Final Report of the Hearing Officer in Case COMP/38.281/B.2 — Raw Tobacco Italy

(pursuant to Articles 15 & 16 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings — OJ L 162, 19.6.2001, p. 21)

(2006/C 303/14)

The draft Decision in the above-mentioned case gives rise to the following observations:

The present case presents a particular feature, since it was started following a communication by DG AGRI to DG COMP of a copy of an Inter-professional Agreement concluded between Associazione Professionale Transformatori Tabacchi Italiani (APTI) and Unione Italiana Tabacco (UNITAB) in 2001 and information from the Court of Auditors. Information was subsequently provided by Deltafina S.p.A, and then Dimon Italia (known today as Mindo) and Transcatab pursuant to the 2002 Leniency Notice.

On 18 and 19 April 2002, investigations were carried out by the Commission at the premises of Dimon, Transcatab, Trestina Azienda Tabacchi and Romana Tabacchi.

Written Procedure and Access to File

On 26 February 2004, a Statement of Objections was sent to APTI and UNITAB, the associations, and to Deltafina, Dimon, Transcatab, Trestina, Romana, and Boselli S.A.L.T.O S.r.l, the raw tobacco processors, and also to the parent companies of the Italian processors, Dimon Inc., Standard Commercial Corp. and Universal Corp.

The Statement of Objections identified single and continuous infringements of Article 81(1) of the EC Treaty, carried out by the Italian processors and their association, APTI and by UNITAB.

Access to the file was provided by means of an individualised CD-ROM for each addressee, which was sent with the Statement of Objections; this allowed the undertakings and associations concerned to implement the principle of equality of arms as defined by the Court of First Instance in the Soda Ash cases (T-31/91& T-32/91).

The Statement of Objections set a time-limit of two and a half months for replies; at the request of one of the parties, I extended this term by two weeks for all the undertakings and associations concerned.

The addressees of the Statement of Objections all replied within the time allowed.

Oral Procedure

In accordance with Article 5 of Commission Regulation (EC) No 2842/98, several parties asked for a formal hearing, which was held on 22 June 2004. All the addressees but three (Dimon Incorporated, Standard Commercial Corporation and Boselli S.A.L.T.O.) attended the hearing.

At this time, Dimon raised a new issue when it claimed that the first leniency applicant, Deltafina, had disclosed its application for leniency to its competitors. According to Dimon, this raised the question whether Deltafina, which had been granted conditional immunity, still met the requirements under Point 11 of the 2002 Leniency Notice and whether Dimon would possibly become eligible for immunity in Deltafina's place.

Following the hearing the Commission investigated this issue thoroughly. These facts and their legal consequences were addressed in a supplementary Statement of Objections to all addressees on 22 December 2004 ('the Addendum'), which took the view that Deltafina had not fulfilled its obligations with the consequence that its provisional immunity should be withdrawn.

Six of the addressees replied to the Addendum, and four of those requested an oral hearing pursuant to Article 2 of Commission Regulation (EC) No 773/2004. This hearing took place on 1st March 2005 and was attended by Deltafina, Universal Corporation, Mindo and Transcatab.

Pursuant to Article 10(3) of Commission Regulation (EC) No 773/2004, Deltafina proposed that the Commission hear persons who could corroborate the facts set out in its submission, to which I agreed.

I did not accept the postponement of the hearing as requested by Deltafina and Universal Corp. on the basis that the period of two weeks between their replies to the Addendum and the hearing was too short for them to prepare their oral defence efficiently and that this was a violation of their rights of defence. I took this view because the Addendum raised only limited issues in factual and legal terms, although their consequences could be far-reaching for the companies concerned. Thus, the companies had ample time to prepare their defence in detail from the date they had received the second Statement of Objections. Universal and Deltafina were nevertheless invited to submit other comments after the hearing if necessary, which they did.

Draft Final Decision

I must mention in particular two issues in terms of due process.

Further to Deltafina's claim that the Commission could not revoke its conditional immunity because it had created a legitimate expectation in the handling of the case, the draft Decision takes the view that legitimate expectations cease to exist when the parties cease to comply with their obligations. I believe that this is a sound application of the general principle of effectiveness ('*effet utile*') as applied to the Leniency Notice. The policy described in the Notice could not be effective if the leniency applicants themselves could endanger the investigation which they helped to initiate like in this case. In fact, the implementation of the leniency policy at this stage of the procedure relies very much on the existence of an application being kept secret.

The basic condition that the expectation must be founded on the proper application of the law is not fulfilled in this case, since Deltafina did not abide by its obligations. The fact that Deltafina did not inform the Commission that it had told the other members of the managing committee of the sectoral association (APTI) that it had submitted a leniency application at an early stage of the procedure is also a strong indication that it was very well aware of its obligations.

Therefore, I do not consider that the withdrawal of Deltafina's provisional leniency is a violation of due process.

With respect to the right to be heard, and in particular the question whether the draft Decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views (Art. 15 of the Mandate of the Hearing Officers), a number of objections contained in the Statement of Objections are not sustained in the draft Decision, because the evidence submitted by the undertakings and by the associations has been taken into account.

As a result, the draft Decision proposes:

— To close the proceedings against Boselli and Trestina.

— To reduce the duration of the infringements, as evidence for the years 1993 and 1994 was found not to be conclusive.

— To limit APTI's liability to decisions adopted in the context of the negotiations of Inter-professional Agreements with UNITAB, as it could not be established that APTI had subscribed to the overall plan of the processors and address its behaviour, like UNITAB behaviour, as a (single and continuous) infringement consisting of decisions of an association of undertakings contrary to Article 81(1).

— To take into account in the determination of the fines the evidence submitted both by APTI and UNITAB confirming that they had acted within the framework of Italian Law 88/88 of 16 March 1988, which regulates Inter-professional Agreements, cultivation contracts and sales of agricultural products and provides, *inter alia*, that Inter-professional Agreements must determine the minimum price to apply in individual contracts.

Moreover, I have not noticed any new objections in the draft Decision.

I conclude that the rights of the parties to be heard have been respected in the present case.

Brussels, 11 October 2005

Serge DURANDE