

**Final report of the Hearing Officer in Case COMP/39.188 — Bananas**

*(Pursuant to Articles 15 and 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)*

(2009/C 189/04)

The draft decision in the above-mentioned case gives rise to the following observations.

**Statement of Objections**

A Statement of Objections (SO) was adopted on 20 July 2007 and addressed to the following companies or group of companies: Chiquita Brands International Inc, Chiquita International Ltd, Chiquita International Services Group N.V. and Chiquita Banana Company B.V. (*Chiquita*); Dole Food Company Inc and Dole Fresh Fruit Europe OHG (*Dole*); Fresh Del Monte Produce Inc, Del Monte Fresh Produce International Inc, Del Monte (Germany) GmbH and Del Monte (Holland) BV (*Del Monte*); Fyffes plc, Fyffes International, Fyffes Group Limited and Fyffes BV (*Fyffes*); FSL Holdings NV and Firma Leon van Parys NV (*LVP*); Internationale Fruchtimport Gesellschaft Weichert & Co KG (*Weichert*).

In the SO the Commission took the preliminary view that the addressees had participated in a single and continuous infringement of Article 81 by exchanging information on banana volumes and quotation prices and by price fixing through the co-ordination of quotation prices for bananas.

Following notification of the SO the Parties were granted access to the Commission's investigation file either in the form of a DVD or, with regard to leniency applications and documents related thereto, at the Commission's premises.

**Procedures**

The Parties were originally granted a deadline of two months to reply to the SO. Upon reasoned requests a series of extensions were granted to the Parties so requesting. The extensions, which were mainly related to claims concerning the accessibility of the Commission's file, amounted to about two additional months. All Parties replied on time and submitted to the Commission their written observations on the objections raised against them.

In addition, all Parties exercised their right to be heard orally pursuant to Article 12 of Regulation (EC) No 773/2004 <sup>(1)</sup>. The Oral Hearing was held on 4-6 February 2008.

During the proceedings numerous complaints of alleged procedural irregularities were made by several Parties claiming that their right to be heard had been breached. Although a majority of these claims were resolved by Competition DG, some were referred to the Hearing Officer. These complaints were examined carefully by me, or the Hearing Officer responsible at the time, and the Parties were informed accordingly. In particular, it was argued that the absence of minutes, transcripts and/or notes from meetings with the leniency applicant in the accessible investigation file amounted to a breach of the rights of defence. It was also claimed that the right to be heard could not be exercised properly due to the existence of numerous illegible pages in the investigation file. In addition, one party requested to be provided with allegedly exculpatory documents, which were not in the investigation file but allegedly in the possession of other Directorates-General of the Commission. Finally, several Parties claimed that the rights of defence require that access be given also to documents submitted to the Commission after the notification of the SO, notably other Parties' replies to the SO.

First, with regard to the absence of minutes, transcripts and/or notes from meetings with the leniency applicant (raised by LVP, Fyffes/Weichert and Dole), the examination led to the following conclusion. Within the framework of the application of the Treaty's competition rules the parties' rights of defence does not impose a general obligation for the Commission services to draw up minutes or make recordings of meetings. Such an obligation exists only if the Commission intends to use in its decision evidence provided orally, in which case a written document must be drawn up. As in this case only formally submitted corporate statements were used as evidence, the Parties' rights of defence could not have been violated by the fact that no records were produced of the meetings in question. In this regard it should be

<sup>(1)</sup> Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

noted that any unilateral notes taken by the Commission services can in any case only represent the Commission's own recollection and interpretation of what was said. Such notes would therefore constitute non-accessible internal notes and have no evidentiary value, neither incriminating nor exculpating.

Second, with regard to the claim that the existence of illegible documents on the file could constitute a breach of the right to be heard and more specifically, a breach of the principle of equality of arms (LVP, Fyffes/Weichert, Dole), the following conclusion was reached. In so far as the original documents in the Commission's investigation file are of the comparable quality as the copies on the Parties' DVD, the Commission could not have had better knowledge of the documents that were illegible or hardly legible than did the Parties to the proceedings. The relevant Commission service, upon request and where available, provided the requesting Parties with new copies of a quality comparable to the original documents on the file. Therefore, the Parties had access to the same documents of comparable quality as the Commission itself. Accordingly, it was concluded that the principle of equality of arms had been upheld.

Third, with regard to the request to be provided with potentially exculpatory documents not in the investigation file, albeit in the Commission's possession (Fyffes/Weichert), the Hearing Officer at the time took the following view. As a general rule the Commission is not obliged to provide documents that are not in the investigation file. However, on the basis of a reasoned request that clearly identifies the document(s) and explains the relevance for the defence and potential exculpatory value, the Commission may be obliged to provide it unless the requesting party can obtain the information from other sources without significant extra effort. Conversely, the Commission is not obliged to accede to an unspecified request referring to a large number of documents. The request was assessed in light of these criteria and was found to be partly justified. Competition DG was thus requested to take the appropriate steps to retrieve and provide documents that had been clearly identified in the request to the requesting parties. Conversely, the request was rejected in so far it referred to documents in a vague and abstract manner or documents which could be obtained through other sources.

Finally, with regard to an alleged right to access other parties' replies to the SO (Del Monte), such a right does not exist in general terms. It follows from point 27 of the Commission's Notice on Access to File that access to documents received by the Commission after notification of the SO may be granted only if such documents may constitute new evidence, whether of an incriminating or exculpatory nature. As a party's reply to a SO constitutes that party's individual defence, it could rarely be considered either incriminating or exculpating with regard to other parties to the proceedings. In any case, the Commission is prohibited from using evidence against a party on which the latter has not been granted the opportunity to be heard. With regard to potentially exculpatory information, however, a request cannot be couched in general terms but should be reasoned and indicate, at least in general terms, how a particular piece of information may be useful for a party's defence and be liable to influence the course of the administrative procedure. It follows that the rights of defence will not be infringed where the Commission refuses a party access to other parties' replies to the SO on the basis of a general request claiming that the replies may potentially contain exculpatory information. In light of these criteria I found that Competition DG's refusal to accede to the concerned Party's request and could not lead to a breach of the rights of defence.

### **Draft Decision**

Following the Parties' written and oral submissions, the Commission has dropped all of its objections against Fyffes plc, Fyffes International, Fyffes Group Limited and Fyffes BV (*Fyffes*) as well as FSL Holdings NV and Firma Leon van Parys NV (*LVP*). The Commission has also dropped its objections against Fresh Del Monte Produce Inc., Del Monte Fresh Produce International Inc., Del Monte (Germany) GmbH and Del Monte (Holland) BV, concerning Del Monte's own alleged participation in the infringement. However, Fresh Del Monte Produce Inc.'s liability for the involvement in the infringement of Internationale Fruchtimport Gesellschaft Weichert & Co KG, over which it is held to have exercised decisive influence, is retained.

Moreover, with regard to the other addressees of the draft Decision the scope of the objections has been reduced as compared to the SO and the duration of the infringement has been considerably shortened.

In my opinion the draft Decision relates only to objections in respect of which the parties have been afforded the opportunity to make known their views.

**Conclusion**

I consider that the right to be heard of all participants to the proceedings has been respected in this case.

Brussels, 10 October 2008.

Karen WILLIAMS

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