

JUDGMENT OF THE COURT
OF 14 FEBRUARY 1978^{1 2}

**United Brands Company and United Brands Continentaal B.V.
v Commission of the European Communities**

“Chiquita Bananas”

Case 27/76

1. *Competition — Dominant position — The relevant market — Delimitation — Criteria*
(EEC Treaty, Art. 86)
2. *Competition — Dominant position on the market — Concept*
(EEC Treaty, Art. 86)
3. *Competition — Dominant position — Factor affording evidence — Market share*
(EEC Treaty, Art. 86)
4. *Competition — Dominant position — Criteria for determining whether there is a dominant position — Profitability of the undertaking*
(EEC Treaty, Art. 86)
5. *Competition — Dominant position — Abuse — Distributors forbidden to resell*
(EEC Treaty, Art. 86)
6. *Competition — Dominant position for the purpose of marketing a product — Refusal to sell — Conditions — Abuse*
(EEC Treaty, Arts. 3 (7) and 86)
7. *Competition — Dominant position — Abuse — Elimination of a competitor — Whether trade between Member States affected — Trade affected to a negligible extent*
(EEC Treaty, Art. 86)
8. *Competition — Dominant position — Abuse — Charging discriminatory prices*
(EEC Treaty, Art. 86)
9. *Competition — Dominant position — Abuse — Unfair selling prices — Concept*
(EEC Treaty, Art. 86)

1 — Language of the case: English.

2 — Rectified subsequently by an order of the Court of 11 May 1978 which was itself rectified by an order of the Court of 26 June 1978: see pages 349, 350 and 351.

1. The opportunities for competition under Article 86 of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated. For the product to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.
2. The dominant position referred to in Article 86 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.
3. A trader can only be in a dominant position on the market for a product if he has succeeded in winning a large part of this market. However an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position.
4. An undertaking's economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not incompatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition. The fact that an undertaking's profitability is for a time moderate or non-existent must be considered in the light of the whole of that undertaking's operations.
5. The fact that an undertaking forbids its duly appointed distributors to resell the product in question in certain circumstances is an abuse of the dominant position since it limits markets to the prejudice of consumers and affects trade between Member States, in particular by partitioning national markets.
6. An undertaking in a dominant position for the purpose of marketing a product — which cashes in on the reputation of a brand name known to and valued by the consumers — cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary. Such conduct is inconsistent with the objectives laid down in Article 3 (f) of the Treaty, which are set out in detail in Article 86, especially in paragraphs (b) and (c), since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market.
7. If the occupier of a dominant position, established in the common market, aims at eliminating a competitor who is also established in the common market, it is immaterial whether this behaviour relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market.
8. The policy of differing prices enabling UBC to apply dissimilar conditions to equivalent transactions

with other trading parties, thereby placing them at a competitive disadvantage is an abuse of a dominant position.

9. Charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied may be an abuse of a dominant position within the

meaning of subparagraph (a) of Article 86; this excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin.

In Case 27/76

UNITED BRANDS COMPANY, a corporation registered in New Jersey, United States of America,

and

UNITED BRANDS CONTINENTAAL B.V., a Netherlands company having its registered office at 3 Van Vollenhovenstraat, 3002 Rotterdam, represented and assisted by Ivo Van Bael and Jean-François Bellis of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Mr Elvinger and Mr Hoss, 84 Grand Rue,

applicants

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Antonio Marchini-Camia and John Temple Lang, with an address for service in Luxembourg at the office of Mr Mario Cervino, Bâtiment Jean Monnet,

defendant,

APPLICATION for the annulment of Decision "IV/26.699 Chiquita" (Official Journal L 95 of 9 April 1976, p. 1 *et seq.*) whereby the Commission, on 17 December 1975, found that the marketing of bananas grown and imported by the applicants infringed Article 86 of the EEC Treaty, and also for payment of damages as well as for the cancellation or reduction of the fine imposed upon them by the Commission,