in Italy.

3.2. *Producers' side*

UNITAB Italia is the Italian confederation of tobacco producers' associations, representing some 80 % of all producers.

4. **The sector concerned: Italian raw tobacco**

The production of raw tobacco in the EU represents approximately 5 % of raw tobacco production worldwide. Greece, Italy and Spain are the leading Member States in terms of tobacco produced, covering 38 %, 37,5 % and 12 % of the production in the EU respectively.

Raw tobacco is not a homogeneous product. In Italy, Burley and Bright are the most common varieties. Within each category, different quality grades can be distinguished. After drying, producers sell the tobacco to processors in batches whose price differs depending on the quality of the tobacco they contain.

Italian processors of raw tobacco buy raw tobacco from producers and producers' associations in Italy (as well as conditioned tobacco from other intermediaries), and process (or re-process) it, and resell it in suitable form to the tobacco manufacturing industry in Italy and worldwide. They are known also as 'first processors' for their being first at processing tobacco (as opposed to the second processing done by the cigarettes manufacturers) or 'tobacco leaf merchants' for their role of intermediaries between the producers and the final product manufacturer.

The expression 'exporter' is generally employed in respect of processors who have threshing equipment, which allows to produce the finished processed product (strips) sought by the cigarette manufacturers. Processors which are only able to produce loose leaves are called 'third packers' or simply 'packers'. After their initial treatment (e.g. removal of impurities and sorting) packers forward the tobacco to exporters for further treatment so that tobacco can be offered to manufacturers. The processors which are addressees of the Decision qualify as 'exporters'.

5. **The Regulatory Framework**

Both the production of raw tobacco and its sale to processors are subject to regulation under Community and national law.

5.1. *The CMO for raw tobacco*

The CMO in the raw tobacco⁽¹⁾ sector provides for (i) a production quota system and (ii) support of producers' income through a premium system for the production of raw tobacco.

Premium is only granted in respect of tobacco produced within the quota (with certain adjustments). Since 1998, the payment of part of the Community premium (so-called variable part) has been linked to the quality of the tobacco produced which is reflected in the price. The payment of the variable part of the premium is entrusted to the producers' groups.

The CMO requires each producer or producers' group and each first processor to enter into so-called 'cultivation contracts' at the start of each year's campaign (around March-May, when tobacco seedlings are transplanted) where they agree on 'contract prices' for each quality grade for each individual variety. At this stage, prices are often expressed as minimum prices or a price range. To note, however, that the final price (or 'delivery price') can only be determined when the harvest takes place (i.e. between October and January) and can vary significantly from the 'cultivation contract price', depending on quality, quantities and further bargaining.

Community law favours the creation of inter-branch organisations within which producers and processors should co-operate for the efficient operation of the market. Prices and quota fixing are however expressly forbidden. None of the associations involved in this case is an inter-branch organisation within the meaning of Community law.

5.2. *National legislation*

In Italy, Law 88/88 regulating interprofessional (meaning sector-wide) agreements, cultivation contracts and sales of agricultural

⁽¹⁾ Council Regulation (EEC) No 727/70 of 21 April 1970 on the common organisation of the market in raw tobacco, hereinafter 'Regulation 727/70' (OJ L 94, 28.4.1970, p. 1) as amended by Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organisation of the market in raw tobacco, hereinafter 'Regulation 2075/92' (OJ L 215, 30.7.1992, p. 70) (last amended by Council Regulation (EC) No 864/2004 of 29 April 2004 (OJ L 161, 30.4.2004, p. 48)). See also 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).

products. More specifically, Article 5(1)(b) of law 88/88 provides that interprofessional agreements must determine the product concerned by the agreement, the modalities and the timing for its delivery and the minimum price. Incentives (especially in terms of preferential aid) are offered to producers and processors complying with the terms of interprofessional agreements. Law 88/88 has found application in a number of agricultural sectors, including tobacco, where APTI and UNITAB concluded a number of interprofessional agreements (providing for cultivation contract prices expressed in the form of minimum prices or price ranges) between 1999 and 2001.

6. Practises addressed in the decision

6.1. *The processors infringement*

From 1995 until the beginning of 2002 Deltafina, Dimon, Transcatab and Romana Tabacchi entered into agreements and or participated into concerted practices aimed at fixing their trading conditions for the purchase of raw tobacco in Italy (to include both direct purchases from producers and purchases from third packers), including: (a) The setting of common purchase prices which processors would pay at 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.

6.2. *APTI's infringement*

From 1999 and until the end of 2001 APTI determined its negotiating position in respect of prices for each quality grade of each tobacco variety to be agreed with UNITAB in the context of the conclusion of the Interprofessional Agreements.

6.3. *UNITAB's infringement*

From 1999 and until the end of 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.

7. Legal assessment

In the Decision, the Commission finds that the practices described above constitute three separate (single and continuous) infringements of Article 81 of the Treaty.

All the participants in the infringements to which the Decision is addressed are or form part of undertakings, associations of undertakings or associations of associations of undertakings within the meaning of Article 81 of the Treaty.

Agreements and/or concerted practices which directly or indirectly fix transaction prices or share quantities are by their very object restrictive of competition. More specifically, co-ordination by the processors of their purchasing conduct in this

case affected fundamental aspects of their competitive conduct and was also by definition capable of affecting the behaviour of the same companies in any other market in which they compete, including downstream markets. These conducts are specifically envisaged under Article 81(1) of the EC Treaty.

Such conducts are capable, at least potentially, to have an impact on the trade of raw tobacco between Italy and other Member States, as they cover a significant amount of the purchases of Italian raw tobacco and relate to a product (raw tobacco) which is an intermediate product of processed tobacco, a product which is largely exported.

The Decision addresses the issue of the application of Council Regulation No 26 of 4 April 1962 (applying certain rules on competition to production of and trade in agricultural products — 'Regulation No 26') to the practices which are being considered. It concludes that the restrictive practices at issue cannot be regarded as being 'necessary' for the attainment of the objectives of the Common agricultural policy and are therefore fully subject to the application of Article 81(1) of the Treaty.

Finally, the Decision concludes that neither national law nor the administrative practice obliged the processors to agree on the average or maximum purchase price for raw tobacco or to share out quantities of tobacco to be bought by each processor. Moreover, such regulatory framework did not require processors and producers to agree collectively on the 'contract prices' nor did it remove all possibility of competitive behaviour on their part. Consequently, the agreements and/or concerted practices of the producer representatives, on the one hand, and the processors, on the other, are fully caught by Article 81(1) of the Treaty.

8. Liability of the mother companies of delfafina, Transcatab and dimon

The Decision also finds that Universal (for Deltafina), Dimon Inc. (for Dimon) and SCC (for Transcatab) exercised decisive influence on their subsidiaries during the period considered and should therefore found to be jointly and severally liable for their subsidiary's conduct.

9. Fines

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

Concerning the producers and processors representatives' behaviour, the Decision considers that a fine of only EUR 1 000 is appropriate.

Although the conclusion of Interprofessional Agreements under the terms of Law 88/88 was not mandatory and in fact no Interprofessional Agreement was entered for several years, Law 88/88 (as further applied in the administrative practice of the Ministry), created incentives for the conclusion of Interprofes-

sional Agreements containing minimum prices. It should also be considered that 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 these agreements were in the public domain and communicated to the Ministry.

9.2. Fines imposed in respect of the processors' infringement

9.2.1. Gravity of the processors' infringement

The nature of the processors' infringement is considered to be very serious, since it concerns the fixing of the prices of the varieties of Italian raw tobacco and the sharing of quantities. Buying cartels can in fact distort producers' willingness to generate output as well as limit competition amongst processors in downstream markets. This is particularly so in cases like the present one, 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). 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 (the last full year of infringement).

9.2.2. Individual weight and deterrence

The Commission considers that fines to the four processors involved should be set in consideration their market position. A higher starting amount should apply in respect of Deltafina as it appears to be the bigger purchaser with a market share of around 25 % in 2001 (full last year of the infringement). In consideration of their smaller shares in the market of raw tobacco in Italy (between, 8,86 and 11,28) Transcatab, Dimon and Romana Tabacchi should be grouped together and receive lower starting amounts.

As Deltafina, Transcatab and Dimon (now Mindo) are (or, in the case of Mindo, used to be) part of large groups that are also addressees of the Decision, a multiplying factor will be applied to their fines to ensure sufficient deterrence.

For these reasons, the starting amount of the fines in this case is set as follows:

— Deltafina	EUR 37 500 000
— Transcatab	EUR 12 500 000
— Dimon (Mindo)	EUR 12 500 000
— Romana Tabacchi	EUR 10 000 000

9.2.3. Duration of the infringement

Deltafina's, Dimon's, Transcatab's infringement lasted for approximately 6 years and 5 months. Romana Tabacchi's

participation in the infringement is taken to have lasted for more than 2 years and 9 months.

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 (Mindo)	EUR 20 000 000
— Romana Tabacchi	EUR 12 500 000

9.2.4. Attenuating circumstances

An attenuating circumstance is recognised in favour of Romana Tabacchi for not taking part in certain aspects of the cartel and for acting against the purpose of the cartel to the point of causing the other participants' joint reaction against it.

Mitigating effect is also recognised to Deltafina's effective co-operation during the proceedings. As explained below, Deltafina has forfeited its entitlement to immunity from fines under the terms of the Leniency Notice. However, in consideration of the exceptional circumstances of this case (being this the first case where an application under the Leniency Notice was made and the first where a decision applies it), Deltafina's co-operation should be favourably taken into consideration. Deltafina's cooperation was indeed substantial and continued throughout the procedure (with the exception of the facts discussed below) and should therefore attract the application of a mitigating factor.

9.2.5. Upper limit to the fine

The 10 % turnover limit set out under Article 23(2) of Regulation (EC) No 1/2003 does not appear to be exceeded in this case in respect of fines to be imposed on Universal/Deltafina and Alliance/Transcatab-Mindo. However, as Mindo does no longer maintain any link with the former Dimon group, its joint and several liability should be apportioned within the 10 % of its turnover in its most recent business year (i.e. Eur 2,59 million).

Reduction within the 10 % is necessary in respect of Romana Tabacchi.

The resulting amounts are therefore as follows:

— Deltafina	EUR 30 000 000
— Dimon (Mindo)	EUR 20 000 000
— Transcatab	EUR 20 000 000
— Romana Tabacchi	EUR 2 050 000

9.3. Application of the Leniency Notice

Deltafina, Dimon and Transcatab applied for leniency under the terms of the 2002 Leniency Notice (see above under section)

9.3.1. Deltafina's application for immunity

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. In particular point 11(a) requires undertakings (having been granted conditional immunity) to cooperate 'fully, on a continuous basis [...]'.

At the oral hearing of 22 June 2004 it became apparent that Deltafina had divulged its Immunity application on the occasion of a meeting of APTI's managing committee which was also attended by representatives of Dimon, Transcatab and Trestina. Such disclosure occurred before the Commission had an opportunity to carry out the investigations and was well capable of jeopardising them.

The Decision concludes that by so acting Deltafina breached the co-operation obligation to which it was bound by virtue of point 11(a) of the Leniency Notice. Accordingly, immunity cannot be granted to Deltafina.

In reply to Deltafina's defence on this point, the Decision confirms that point 11(a) of the Leniency Notice includes a duty to keep the immunity application confidential, which is justified by the need to ensure that the result of the subsequent investigations which the Commission needs to carry out be not compromised. Deltafina was aware of the Commission's intention to carry out surprise investigations. Inspections were actually organised and occurred as announced to Deltafina at a meeting between Deltafina and the Commission services.

A certain degree of difficulty in keeping an immunity application confidential is inherent in all cases where a cartel participant decides to apply for immunity. However, any such difficulty (or the fact of having informed the Commission of it) does not licence the immunity applicant to voluntarily disclose its immunity application at meetings with competitors.

9.3.2. Deltafina's alternative application for reduction of the fine

Deltafina's application for immunity also included an application for a reduction of the fine which would have been otherwise applicable to it in this case, strictly subject to 'rejection by DG Comp of its application for full immunity'.

The Decision (based on the tenor of the Leniency Notice, as well as on its teleological and systematic interpretation), finds that subsidiary applications for reduction can only be accepted in cases where conditional immunity cannot be granted at the time an application is made and loses any legal value once conditional immunity is granted. Given that Deltafina was initially granted conditional immunity and lost it for breaching the cooperation obligations to which it was subject, it cannot benefit from a reduction of the fine.

9.3.3. Application of the Leniency Notice to Dimon and Transcatab

The Decision concludes that the non application of final immunity to Deltafina does not have any direct bearing on the way the Leniency Notice should apply to Dimon and Transcatab. In particular, the Leniency Notice does not warrant any up-grading of their positions following withholding of final immunity to Deltafina.

Both Dimon and Transcatab are found to have complied with the conditions imposed on them by virtue of their application for reduction. Upon assessment of the evidence supplied to the Commission and their co-operation with the Commission during the procedure, the Decision awards Dimon and Transcatab with the highest level of reduction which is envisaged within the brackets which were indicated to them following their applications for reduction (i.e. 50 % and 30 % respectively).

In view of the above, the final amount of the fines in this case is set as follows:

— Deltafina and Universal, jointly and severally,	EUR 30 000 000
— Dimon (Mindó) and Alliance One International, Alliance One International being responsible for the whole, Mindó only being jointly and severally liable for EUR 3,99 million	EUR 10 000 000
— Transcatab 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