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(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 20 October 2004

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

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

(notified under document number C(2004) 4030)

(Only the Spanish, English and Italian texts are authentic)

(2007/236/EC)

On 20 October 2004, the Commission adopted a Decision relating to a proceeding under Article 81 of the EC Treaty. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003⁽¹⁾, 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 website at http://europa.eu.int/comm/competition/index_en.html

SUMMARY OF THE DECISION

1. INTRODUCTION

The decision deals with two horizontal infringements, one by processors and the other by representatives of producers of raw tobacco in Spain.

The processors' infringement concerns agreements and/or concerted practices between the four undertakings engaged in the first processing of raw tobacco in Spain, namely Compañía española de tabaco en rama, SA (Cetarsa), Agroexpansión SA (Agroexpansión), World Wide Tobacco España (WWTE) and Tabacos españoles SL (Taes) (hereinafter referred to collectively as the processors) and Deltafina SpA (Deltafina, an Italian processor), either directly or, from 1999 onwards, through the association ANETAB. The object of this secret cartel was to fix each year, between 1996 and 2001, the (maximum) average delivery price for each variety of raw tobacco and to share out the quantities of each variety of raw tobacco that were to be bought. During the last three years, the processors also agreed among themselves the price brackets per quality grade of each raw tobacco variety that are given in the schedules annexed to the 'cultivation contracts' and the additional conditions applicable (i.e. the average minimum price per producer and per producer group).

The producers' infringement concerns agreements and/or concerted practices between the three agricultural unions in Spain⁽²⁾: ASAJA, UPA and COAG and the Confederation of Agricultural Cooperatives CCAE⁽³⁾ (hereinafter referred to collectively as the producer representatives). The object of this cartel was to fix each year, between at least 1996 and 2001, the price brackets per quality grade of each raw tobacco variety that are given in the schedules annexed to the 'cultivation contracts' and the additional conditions applicable.

2. ORIGIN OF THE CASE AND PROCEDURE

The Commission started this ex officio procedure with inspections at the premises of several Spanish processors and other market participants between 3 and 5 October 2001.

By letter of 16 January 2002, the four Spanish processors and their association ANETAB announced that they were committed to cooperating with the Commission in the proceedings under the terms of the 1996 leniency notice and supplied various memoranda giving evidence on the facts at issue. They also informed the Commission that, as of 3 October 2001, they had put an end to their practices.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ Asociación agraria de jóvenes agricultores (ASAJA), Unión de pequeños agricultores (UPA) and Coordinadora de organizaciones de agricultores y ganaderos (COAG).

⁽³⁾ Confederación de cooperativas agrarias de España (CCAIE).

During the procedure, several requests were addressed to the parties concerned, including one to the Spanish Ministry for Agriculture, Fisheries and Food (the Agriculture Ministry) regarding the Spanish rules governing agricultural products.

On 11 December 2003, 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 29 March 2004.

3. PARTIES

3.1. Processors' side

The decision is addressed to the four Spanish processors (Cetarsa, Agroexpansión, WWTE and Taes) and Deltafina as well as to the parent companies of some of these companies.

Cetarsa is a public undertaking that held until 1990 a legal monopoly in the processing of raw tobacco in Spain. It is still the largest Spanish processor, having bought in 2001 some 67,6 % of the raw tobacco bought in Spain that year.

Agroexpansión was set up in 1988 by its chairman as a family-run enterprise. In the first half of 1997 the firm Intabex Netherlands BV (Intabex), a wholly owned subsidiary of Dimon Inc., (Dimon), acquired all the capital. In 2001 Agroexpansión bought around 15 % of the raw tobacco bought in Spain that year.

Since May 1998 WWTE has been some 90 %-controlled by the US multinational Standard Commercial Corporation (SCC) through two wholly owned subsidiaries: Standard Commercial Tobacco Co., Inc., (SCTC) and Trans-Continental Leaf Tobacco Corporation (TCLT). From 1995 to May 1998, SCC, through TCLT, held two thirds of WWTE's capital. In 2001 WWTE bought around 15,7 % of the raw tobacco bought in Spain that year.

Taes is a subsidiary of the Universal Corporation Group. Until December 2002 Universal Leaf Tobacco Company Inc., (Universal Leaf), a wholly owned subsidiary of Universal Corporation, held 90 % of Taes's shares. Since December 2002, Taes is a wholly owned subsidiary of Universal Leaf. In 2001 Taes bought around 1,6 % of the raw tobacco bought in Spain that year.

Deltafina is the wholly owned subsidiary of Universal Corporation in Italy and hence the sister company of Taes. It is responsible for the activities of the Universal group in Europe. It purchases most of the tobacco bought by Taes in Spain as well as a significant part of two other Spanish processors' tobacco.

WWTE's and Agroexpansión's parent companies are also addressees for being jointly and severally liable of the behaviour of the subsidiaries.

Following the hearing of the parties, the Commission decided to close the proceedings against Universal Corporation, Universal Leaf, Intabex and ANETAB. For Universal Corporation, Universal Leaf and Intabex, the Commission considered that it had not sufficient evidence of their exercising decisive influence on Deltafina and Taes (as far as Universal Corporation and Universal Leaf are concerned) and Agroexpansión (as far as Intabex is concerned). Liability is nonetheless found in respect of Dimon, Agroexpansión's ultimate parent. For ANETAB, the Commission considered that it did not have sufficient evidence that ANETAB's behaviour was distinct from the behaviour of its four member companies.

3.2. Producers' side

The decision is also addressed to three agricultural union organisations (ASAJA, UPA, and COAG) and the confederation of agricultural cooperatives, CCAE, all representing tobacco producers.

Following the hearing of the parties, the Commission decided to close the proceedings against FNCT, ACOTAB and TABARES, having concluded that they acted as sectoral branches of ASAJA (as far as FNCT is concerned) and UPA (as far as ACOTAB and TABARES are concerned).

4. THE SECTOR CONCERNED: SPANISH 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. Production of raw tobacco in the EU is subject to a quota system (see below).

Raw tobacco, as produced by growers, is not a homogeneous product. Community law recognises eight different varieties. In Spain, Bright is the most common variety. Within each category, different quality grades can be distinguished. Determination of the grades is left to the industry and, ultimately, to private negotiation. After drying, producers sell the tobacco to processors in batches whose price differs depending on the quality of the tobacco they contain.

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 common organisation of the market in raw tobacco (CMO for raw tobacco) was established in 1970 by Council Regulation (EEC) No 727/70 ⁽¹⁾. It was replaced in 1992 by Council Regulation (EEC) No 2075/92 ⁽²⁾ and substantially amended in 1998 by Council Regulation (EC) No 1636/98 ⁽³⁾ and Commission Regulation (EC) No 2848/98 ⁽⁴⁾.

The CMO in the raw tobacco 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 a price range. In Spain, contract prices are in fact expressed as a series of price brackets for the various quality grades of a particular tobacco variety (e.g. Bright). The price brackets featuring in the cultivation contracts are quite wide. 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 cooperate for the efficient operation of the market. Practices consisting of the fixing of prices and quotas are expressly forbidden. None of the associations involved in this case are inter-branch organisations within the meaning of Community law.

5.2. National legislation

In Spain, a 1982 Law and a Royal Decree of 1985 discipline the bargaining and the conclusion of standard cultivation contracts between producers' representatives and processors. The purpose of this overall regulatory framework (to include the action taken by the Agriculture Ministry thereafter) was (until the year 2000) to at least encourage joint negotiations between producers and

processors on the cultivation 'contract prices'. Since 2000, a new law requires that the parties to cultivation contracts must individually agree the contract prices.

6. PRACTICES ADDRESSED IN THE DECISION

6.1. The processors' cartel

The four Spanish processors and Deltafina agreed on the (maximum) average price they would pay at delivery for each variety of tobacco, irrespective of quality grades ((maximum) average delivery price) and the quantities of tobacco that each of them could buy. By so doing the processors aimed at avoiding that negotiation with producers at delivery could push prices beyond the level they would consider acceptable. The period covered by the decision is 1996-2001. Since 1998, they also put in place a sophisticated monitoring and enforcement mechanism (including regular exchanges of information and mandatory transfers of tobacco) concerning their respective behaviour during delivery. As from 1999 to 2001, processors also agreed among themselves the 'contract prices' (price brackets and additional conditions) which they would then propose to producer representatives during the negotiation of the annual standard cultivation contract.

6.2. The producers' cartel

The producer representatives agreed on the 'contract prices' (price brackets and additional conditions) which they would then propose to processors during the negotiation of the standard cultivation contract.

As to the additional price conditions, they take the form of minimum average prices per producer as well as per producers group for each variety of tobacco, irrespective of the various quality grades. To note that, by their very nature, average minimum prices per producers group would still be open to increase following negotiation at delivery.

7. LEGAL ASSESSMENT

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

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

Agreements and/or concerted practice which directly or indirectly fix transaction prices or share quantities are by their very object restrictive of competition. These conducts are specifically envisaged under Article 81(1) of the EC Treaty.

⁽¹⁾ OJ L 94, 28.4.1970, p. 1. Regulation as last amended by Regulation (EEC) No 860/92 (OJ L 91, 7.4.1992, p. 1).

⁽²⁾ 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. Corrected by OJ L 206, 9.6.2004, p. 20).

⁽³⁾ OJ L 210, 28.7.1998, p. 23.

⁽⁴⁾ OJ L 358, 31.12.1998, p. 17. Regulation as last amended by Regulation (EC) No 1809/2004 (OJ L 318, 19.10.2004, p. 18).

Such conducts are capable, at least potentially, to have an impact on the trade between Spain and other Member States, as they cover the entirety of the Spanish market 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 ⁽¹⁾ (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 Ministerial practice obliged the processors to agree on the maximum delivery average 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' (price brackets or additional conditions) nor did it remove all possibility of competitive behaviour on their part. Consequently, the agreements and/or concerted practices between the producer representatives, on the one hand, and the processors, on the other, are caught by Article 81(1) of the Treaty.

8. LIABILITY OF DELTAFINA AND THE MOTHER COMPANIES OF WWTE AND AGROEXPANSIÓN

The decision finds that Deltafina fully participated in the processors' cartel, in spite of not being an active processor in Spain, by playing a preponderant role in the Spanish raw tobacco market by virtue of several circumstances, among which: 1. its being the most important customer of three of the Spanish processors, 2. its being the ultimate biggest buyer of tobacco in Spain and 3. its being the subsidiary of the Universal group responsible for the European market.

The decision also finds that Dimon (for Agroexpansión) and SCC, TCLT and SCTC (for WWTE) exercised decisive influence on their subsidiaries during the period considered and should therefore be held jointly and severally liable for their subsidiary's conduct.

9. FINES

9.1. Gravity of the infringement

In assessing the gravity of the infringements, account must be taken of the fact that the production of raw tobacco in Spain

accounts for 12 % of the Community production. The size of the market is rather small (in 2001 the value of tobacco bought in Spain was around EUR 25 million) and quite concentrated in one region of Spain: Extremadura.

However, the nature of the infringements is considered as very serious, since it concerns the fixing of the prices of the varieties of raw tobacco in Spain and (as far as the processors are concerned) the sharing out of quantities.

Although the Commission does not possess conclusive evidence of the actual effects of the producers' and processors' infringements on the market; it can be said that at least since 1998, the processors' cartel was fully implemented and enforced and was liable to have a real impact on the market.

On the basis of the considerations above, the Commission concludes that both infringements must be qualified as very serious. The Commission however takes account of the relatively limited size of the market when setting the starting amount of the fines.

9.2. Individual weight and deterrence

- (i) As far as the processors' cartel (to include Deltafina) is concerned, the Commission considers that fines should be scaled down in consideration of the contribution to the illegal conduct of and the market position enjoyed by each party involved.

Bearing this in mind, the Commission concludes that Deltafina should receive the highest starting amount for its prominent market position as explained above under 8.

The contribution to the illegal conduct by the Spanish processors can be broadly taken as having been similar. The starting amounts should however take into account the different size and the market shares of each processor involved.

With a market share of around 67 % of the market for the purchase of Spanish raw tobacco, Cetarsa is by far the leading Spanish first processor and should be placed in a category of its own and receive the highest starting amount of the fine. Agroexpansión and WWTE have both market shares of approximately 15 % each and should receive the same starting amount of fine. Finally, Taes, by far the smallest processor involved, with a market share of only 1,6 % should receive the lowest starting amount.

⁽¹⁾ OJ 30, 20.4.1962, p. 993/62.

As Agroexpansión and WWTE are part of large groups that are also addressees of the Decision, a multiplying factor is applied to their fines to ensure sufficient deterrence of 2 and $1\frac{1}{2}$ respectively.

- (ii) Concerning the producer representatives' behaviour, the Decision concludes that only a symbolic fine is appropriate for the following reasons.

Although the applicable national rules did not require the producer representatives and the processors to agree jointly on the price brackets and the additional conditions, the standard 'cultivation contracts' negotiated between 1995 and 1998 mentioned that all the producer representatives would negotiate jointly with each individual processor the price schedules and the additional conditions relating to the sale of tobacco. In 1999 the Agriculture Ministry even approved the price schedules that had already been negotiated jointly by all the producer representatives and the four processors. These schedules were annexed to the 'standard' contract published in the Official Gazette that year. Lastly, in 2000 and 2001 the Agriculture Ministry invited the representatives of the two sectors to a number of meetings — some of which were held at the Ministry itself — with a view to agreeing on the price schedules. In so doing, the Ministry did at least encourage the producers to press ahead with their joint negotiations on those schedules.

On this basis, the Decision accepts that the legal framework surrounding the collective negotiation of standard agreements could engender a considerable degree of uncertainty as to the legality of the conduct of the producers. Moreover, the existence and the results of the negotiations on standard contracts were generally well in the public domain and no authority ever questioned their compatibility with either Community or Spanish law before these proceedings started.

The Decision therefore imposes a symbolic fine of EUR 1 000 on each producer representative. In view of the application of a symbolic fine to producer representatives, the application to them of other criteria for setting fines becomes irrelevant.

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

— Deltafina	EUR 8 000 000;
— Cetarsa	EUR 8 000 000;
— WWTE	EUR 1 800 000 × 1,5 = 2 700 000;
— Agroexpansión	EUR 1 800 000 × 2 = 3 600 000;
— Taes	EUR 200 000;
— ASAJA	EUR 1 000;
— UPA	EUR 1 000;

— COAG	EUR 1 000;
— CCAE	EUR 1 000.

9.3. Duration of the infringement

The restrictive practice involving the processors and Deltafina lasted more than five years and four months. Therefore, the fines of each producer should be increased by 50 %.

The following basic amounts of the fines are therefore withheld:

— Deltafina	EUR 12 000 000;
— Cetarsa	EUR 12 000 000;
— WWTE	EUR 4 050 000;
— Agroexpansión	EUR 5 400 000;
— Taes	EUR 300 000.

9.4. Aggravating circumstances

The documents in the Commission's file actually prove that Deltafina took the lead in designing, implementing, enforcing and arbitrating the agreements on (maximum) average delivery prices and quantities concluded between the processors after 1996. It also acted as the repository of the processors' anticompetitive agreements. For these reasons the basic amount of the fine imposed on Deltafina should be increased by 50 %.

9.5. Attenuating circumstances

The Spanish regulatory context in which the restrictive practices and agreements took place applies as an attenuating circumstance for the processors in respect of their agreement on price brackets and additional conditions which preceded the public negotiation of the standard cultivation contract with the producers' representatives.

In respect of their secret agreement on (maximum) average delivery prices and share-out of quantities, the conduct of the processors went beyond the scope of the relevant legal framework of the public negotiations and agreements with the producers' representatives. However, the Commission considers that the public negotiations determined to some extent the material framework for the conduct of the processors and therefore is to be considered as an attenuating circumstance for the processors.

For these reasons, the overall attenuating effect of the circumstances discussed above is to be taken, as far as processors' conduct is concerned, as leading to a reduction of 40 % of the basic amount of the fines which would be otherwise applicable to the processors (to include Deltafina).

The amount of the fines after taking into consideration the aggravating and the attenuating circumstances are as follows:

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

9.6. Upper limit to the fine

Article 23(2) of Regulation (EC) No 1/2003 provides that for each undertaking and association of undertakings participating in the infringement the fine shall not exceed 10 % of its total turnover in the preceding business year.

In the present case SCC, SCTC, TCLT and Dimon, in their capacity of parent companies of WWTE and Agroexpansión, are jointly liable for the fines imposed on their subsidiaries and their worldwide turnover must be taken into account in order to determine the 10 % limit.

As Cetarsa's 2003 annual turnover amounted to EUR 48,42 million, the fine imposed on it should be reduced to EUR 4,842 million. The fines imposed on all the other addressees do not need any adjustment in this respect

9.7. Application of the 1996 Leniency Notice

Both processors and producer representatives have applied for leniency under the terms of the Commission notice on the non-imposition of fines in cartel cases of 1996 at different stages of the investigation.

Cetarsa, Agroexpansión, WWTE, Taes and Deltafina have claimed the benefits of the 1996 Leniency Notice before the issue of the Statement of Objections and have provided the Commission with information mainly as regards the market functioning, the applicant's restrictive activities and the context of the facts at issue.

In consideration of its particularly valuable cooperation during the procedure (especially insofar as the involvement of Deltafina is concerned) and of the fact that it never contested the facts as set out in the Statement of Objections, Taes should be granted a 40 % reduction of the fine that would have been imposed if it had not cooperated with the Commission in accordance with the first and second indent of Section D(2) of the 1996 Leniency Notice.

In consideration of the information provided to the Commission but given the fact that they contested the facts in their replies to the Statement of objections, Cetarsa and WWTE are granted a 25 % reduction of the fine.

In consideration of the information provided to the Commission but given the fact that it contested the facts and the secret nature of the processors' cartel in its reply to the Statement of objections, Agroexpansión is granted a 20 % reduction of the fine.

Finally, in view of the limited value of its cooperation with the Commission throughout the procedure, Deltafina is granted a 10 % reduction of the fine.

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

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