



# Reports of Cases

## JUDGMENT OF THE COURT (Second Chamber)

24 June 2015\*

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(Appeals — Competition — Agreements, decisions and concerted practices — European banana market — Coordination in the setting of quotation prices — Concept of 'economic unit' between two companies — Concept of 'decisive influence' — Whether the conduct of one company may be imputed to another — Distortion of evidence — Burden of proof — Principle of *in dubio pro reo* — Concept of 'single and continuous infringement' — Concept of 'concerted practice' — Concept of 'infringement by

object' — Undertakings that are members of the same cartel — Communication of information to the Commission — Legal obligation — Scope — Protection against self- incrimination — Intervener at first instance — Cross-appeal — Admissibility)

In Joined Cases C-293/13 P and C-294/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 May 2013,

**Fresh Del Monte Produce Inc.**, established in George Town, Cayman Islands (United Kingdom), represented by B. Meyring, Rechtsanwalt, and L. Suhr, advocate, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

**European Commission**, represented by A. Biolan, M. Kellerbauer and P. Van Nuffel, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

**Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG**, established in Hamburg (Germany), represented by K. Smith QC, C. Humpe and S. Kon, Solicitors,

intervener at first instance (C-293/13 P),

and

**European Commission**, represented by A. Biolan, M. Kellerbauer and P. Van Nuffel, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

**Fresh Del Monte Produce Inc.**, established in George Town, Cayman Islands (United Kingdom), represented by B. Meyring, Rechtsanwalt, and L. Suhr, advocate, with an address for service in Luxembourg,

applicant at first instance,

**Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG**, established in Hamburg (Germany), represented by K. Smith QC, C. Humpe and S. Kon, Solicitors,

intervener at first instance (C-294/13 P),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Second Chamber, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2014,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2014,

gives the following

### Judgment

- 1 By its appeal in Case C-293/13 P, Fresh Del Monte Produce Inc. ('Del Monte') seeks to have set aside the judgment of the General Court of the European Union in *Fresh Del Monte Produce v Commission* (T-587/08, EU:T:2013:129, 'the judgment under appeal'), by which that court, first, dismissed its action for annulment of Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39 188 — Bananas) ('the contested decision') and, second, granted its request for a reduction of the fine imposed on it by that decision.
- 2 By its cross-appeal in Case C-293/13 P, Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG ('Weichert') seeks to have that judgment set aside.
- 3 By its appeal in Case C-294/13 P, the European Commission seeks to have set aside point 1 of the operative part of the judgment under appeal, by which the General Court decided to reduce the fine imposed on Del Monte by the contested decision.
- 4 By their respective cross-appeals in Case C-294/13 P, Del Monte and Weichert are asking the Court of Justice, in the event that it should grant the Commission's appeal in that case, (i) to set aside the judgment under appeal in so far as the General Court held that they could not rely on the right to protection against self-incrimination and (ii) to reduce the fine imposed on them jointly and severally.

### Legal context

- 5 Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), entitled 'Requests for information', provides in paragraphs 1 to 4 thereof as follows:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.’

6 Article 23 of Regulation No 1/2003, entitled ‘Fines’, states in paragraph 1(a) and (b) thereof as follows:

‘The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit’.

7 Article 24 of Regulation No 1/2003, entitled ‘Periodic penalty payments’, provides in paragraph 1(d) thereof, as follows:

‘The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

...

(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3)’.

8 Points 20 to 23 of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) (‘the 2002 Leniency Notice’) provide as follows:

#### ‘B. Reduction of a fine

20. Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission’s possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of “added value” refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.

23. The Commission will determine in any final decision adopted at the end of the administrative procedure:
- (a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;
  - (b) the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:
    - first undertaking to meet point 21: a reduction of 30%-50%;
    - second undertaking to meet point 21: a reduction of 20%-30%;
    - subsequent undertakings that meet point 21: a reduction of up to 20%.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

### **Background to the dispute**

- 9 For the purposes of these proceedings, the background to the dispute set out in paragraphs 1 to 35 of the judgment under appeal may be summarised as follows.
- 10 The Fresh Del Monte Produce group is one of the world's leading vertically integrated producers, marketers and distributors of fresh and fresh-cut fruit and vegetables, as well as a leading producer and distributor of prepared fruits and vegetables, juices, beverages, snacks and desserts in Europe, the United States of America, the Middle East and Africa. It markets its products, including bananas, worldwide under the Del Monte brand.
- 11 Del Monte is the ultimate parent company of the Fresh Del Monte Produce group. That group is involved in the marketing of bananas in Europe via numerous wholly-owned subsidiaries, including Del Monte Fresh Produce International Inc., Del Monte (Germany) GmbH and Del Monte (Holland) BV.
- 12 Weichert was, at the material time, a German limited liability partnership company, primarily involved in the marketing of bananas, pineapples and other exotic fruits in Northern European. From 24 June 1994 until 31 December 2002, Del Monte held an indirect 80% shareholding in Weichert through its wholly owned subsidiary Westeuropa-Amerika-Linie GmbH ('WAL'). Weichert was, until 31 December 2002, the exclusive distributor for Northern Europe of Del Monte bananas.
- 13 The Commission stated, at recitals 382 and 383 of the contested decision, that Weichert was a partnership between Del Monte, a limited partner, and, initially, Mr D. W., and subsequently, from March 1999, the Weichert family, in their capacity as general partners. In particular, it stated that the commercial relationship between the partners in that joint undertaking was established through a partnership agreement that was intended to define the statutes of the limited partnership and,

specifically, the mechanisms of control and management ('the partnership agreement') and through an exclusive distribution agreement relating to the bananas supplied by Del Monte for the purpose of importing them into the Community ('the distribution agreement').

- 14 On 8 April 2005, Chiquita Brands International Inc. ('Chiquita') lodged an application for immunity under the 2002 Leniency Notice.
- 15 On 3 May 2005, the Commission granted Chiquita conditional immunity from fines under point 8(a) of the 2002 Leniency Notice.
- 16 On 20 July 2007, the Commission sent a statement of objections to, inter alia, Chiquita, Dole Food Company Inc. ('Dole'), Del Monte and Weichert.
- 17 On 15 October 2008, the Commission adopted the contested decision, by which it found, in recitals 1 to 3 thereof, that the addressees of the decision participated in a concerted practice by which they coordinated their quotation prices for bananas marketed in Northern Europe, namely Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden, between 1 January 2000 and 31 December 2002.
- 18 It is apparent from recitals 104 and 107 of the contested decision that Chiquita, Dole and Weichert set the quotation prices for their brands each week, in practice on Thursday mornings, and announced them to their customers. The expression 'quotation prices' usually corresponded to quotation prices for green bananas, while quotation prices for yellow bananas were normally the 'green' quote plus a ripening fee.
- 19 The Commission stated at paragraphs 34 and 104 of the contested decision that the 'actual' prices paid by retailers and distributors for bananas could be the result either of negotiations which took place on a weekly basis — in practice on Thursday afternoon or later — or the implementation of supply agreements with pre-established pricing formulae mentioning a fixed price or linking the price to a quotation price of the seller or a competitor or to another reference price, such as the 'Aldi price'. Each Thursday, between 11 a.m. and 11.30 a.m., the Aldi retail chain received offers from its suppliers and then sent a counter-offer; the 'Aldi price', the price paid to suppliers, was generally set at around 2 p.m. From the second half of 2002, the 'Aldi price' began to be used increasingly as an indicator for the calculation of banana prices for a number of other transactions, in particular those relating to branded bananas.
- 20 The Commission observed at recitals 51 to 210 of the contested decision that the undertakings to which that decision was addressed engaged in bilateral pre-pricing communications during which they discussed banana price-setting factors, that is to say, factors relevant to the setting of quotation prices for the forthcoming week, or discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week. Those communications took place before the undertakings involved set their quotation prices, usually on Wednesdays, and all related to future quotation prices.
- 21 At recitals 56 and 57 of the contested decision, the Commission found that Dole thus communicated bilaterally with both Chiquita and Weichert. Chiquita was aware or at least foresaw that Dole had pre-pricing communications with Weichert.
- 22 It is apparent from recital 54 of the contested decision that those bilateral pre-pricing communications were designed to reduce uncertainty as to the conduct of the undertakings concerned with respect to the quotation prices to be set by them on Thursday mornings.

- 23 The Commission stated, at recitals 198 to 208, 227, 247 and 273 to 277 of the contested decision, that after the quotation prices had been set on Thursday morning, the undertakings concerned exchanged those prices bilaterally. That subsequent exchange enabled those undertakings to monitor the individual pricing decisions in the light of the previous pre-pricing communications and reinforced cooperation among them.
- 24 The Commission indicated at recital 115 of the contested decision that the quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices and were relevant for the banana trade and the prices obtained. In some transactions, moreover, the price was directly linked to quotation prices in accordance with formulae based on quotation prices.
- 25 It is apparent from recitals 228 and 229 of the contested decision that, according to the Commission, the undertakings concerned must necessarily have taken account of the information received from competitors when determining their conduct on the market, Chiquita and Dole even expressly admitting having done so.
- 26 The Commission concluded, at recitals 54 and 271 of the contested decision, that the pre-pricing communications between Dole and Chiquita, on the one hand, and between Dole and Weichert on the other, were liable to influence operators' pricing behaviour, concerned the fixing of prices and gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.
- 27 The Commission stated, at recital 258 of the contested decision, that all the collusive agreements described in that decision constituted a single and continuous infringement having as its object the restriction of competition within the Community within the meaning of Article 81 EC. Chiquita and Dole were held responsible for the entire single and continuous infringement, while Weichert was held responsible only for the part of the infringement relating to the collusive agreements with Dole.
- 28 In view of the fact that the market for bananas in Northern Europe is characterised by a substantial volume of trade between Member States and that the collusive agreements covered a significant part of the European Union, the Commission concluded, at recitals 333 to 338 of the contested decision, that those agreements had an appreciable effect on trade between Member States.
- 29 After finding that Del Monte, jointly with the general partners of Weichert, had been able to exercise decisive influence on the way in which Weichert ran its business and had in fact exercised such influence during the infringement period, the Commission found, at recitals 384, and 432 to 434 of the contested decision, that Del Monte and Weichert formed an economic unit, as Weichert had not acted independently on the market. Consequently, Del Monte and Weichert were declared 'jointly and severally' liable for the infringement of Article 81 EC found in the contested decision.
- 30 For the purposes of calculating the amount of the fines, the Commission applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines') and the 2002 Leniency Notice.
- 31 The Commission determined a basic amount of the fine to be imposed, which corresponds to an amount of between 0% and 30% of the value of the relevant sales of the undertaking, depending on the degree of gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of the sales in order to deter undertakings from engaging in unlawful conduct.
- 32 The basic amount of the fine to be imposed was reduced by 60% for all the addressees of the contested decision on the ground, *inter alia*, that the coordination related to the quotation prices. A further reduction of 10% was granted to Weichert, which had not been informed of the pre-pricing communications between Dole and Chiquita.

33 Chiquita was granted immunity from fines under the 2002 Leniency Notice. No other adjustment was made for Dole, Del Monte or Weichert.

34 The contested decision includes the following provisions:

*‘Article 1*

The following undertakings infringed Article 81 [EC] by participating in a concerted practice by which they coordinated quotation prices for bananas:

- [Chiquita] from 1 January 2000 until 31 December 2002;
- ...
- [Dole] from 1 January 2000 to 1 December 2002;
- Dole Fresh Fruit Europe OHG from 1 January 2000 until 31 December 2002;
- [Weichert] from 1 January 2000 to 31 December 2002;
- [Del Monte] from 1 January 2000 to 31 December 2002.

The infringement covered the following Member States: Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.

*Article 2*

For the infringement referred to in Article 1, the following fines are imposed:

- [Chiquita], Chiquita International Ltd, Chiquita International Services Group NV and Chiquita Banana Company BV, jointly and severally: EUR 0;
- [Dole] and Dole Fresh Fruit Europe OHG, jointly and severally: EUR 45 600 000;
- [Weichert] and [Del Monte], jointly and severally: EUR 14 700 000.

...’

35 By application lodged at the Registry of the General Court on 31 December 2008, Del Monte brought an action for annulment of the contested decision, or, in the alternative, a reduction of the fine imposed on it by that decision.

36 On 9 April 2009, Weichert applied for leave to intervene in those proceedings in support of the form of order sought by Del Monte. On 17 February 2010 leave to intervene was granted by the General Court.

37 By the judgment under appeal, the General Court dismissed Del Monte’s application for annulment of the contested decision and granted its application for a reduction of the fine imposed on it by that decision, setting the fine at EUR 8.82 million.

### Forms of order sought by the parties

38 Del Monte claims that the Court should:

- set aside the judgment under appeal and annul the contested decision in so far as that decision concerns it;
- dismiss the Commission's appeal in Case C-294/13 P or, in the alternative, set aside the judgment under appeal in so far as the General Court held, at paragraph 839 of that judgment, that the right to silence does not apply to situations in which the Commission has made a simple request for information, and refer the case back to the General Court for a ruling on the question whether the statements sought by the Commission were self-incriminatory in nature and whether Weichert and Del Monte should thus be granted a reduction of the fine, and
- order the Commission to pay the costs in relation to all the proceedings.

39 Weichert contends that the Court should:

- dismiss Del Monte's appeal in Case C-293/13 P in so far as it relates to Del Monte's liability as parent company, grant the appeal in so far as it relates to a single and continuous infringement, set aside the judgment under appeal and annul the contested decision in its entirety;
- in the alternative, set aside the judgment under appeal in so far as it upholds the contested decision as regards single and continuous infringement and reduce the fine imposed on Del Monte and Weichert so as to reflect the annulment of the contested decision as regards single and continuous infringement;
- in the event that the Court upholds the Commission's appeal in Case C-294/13 P, set aside the judgment under appeal in so far as it finds that Weichert cannot rely on protection against self-incrimination, and reduce the fine imposed jointly and severally on Weichert and Del Monte so as to take account of the fact that Weichert cooperated beyond its legal obligation to do so by responding to the requests for information, and
- order the Commission to pay the costs in relation the proceedings at first instance and on appeal.

40 The Commission contends that the Court should:

- dismiss the appeal in Case C-293/13 P and Del Monte's cross-appeal in Case C-294/13 P;
- dismiss Weichert's cross-appeals in Cases C-293/13 P and C-294/13 P;
- set aside point 1 of the operative part of the judgment under appeal and give final judgment in the dispute, and
- order Del Monte and Weichert to pay the costs of the various proceedings.

41 By decision of the President of the Court of 22 July 2014, Cases C-293/13 P and C-294/13 P were joined for the purposes of oral procedure and of the judgment.

## **Admissibility of Weichert's cross-appeal in Case C-293/13 P**

### *Arguments of the parties*

- 42 The Commission states that, as Weichert's action for annulment of the contested decision was brought out of time, that decision has become final with regard to Weichert, so that the cross-appeal under consideration cannot alter the binding effect of that decision for Weichert. Any decision setting aside the judgment under appeal and annulling the contested decision, in so far as they concern Del Monte, would be contrary to Weichert's interests, since the latter would then alone be liable for payment of the fine imposed.
- 43 Del Monte shares the Commission's view that the Court is required to examine whether Weichert's cross-appeal is admissible.
- 44 Weichert states that the General Court granted it leave to intervene in the dispute on the basis of the finding that it had a direct and present interest in the result of the dispute and was therefore directly affected by the outcome of the case. The General Court stated in that regard that the contested decision considered Del Monte and Weichert to be an economic unit and ordered those companies jointly and severally to pay a fine for an infringement connected with Weichert's conduct. Those considerations are equally relevant in the cross-appeal.

### *Findings of the Court*

- 45 As the Commission has observed, any decision setting aside the judgment under appeal and annulling the contested decision, in so far as they concern Del Monte, would be contrary to Weichert's interests, as Weichert would then alone be liable for payment of the fine imposed by the contested decision, which has become final with regard to Weichert.
- 46 The Court has consistently held that for an appellant to have an interest in bringing proceedings the appeal must be capable, if successful, of procuring an advantage to the party bringing it (judgment in *France v People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 43 and case-law cited).
- 47 Accordingly, Weichert's cross-appeal in Case C-293/13 P seeking the setting aside of the judgment under appeal and the annulment of the contested decision in so far as they concern Del Monte, which cannot procure an advantage to Weichert, must be dismissed as inadmissible.

## **Del Monte's appeal in Case C-293/13 P**

### *Whether Weichert has an interest in submitting a response*

#### *Arguments of the parties*

- 48 The Commission points out that it contested Weichert's claim that it had an interest in intervening in the proceedings which gave rise to the judgment under appeal on the ground that Weichert's action against the contested decision was lodged out of time and that decision became final with regard to Weichert, so that Del Monte's appeal cannot call into question the binding effect of that decision in so far as concerns Weichert. On the same grounds, the Commission contests Weichert's claim that it has an interest in submitting a response.

49 Del Monte shares the Commission's view that the Court is required to examine whether Weichert has an interest in submitting a response. It also criticises the fact that Weichert, as intervener, has used Del Monte's appeal to defend its own views and requests the Court to focus its examination on the questions which Del Monte has raised.

50 Weichert contests the Commission's and Del Monte's arguments.

#### Findings of the Court

51 In accordance with Article 172 of the Rules of Procedure of the Court of Justice, any party to the relevant case before the General Court having an interest in the appeal being allowed or dismissed may submit a response within two months after service on him of the appeal.

52 In the present case, contrary to what the Commission and Del Monte would appear to consider, it is obvious that Weichert has an interest in Del Monte's appeal in Case C-293/14 P being dismissed. As Weicher failed to challenge the contested decision in good time, so that that decision has become final in so far as it is concerned, in the event that the Court should grant Del Monte's appeal in Case C-293/13 P, it would be responsible for payment of the fine imposed alone, not jointly and severally with Del Monte.

53 Accordingly, it must be concluded that Weichert has an interest in submitting a response.

*The first ground of appeal in Case C-293/13 P, alleging that Del Monte and Weichert did not form an economic unit during the infringement period*

#### Arguments of the parties

54 Del Monte takes issue with the General Court for taking the view that it is liable for the conduct of Weichert as its parent company.

55 In the first place, Del Monte states that the Commission and the General Court recognised that Weichert did not always follow its instructions and that some of Weichert's pricing decisions may not have met Del Monte's expectations. Therefore, Weichert did not carry out, in all material respects, the instructions given to it by Del Monte, with the result that it could not be concluded that decisive influence was being exercised.

56 In particular, there is no justification for the assertion at paragraph 208 of the judgment under appeal that it cannot be inferred from the evidence on the file that Weichert generally did not follow the instructions of Del Monte. The relevant test is whether or not Weichert followed those instructions in all material respects or whether it took its pricing decisions entirely independently.

57 The evidence in question relates to the instances in which Weichert acted independently and contrary to Del Monte's expectations. Even if other decisions that Weichert made had generally been in line with Del Monte's expectations, which is not the case, that would not affect Weichert's independence

58 Moreover, Del Monte states that, at paragraphs 233, 237 and 240 of the judgment under appeal, the General Court acknowledged that on three occasions Weichert instructed external lawyers to defend its interests against Del Monte. However, at paragraph 236 of the judgment, that court concluded that the fact that Del Monte was unable to prevent Weichert defending its interests is not a sign of Del Monte's inability to exercise decisive influence over Weichert. That conclusion is at odds with

established case-law on the liability of a parent company, as it would be inconsistent to acknowledge that Weichert acted independently in relation to such vital questions and at the same time to find that Del Monte and the general partners of Weichert exercised joint control over Weichert.

- 59 In the second place, Del Monte is of the view that the General Court confined itself to establishing a number of factors which, in its view, gave Del Monte some degree of influence over Weichert. However, the General Court never stated that that influence was decisive or that Weichert followed Del Monte's instructions in all material respects.
- 60 In that regard, first, Del Monte submits that, as a limited partner, it was excluded, as a matter of German law, from any management function and had no means of making decisions as to who managed Weichert.
- 61 First of all, under Clause 7(1) of the partnership agreement, Del Monte could object only to measures falling outside the ordinary course of business. Next, all the measures set out in in Clause 7(2) and (3) of the partnership agreement were outside Weichert's ordinary course of business and there was no link between those measures and Weichert's market conduct.
- 62 Lastly, with regard to the fact that it was possible for it to convene a partners' meeting at any time, Del Monte observes that the general partners could veto any proposed measure at such a meeting. Furthermore, where a deadlock occurred, in order to solve it the general partners could call an advisory council, in which they were certain not to be in a minority.
- 63 Second, according to Del Monte, none of the factors which led the General Court to conclude that Del Monte exerted decisive influence over Weichert, either in isolation or as a whole, are capable of establishing that it actually exerted such influence.
- 64 With regard to the partnership agreement, Del Monte considers that balance of power said to exist by the General Court at paragraph 118 of the judgment under appeal is not indicative of decisive influence.
- 65 Given that only the general partners were empowered to act and sign on behalf of Weichert, to bind Weichert to third parties and to bind third parties to it, to receive and spend funds on its behalf, to carry out the day-to-day management and to assume its commitments jointly and without limitation, the alleged balance of power and the power of veto cannot justify a finding of decisive influence.
- 66 Contrary to the conclusion reached by the General Court, the veto rights enjoyed by Del Monte are not indicative of decisive influence, because that company was not able to impose an annual budget, investment plan or staffing plan and those veto rights did not affect the continuity of management by Weichert's general partners.
- 67 As regards capital links, Del Monte states that the reasoning at paragraph 125 of the judgment under appeal, to the effect that the size of its interest in Weichert gave it an incentive to exercise decisive influence over Weichert and reflected a certain economic power and, therefore, an ability to exercise such influence is incorrect, since mere incentive is irrelevant to the ability to exercise decisive influence and a certain economic power is not indicative of decisive influence. The General Court does not point to any element in connection with the size of WAL's interest that could have affected Weichert's independence with regard to management decisions and market conduct.
- 68 With regard to the distribution agreement, none of the three factors identified by the General Court at paragraphs 135 to 149 of the judgment under appeal disclose, according to Del Monte, that it exercised decisive influence over Weichert.

- 69 First of all, there is nothing in the judgment under appeal to establish that the distribution agreement, taken alone or in conjunction with other factors, prevented Weichert from determining its commercial policy entirely independently. It was a standard agreement between independent economic operators. Del Monte's interest — which is admitted — in Weichert selling its bananas at higher prices is not indicative of any ability to exercise decisive influence.
- 70 Next, with regard to information received by Del Monte, it is apparent from paragraph 157 of the judgment under appeal that the information mechanisms in conjunction with the control mechanisms in the partnership agreement allowed Del Monte only to influence Weichert's commercial conduct, including the day-to-day business management, not to exercise decisive influence.
- 71 Lastly, the four instances in which Del Monte directly intervened in the marketing and prices charged by Weichert referred to in paragraph 164 of the judgment under appeal illustrate that Del Monte wanted to position its brand as a brand commanding higher prices and that Weichert sold its bananas at lower prices. Those interventions do not, therefore, disclose decisive influence. The relevant question is whether Weichert was bound to comply with Del Monte's wishes. However, at paragraph 208 of the judgment under appeal, the General Court expressed the view that that was not the case.
- 72 The Commission and Weichert dispute Del Monte's arguments as regards both their admissibility and substance.

#### Findings of the Court

- 73 With regard to the admissibility of Del Monte's first ground of appeal, it is sufficient to observe that, contrary to what the Commission and Weichert claim, it is quite clear from the arguments put forward by Del Monte that it is not disputing the General Court's findings of fact or the assessment of those facts but only their legal classification.
- 74 The first ground of appeal is therefore admissible.
- 75 With regard to the substance, it is settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (judgments in *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 58; *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 43; and *Areva and Others v Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 30).
- 76 In examining whether the parent company is able to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of economic reality (judgment in *Commission v Stichting Administratiekantoort Portielje*, C-440/11 P, EU:C:2013:514, paragraph 66).
- 77 Moreover, the exercise of decisive influence may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such influence (see, to that effect, judgment in *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389, paragraph 65).

- 78 Lastly, the Court has previously held that the exercise of joint control, by two parent companies which are independent of each other, of their subsidiary does not, in principle, preclude a finding by the Commission of the existence of an economic unit comprising one of those parent companies and the subsidiary concerned (judgment in *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 101).
- 79 In the present case, with regard, first, to Del Monte's ability to exercise decisive influence over Weichert, the General Court began, at paragraph 118 of the judgment under appeal, by characterising the right enjoyed by Del Monte under Clauses 7(2) to (4), 8(2) and 9(2) to (5) of the partnership agreement as illustrating that Del Monte and the Weichert family had joint control of the Weichert company and as indicative of Del Monte's ability to exercise decisive influence over Weichert.
- 80 Next, at paragraph 125 of the judgment under appeal, the General Court characterised the capital links between Del Monte and Weichert as reflecting the fact that the former had the ability to exercise influence over the latter.
- 81 Lastly, at paragraph 150 of the judgment under appeal, the General Court characterised Del Monte's rights and obligations under Clauses 2(a), 3, 4, 9(3) and 11 of the distribution agreement as strengthening Del Monte's economic and legal capacity to exert influence over the day-to-day management of Weichert's business.
- 82 The General Court based those legal classifications on, inter alia, the following assessments of the evidence established.
- 83 First, at paragraphs 101 and 118 of the judgment under appeal, the General Court expressed the view that it appeared from Clause 7(2) and (3) of the partnership agreement that a range of important acts necessarily having an — even indirect — impact on the management of Weichert could not be carried out without the limited partner's consent and that that agreement revealed a 'balance of power' between general and limited partners.
- 84 Second, at paragraph 125 of the judgment under appeal, the General Court stated that Del Monte's financial interest in the activities of Weichert constituted an obvious incentive for Del Monte to exert influence over Weichert, and that the size of its shareholding indicated a certain economic power.
- 85 Third, at paragraph 139 of the judgment under appeal, the General Court observed that Del Monte had a double interest in exercising control over prices charged by Weichert, since these not only had an impact on Weichert's revenues, and thereby on profits produced for shareholders, but also directly influenced the prices obtained by Del Monte for the bananas supplied to Weichert under the distribution agreement.
- 86 Fourth, at paragraph 149 of the judgment under appeal, the General Court observed that, since Del Monte had a contractual possibility of influencing the volume of bananas which it supplied to Weichert significantly and Weichert was obliged to acquire almost its entire banana volume from Del Monte, Del Monte had a powerful means of putting pressure on Weichert.
- 87 Against that background, the arguments put forward by Del Monte in the appeal proceedings are not such as to establish that the General Court erred in law in classifying all the economic, organisational and legal links in questions as demonstrating that Del Monte had the ability to exercise decisive influence over Weichert.
- 88 First, the fact that Del Monte was legally precluded from involvement in the management of Weichert's day-to-day business and that its veto rights did not allow it, inter alia, to impose a particular budget does not mean that Del Monte was precluded altogether from being able to exert

decisive influence over Weichert's conduct on the relevant market. Indeed, other circumstances, in particular those referred to at paragraphs 79 to 86 of the judgment under appeal, enabled it to wield such power.

- 89 Next, for the same reasons, the fact that on three occasions Weichert instructed external lawyers to defend its interests against Del Monte does not mean that Del Monte was unable to exercise decisive influence over Weichert's conduct on the relevant market.
- 90 Lastly, in the overall context of the economic, organisational and legal links that existed, according to the General Court, between Del Monte and Weichert, the fact that Del Monte had a contractual possibility of influencing significantly the volume of bananas which it supplied to Weichert and that Weichert was obliged to acquire almost its entire banana volume from Del Monte entitled the General Court to conclude, at paragraph 149 of the judgment under appeal, not only that Del Monte had a powerful means of putting pressure on Weichert but also that it had the ability to exercise decisive influence over that company.
- 91 In the second place, with regard to Del Monte's exercise of decisive influence over Weichert, at paragraph 158 of the judgment under appeal the General Court characterised the fact that Del Monte had received information over and above what was required under Clause 4 of the distribution agreement as a clear indication of the exercise of influence.
- 92 Furthermore, at paragraph 220 of the judgment under appeal, the General Court characterised the evidence relating to correspondence between Del Monte and Weichert as indicative of the exercise by Del Monte of decisive influence over Weichert during the infringement period.
- 93 The General Court based those legal classifications on, inter alia, the following assessments of the evidence established:
- the reports which, between May 2000 and January 2003, Weichert sent to Del Monte each week with an indication, in respect of Del Monte, Dole, Chiquita and the other banana suppliers and of each of the relevant geographical markets, of the volumes concerned, the official prices and the actual prices, that is the 'tentative net price', were an additional source of information directly linked to the marketing of bananas, and thus to the day-to-day management of Weichert (paragraphs 152 to 155 of the judgment under appeal);
  - the regular nature of the weekly transmission of those reports resulted in a continuous flow of information to Del Monte, giving it an extensive and precise understanding of the market, including of Weichert's positioning (paragraph 156 of the judgment under appeal);
  - those reports constituted information that was requested and obtained outside the contractual framework (paragraph 158 of the judgment under appeal);
  - exchanges between Del Monte and Weichert reveal Del Monte's direct intervention in Weichert's marketing and pricing: very precise instructions — since they include figures — on the pricing policy to be adopted; meetings and telephone conversations on that subject; an express request for information to be provided daily on commercial negotiations; overt pressure in relation to supply; and Weichert's explanations or justification of its day-to-day management (paragraphs 175 and 203 of the judgment under appeal);
  - Del Monte had a real capacity to influence significantly Weichert's supplies and, in practice, used that power to put Weichert under considerable pressure, threatening to reduce the volume of the weekly banana supply 'to the level of Interfrucht's own licences, i.e. +/- 60 000 boxes per week', without referring to any case of *force majeure*, that is to a quantity below the minimum threshold

provided for by the distribution agreement, a reduction which was likely to create difficulties for Weichert in its relationships with its customers (paragraphs 185 to 187 of the judgment under appeal);

- Del Monte closely monitored Weichert’s commercial behaviour and even intervened directly in the determination of its pricing policy (paragraph 204 of the judgment under appeal);
  - Weichert’s replies reveal that it felt obliged to account to Del Monte for its pricing decisions and to try to meet Del Monte’s expectations (paragraph 205 of the judgment under appeal);
  - in the light of the risks to its supplies and the occasional reductions in those supplies, Weichert was obliged to follow Del Monte’s instructions in order to avoid going out of business, that fear clearly having been relayed to its supplier (paragraph 207 of the judgment under appeal);
  - although, as the Commission itself acknowledges in recital 424 of the contested decision, Weichert’s pricing decisions may not have met Del Monte’s expectations, it cannot be inferred from the documentary evidence obtained by the Commission that Weichert generally did not — in the words of the applicant — follow ‘the instructions of Del Monte’, and behaved independently on the market (paragraph 208 of the judgment under appeal).
- 94 In the light of those factual findings and assessments, for which the Court cannot substitute its own, it cannot be claimed that the General Court erred in law by characterising all the information requested and obtained by Del Monte and the instructions, accompanied by threats and pressure, given by Del Monte to Weichert, as demonstrating that Del Monte actually exercised decisive influence over Weichert.
- 95 The arguments put forward by Del Monte in the appeal proceedings cannot affect that finding.
- 96 In so far as Del Monte claims that all the evidence relating to its exchanges with Weichert shows that the latter’s conduct was at odds with Del Monte’s expectations, first, it should be noted, as the Advocate General observed at points 101, 103 and 104 of her Opinion, that it is not necessary for the subsidiary to carry out all the parent company’s instructions to demonstrate decisive influence, as long as the failure to carry out instructions is not the norm.
- 97 As the Advocate General observed at points 108 and 109 of her Opinion, the General Court considered that the evidence placed before it was not, as a whole, such as to establish that Weichert’s failure to act on Del Monte’s instructions was the norm.
- 98 Second, by establishing that Del Monte had obtained, at its request and over and above what it was entitled to, up-to-date information on the state of the banana market concerned, that it gave Weichert precise instructions on the conduct to be adopted by it on that market, that those instructions were accompanied by threats which Del Monte could make because it enjoyed a powerful means of putting pressure on Weichert and that Weichert, fearing that it would be put out of business, endeavoured to meet Del Monte’s expectations, the General Court had a body of evidence which enabled it to conclude that Del Monte, in conjunction with the Weichert’s general partners, exerted a decisive influence over Weichert.
- 99 It follows that the General Court did not err in law in characterising all the information requested and obtained by Del Monte and the instructions, accompanied by threats and pressure, given by Del Monte to Weichert, as demonstrating that Del Monte actually exerted decisive influence over Weichert.
- 100 In the light of all the foregoing considerations, the first ground of appeal in Case C-293/13 P must be rejected.

*The second ground of appeal in Case C-293/13 P, alleging distortion of the evidence*

Arguments of the parties

- 101 Del Monte claims that the General Court based its finding that Del Monte exerted decisive influence over Weichert on a distortion of the evidence.
- 102 First, contrary to what is stated at paragraphs 100 and 101 of the judgment under appeal, it is not possible to conclude, on the basis of Del Monte's veto rights in Clause 7(3) of the partnership agreement, that those rights had an — even indirect — impact on the management of Weichert. None of those veto rights related to Weichert's market conduct, which was determined solely by the general partners.
- 103 Second, according to Del Monte, the General Court distorted the partnership agreement by taking the view, at paragraph 114 of the judgment under appeal, that it was not apparent from the terms of that agreement that the general partners held a right of veto over 'any' decisions of Weichert. Indeed, that finding contradicts other statements made by the General Court to the effect that:
- Weichert was managed and represented solely by the general partners and that no management measures, appointments or dismissals could be imposed against the general partners' will;
  - the general partners needed Del Monte's prior consent only for a limited number of measures, none of which, with the exception of the budget, business and staffing plans, were outside the ordinary course of business;
  - the general partners could veto amendments of the partnership agreement, the financial statements, discharge of the general partners for their management and the appointment of an auditor, as well as any decisions that could be made at partnership meetings, and the general partners alone could adopt any act of management or representation of the partnership, yearly proposals for the budget, investment and staffing plans, preparation of the financial statements and the transfer of their shares in the company.
- 104 In particular, Del Monte states that the General Court does not point to any decision that Del Monte could have imposed or did in fact impose on Weichert against the general partners' veto and that no such decision was taken.
- 105 Third, Del Monte contends that it was only by distorting the facts that the General Court was able to reject its argument that it could neither dismiss nor replace or even veto the appointment of Weichert's management, by observing that it is sufficient to state that the unanimity of the partners was required for any amendment of the partnership agreement.
- 106 Fourth, Del Monte submits that the General Court distorted Clause 9(5) of the partnership agreement by stating that the claim that decisions were adopted by simple majority within the advisory council and were thus inevitably favourable to the general partners was not substantiated and that, in any event, the scope of the advantage in question must be placed in context in the light of the specific powers of the partnership meeting.
- 107 In that regard, Del Monte maintains that it was accepted that, within the advisory council, the distribution of the voting rights was as follows: three votes for the general partners, one for Del Monte and two neutral votes. Moreover, the partnership agreement did not contain any provision requiring a qualified majority. Lastly, as Del Monte was excluded from Weichert's management, the

partnership meeting was the only governance body on which it was represented. The mechanism provided for by the partnership agreement in the event of a deadlock was therefore indicative of the distribution of powers.

- 108 Fifth, Del Monte considers that, at paragraph 118 of the judgment under appeal, the General Court distorted its statement that the partnership agreement reflected a ‘balance of powers’ between Del Monte and the general partners by interpreting that statement as confirming that it indicated decisive influence. It is, however, clear that that interpretation is inconsistent with the content of that statement.
- 109 Sixth, Del Monte submits that, at paragraphs 212 to 214 of the judgment under appeal, the General Court distorted statements made by Dole and Chiquita, to which the Court refers. The General Court concluded that the first and second statements made by Dole provide evidence that Del Monte had a strategy of fixing prices at the same level as Dole. The General Court thereby failed to have regard to the content of the second Dole statement, which confirmed that it was Weichert, not Del Monte, that wished to place the Del Monte brand on a par with Dole’s, on the ground that that second statement was indissociable from Dole’s first statement.
- 110 Del Monte nevertheless contends that that is incorrect, as Dole’s second statement is more recent, answers a precise question put by the Commission and expressly explains in detail and supplements information given in the first statement. However, the General Court’s interpretation of the first Dole statement is at odds with the second statement.
- 111 The third Dole statement and the statement of Chiquita are wholly unambiguous and the only conclusion to be drawn from them is that Del Monte was dissatisfied with Weichert’s commercial strategy and implemented its own strategy as soon as it began to market its bananas through its wholly controlled subsidiaries. When Dole stated that Del Monte was dissatisfied with the results of Weichert’s marketing, the General Court confined that dissatisfaction to profits, in spite of the fact that it was made expressly clear that Del Monte’s dissatisfaction related to Weichert’s marketing strategy.
- 112 Del Monte is of the view that it is clear from those statements that Del Monte was unable to decisively influence Weichert’s commercial strategy.
- 113 Del Monte claims that the General Court also distorted Dole’s fourth statement by suggesting that Del Monte changed strategy after the separation from Weichert at the end of the infringement period. That interpretation is incompatible with Chiquita’s statement and the communications between Del Monte and Weichert, which reveal constant disagreement between those two companies as to the positioning of Del Monte’s bananas. A further element of Dole’s fourth statement confirms that there was constant disagreement.
- 114 Seventh, Del Monte submits that, at paragraph 236 of the judgment under appeal, the General Court distorted a letter sent to Del Monte on 27 March 1997 by an external lawyer on Weichert’s behalf to defend the latter’s interests against Del Monte. That letter clearly indicates that Weichert acted against Del Monte’s interests and proves that there was no decisive influence. None the less, the General Court rejected Del Monte’s argument, adopting the view that the general partners sought to have their interests defended against the limited partner, whereas that letter makes it unambiguously clear that it was sent not on behalf of the general partners but on behalf of Weichert.
- 115 Eighth, Del Monte considers that, at paragraph 238 of the judgment under appeal, the General Court distorted Weichert’s statement of response in litigation between Weichert and WAL by disregarding the arguments put forward on the sole ground that the proceedings in question were started by Del Monte, not by Weichert. However, who started the proceedings is entirely irrelevant to the content of such a pleading.

- 116 Ninth, Del Monte considers that, at paragraph 259 of the judgment under appeal, the General Court distorted the evidence based on the fact that Weichert's results were not consolidated into the accounts of Del Monte, by rejecting that evidence as irrelevant on the ground that Weichert was a partnership. However, there is no justification for the view that there is a difference between the consolidation rules for partnerships and those for other legal forms that companies may have.
- 117 Tenth, the General Court distorted the evidence by failing to consider how different pieces of negative evidence interrelate. The General Court simply examined whether each individual piece of evidence established that there was no decisive influence and concluded that that was not the case. However, it failed to examine whether that evidence, taken as a whole, suggested that there was no decisive influence.
- 118 Del Monte is of the view that that evidence, taken as a whole, does not suffice to show that Del Monte had such an influence over Weichert that it was not able to decide independently upon its conduct on the market and, in all material respects, carried out Del Monte's instructions.
- 119 Weichert is of the view that Del Monte has not proven distortion of the evidence but simply called into question the General Court's assessment of the evidence.
- 120 The Commission considers that there is nothing in the reasoning followed by the General Court to suggest distortion of the evidence.

#### Findings of the Court

- 121 Del Monte's first, third, fifth and eighth to tenth arguments must be rejected at the outset because, clearly, they do not disclose any ground on which the General Court may be criticised for distorting the evidence, or indicate precisely what evidence was distorted and, accordingly, those arguments fall short of the requirements laid down by case-law.
- 122 While Del Monte's second, fourth, sixth and seventh arguments do in fact contain precise complaints alleging distortion of the evidence, the Court none the less finds that those arguments are unfounded.
- 123 With regard to Del Monte's second argument, as observed by the Advocate General at points 131 and 132 of her opinion, the General Court's finding, at paragraph 114 of the judgment under appeal, that 'it is not apparent from the terms of the partnership agreement that ... the general partner held a right of veto over "any" decisions of the company' must be read in the light of the preceding paragraphs of that judgment, which concern the second sentence of clause 9(2) of the partnership agreement, a provision which relates exclusively to certain decisions of the partners' meeting defined in clause 9(4) of that agreement.
- 124 As regards Del Monte's fourth argument, first, it is sufficient to note, as the Advocate General observed at point 143 of her Opinion, that clause 9(5) of the partnership agreement contains no mention whatsoever of the majority requirements applicable to the decisions of the advisory council. Second, Del Monte fails to specify how the General Court distorted that provision in finding, at paragraph 116 of the judgment under appeal, that 'the scope of the advantage in question must be placed in context in the light of the specific powers of the partners' meeting'.
- 125 With regard to the sixth argument, as the Advocate General observed at points 152 and 153 of her Opinion, it is clear that the submissions in question from Chiquita and Dole were not wholly without ambiguity and were therefore open to interpretation. As it is not apparent that the General Court's interpretation is manifestly at odds with the content of those submissions, the distortion alleged cannot be established.

- 126 Lastly, Del Monte's seventh argument cannot succeed as the General Court's assertion that 'the fact that a partner calls on a lawyer to assert his rights and defend himself against someone he suspects of infringing them' is not incompatible with the content of the letter sent to Del Monte on 27 March 1997 by an external lawyer on behalf of Weichert, which, as the Advocate General observed at points 157 and 158 of her Opinion, is written in an ambiguous manner, as it is apparent from its introductory section that it is providing an opinion for the company, whereas the remainder of the letter is written, inter alia, in the name of Mr W. and, in parts, even expressly in the name of Mr W. and Weichert jointly.
- 127 In the light of the foregoing considerations, the second ground of appeal in Case C-293/13 P must be rejected.

*Third ground of appeal in Case C-293/13 P, relating to the burden of proof*

Arguments of the parties

- 128 Del Monte submits that the General Court, while holding that the burden of proof of decisive influence lay with the Commission, reversed that burden on a number of instances. The reasoning set out below presupposes a presumption of decisive influence that it fell to Del Monte to rebut.
- 129 First, at paragraph 113 of the judgment under appeal, the General Court found, with regard to the general partner's veto right in clause 9(2) of the partnership agreement, that, in accordance with clause 9(3) and (4) of that agreement, the partners' meeting had well-defined powers, 'which did not mean that Del Monte was precluded altogether from being able to exert decisive influence over Weichert's conduct on the relevant market'.
- 130 Second, at paragraph 208 of the judgment under appeal, the General Court stated that although 'Weichert's pricing decisions may not have met Del Monte's expectations, it cannot be inferred from the documentary evidence obtained ... that Weichert generally did not ... follow "the instructions of Del Monte", and behaved independently on the market'.
- 131 Third, at paragraphs 237 and 238 of the judgment under appeal, the General Court found that 'an extract from a defence statement dated 15 May 2002 submitted by Weichert to a German court in proceedings between Weichert and WAL, in which it is claimed that all of Weichert's economic added value, that is acquisition, marketing and logistics, was exclusively attributable to the general partners, and that the role of WAL within the partnership was limited to financial participation ... does not preclude the conclusion that decisive influence was exercised'.
- 132 Fourth, at paragraph 260 of the judgment under appeal, the General Court found, with regard to the fact that Del Monte's and Weichert's accounts were not consolidated, that 'the absence of such consolidation does not necessarily mean that ... it is impossible to conclude ... that there is decisive influence'.
- 133 If it had correctly applied the principles governing the burden of proof, the General Court would have been required to examine whether the limited partner's veto right, the fact that Weichert's prices did not meet Del Monte's expectations, Weichert's submissions before the German courts and the fact that the accounts were not consolidated were such as to cast sufficient doubt on the Commission's finding that Del Monte exercised decisive influence over Weichert and to conclude that that finding was not established to the requisite standard.
- 134 Weichert and the Commission contest Del Monte's arguments.

## Findings of the Court

- 135 It is clear that Del Monte's argument in support of its third ground of appeal is based on a misreading of the judgment under appeal.
- 136 First, as Del Monte acknowledges, it is abundantly clear from paragraphs 104 and 221 of the judgment under appeal that the General Court considered that the burden of proof of Del Monte's joint liability for the infringement committed by Weichert was borne by the Commission.
- 137 Next, the General Court examined, at paragraphs 98 to 220 of the judgment under appeal, whether the Commission had discharged that burden and concluded that the evidence on which the Commission relied was such as to make out the claim of joint liability.
- 138 Lastly, at paragraphs 222 to 265 of the judgment under appeal, the General Court verified whether the evidence and arguments put forward by Del Monte were such as to undermine the Commission's finding that the infringement committed by Weichert was attributable to Del Monte.
- 139 As the Advocate General observed at point 117 of her Opinion, such an analysis does not entail any reversal of the burden of proof.
- 140 Nor is such a reversal implied by the fact that the General Court rejected, at paragraphs 113 and 208 of the judgment under appeal, Del Monte's argument that the circumstances referred to in those paragraphs precluded the actual exercise of decisive influence by Del Monte over Weichert. Indeed, in those paragraphs, the General Court simply addressed Del Monte's claims concerning the imputability of the infringement.
- 141 It follows that the third ground of appeal in Case C-293/13 P must be rejected.

*The fourth ground of appeal in Case C-293/13 P, based on the principle of in dubio pro reo*

## Arguments of the parties

- 142 Del Monte contends that the General Court infringed the principle of *in dubio pro reo* by holding it liable for Weichert's conduct notwithstanding the fact that evidence on the file cast doubt as to whether or not it exercised decisive influence over Weichert.
- 143 According to case-law, the Commission must adduce sufficiently precise and consistent evidence to support the firm conviction that the infringement alleged took place. Where no single piece of evidence on its own supports that conviction, it is necessary for the body of evidence relied on, viewed as a whole, to meet that requirement.
- 144 In the present case, numerous factors cast doubt on the claim that Del Monte determined, in all material respects, Weichert's conduct on the relevant market. The General Court dismissed all those factors on the basis that, in its view, they did not prove the absence of decisive influence. However, even if that were correct, the doubts those factors cast on the Commission's finding of decisive influence would have justified the application of the *in dubio pro reo* principle.
- 145 According to Weichert, Del Monte is calling into question the General Court's assessment of the facts, from which it is apparent that none of the evidence relied on by Del Monte is capable of casting sufficient doubt on the Commission's conclusion.

146 The Commission is also of the view that, as Del Monte is seeking a reassessment of the evidence, the fourth ground of appeal is inadmissible. Moreover, the Commission states that it is apparent from the General Court's assessment of Del Monte's arguments that it considered that the evidence relied on demonstrated to the requisite legal standard that Del Monte exerted decisive influence, without indicating any doubt in that regard.

#### Findings of the Court

147 As regards the admissibility of Del Monte's fourth ground of appeal, it should be noted that Del Monte claims that the General Court committed an error in law consisting in an infringement of the *in dubio pro reo* principle and, therefore, that ground of appeal is admissible.

148 As to the substance, it is sufficient to observe that the General Court deduced from all the evidence placed before it that Del Monte had exercised decisive influence over Weichert during the infringement period.

149 As the General Court's assessment was, on the one hand, conclusive and, therefore, free from any doubt and, on the other, free from any error of law, as has been established in the examination of the first ground of appeal, it is clear that the conditions for the application of the *in dubio pro reo* principle were not met in the circumstances of the present case.

150 It follows that the fourth ground of appeal in Case C-293/13 P is unfounded and must accordingly be rejected.

*The fifth ground of appeal in Case C-293/13 P, alleging that there was no single and continuous infringement*

#### Arguments of the parties

151 Del Monte is of the view that the General Court infringed Article 81(1) EC by concluding that Del Monte participated in a single and continuous infringement with Dole and Chiquita, while at the same acknowledging that Weichert had no knowledge of the exchanges between Chiquita and Dole. The General Court's reasoning at paragraphs 590 to 651 of the judgment under appeal is based on an artificial bifurcation of its analysis into (i) unlawful conduct and (ii) liability, addressing the question of subjective intent only in the context of liability.

152 In Del Monte's view, the fact that Weichert was not aware of those exchanges is not only a mitigating factor for the determination of the fine but is also a key element for determining whether a single and continuous infringement has been established. Concerted practices constitute a single and continuous infringement only if it can be established that a common objective was pursued and that there was awareness of and/or preparation for or acceptance of the risk of participating in the entire cartel. That test therefore contains objective and subjective elements, and the subject element is absent in so far as concerns Weichert.

153 Weichert supports Del Monte's arguments and adds that, in so far as the General Court found, at paragraph 593 of the judgment under appeal, that the bilateral communications between Dole and Chiquita and those between Dole and Weichert were linked and complementary, it relied solely on the fact that Dole was involved in both sets of communications. If that were sufficient, almost any set of bilateral communications which infringe Article 81 EC could be regarded as a single and continuous infringement.

154 Weichert is of the view that that error of law should have the effect of annulling the contested decision in its entirety, as the finding of a single and continuous infringement cannot be severed from the rest of that decision.

155 The Commission disputes the arguments put forward by Del Monte and Weichert.

#### Findings of the Court

156 According to settled case-law, an infringement of Article 81(1) EC can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an ‘overall plan’ because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (judgment in *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41 and the case-law cited).

157 An undertaking which has participated in such a single and complex infringement, by its own conduct, which meets the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (judgment in *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 42 and the case-law cited).

158 An undertaking may thus have participated directly in all the forms of anti-competitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (judgment in *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 43).

159 On the other hand, if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (judgment in *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 44).

160 As a consequence, in the present case the General Court did not err in law in finding that the fact that Weichert was unaware of the exchange of information between Dole and Chiquita and did not have to know about it was not such as to alter the finding of a single and continuous infringement, even though liability could not be attributed to that company in respect of all that infringement.

161 It follows that the fifth ground of appeal in Case C-293/13 P must be rejected and, as a consequence, Del Monte's appeal dismissed.

### **The Commission's appeal in Case C-294/13 P**

#### *Weichert's interest in submitting a response*

##### Arguments of the parties

162 For the reasons set out at paragraphs 48 and 49 above, the Commission and Del Monte contest Weichert's claim that it has an interest in submitting a response.

163 Weichert contests the Commission's and Del Monte's arguments.

##### Findings of the Court

164 As observed at paragraph 51 above, in accordance with Article 172 of the Rules of Procedure, any party to the relevant case before the General Court having an 'interest in the appeal being allowed or dismissed' may submit a response within two months after service on him of the appeal.

165 In the present case, contrary to what the Commission and Del Monte would appear to consider, it is quite clear that Weichert has an interest in the Commission's appeal being dismissed. If the Court were to grant that appeal, the amount of the fine for which Weichert is jointly and severally liable could be greater, with the result that it is in Weichert's interest to submit observations on all the relevant legal issues.

166 The Court therefore finds that Weichert has an interest in submitting a response.

#### *The first ground of appeal in Case C-294/13 P, alleging that Weichert was under an obligation to provide information to the Commission*

##### Arguments of the parties

167 The Commission submits that the General Court erred in law by considering, at paragraphs 840 to 853 of the judgment under appeal, that the information provided by Weichert during the administrative procedure justified a reduction of the fine imposed on it by the contested decision.

168 The Commission points out that, in accordance with point 29 of the Guidelines, the basic amount of the fine to be imposed pursuant to Article 23 of Regulation No 1/2003 may be reduced, inter alia, where the undertaking concerned has effectively cooperated with the Commission, in particular where it has cooperated beyond its legal obligation to do so.

169 According to the Commission, undertakings are under an obligation to respond to requests for information under Article 18 of Regulation No 1/2003 as that provision does not give the undertakings under investigation any right to evade such requests and imposes on them an obligation

to cooperate actively. Accordingly, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, related documents in its possession.

170 Accordingly, an undertaking providing information by replying to a Commission request for information does not go further in cooperating with the Commission than the cooperation which it is required to provide under Article 18 of Regulation No 1/2003 and the information provided in that context does not constitute voluntary cooperation for which the undertaking concerned should be rewarded by a reduction of the fine.

171 Accordingly, the General Court has consistently held that an undertaking's cooperation in an investigation which does not go beyond that which it is required to provide under Article 18(1) of Regulation No 1/2003 does not entitle that undertaking to any reduction of the fine to be imposed on it, irrespective of whether the information was requested under Article 18(2) of that regulation or by way of decision pursuant to Article 18(3) of the regulation.

172 The Commission adds that an undertaking that merely complies with its obligations to cooperate under Regulation No 1/2003 does not demonstrate true 'voluntary' cooperation in the sense of the Court's case-law on the Leniency Notice.

173 The Commission states that the objectives of destabilising cartels by encouraging undertakings to disclose cartels to the Commission and to facilitate the Commission's task by providing evidence would be seriously undermined if undertakings that do not spontaneously provide information but merely respond to investigative measures would equally be entitled to reductions of the fine if the information requested turned out to be useful.

174 The Commission observes that the information provided in response to requests for information will in many cases be useful for establishing the infringement under investigation, as it is the very purpose of this investigative instrument to enable the Commission to acquire information that it deems useful.

175 Lastly, the Commission considers that the state of the proceedings is such as to permit final judgment to be given in the matter and requests the Court to fix the final amount of the fine to be imposed jointly and severally on Weichert and Del Monte at EUR 9 800 000.

176 In reply, Del Monte and Weichert maintain that the Commission's arguments are based on a misreading of the judgment under appeal, the General Court having examined, at paragraphs 834 to 839 of that judgment, whether Weichert's cooperation was voluntary, and stated, at paragraph 840 of the judgment, that its cooperation was voluntary, as it had been provided not in response to a decision within the meaning of Article 18(3) of Regulation No 1/2003 but to a simple request for information within the meaning of Article 18(2) of that regulation.

177 Furthermore, Del Monte and Weichert are of the view that there is no legal obligation to reply to a simple request for information under Article 18(2) of Regulation No 1/2003. They claim that only a decision under Article 18(3) of that regulation creates an enforceable legal obligation, may be appealed and gives rise to the imposition of penalties for failure to reply, pursuant to Articles 23 and 24 of that regulation. In the case of simple requests for information, neither fines nor periodic penalty payments are imposed for failure to reply. Moreover, in accordance with Article 288 TFEU, only regulations, directives and decisions are binding. Accordingly, where an undertaking fails to reply to such a request, it is open to the Commission, in order to create a legal obligation, to adopt a decision.

178 Del Monte and Weichert also consider that the General Court exercised its unlimited jurisdiction to review fines and that it is not bound by the Commission's Guidelines. Therefore, the Commission cannot validly claim that the reduction granted misapplies the 2002 Leniency Notice and that

reduction cannot be challenged on the ground that it does not tally with the Commission's practice as set out in its notices. The General Court has previously reduced fines for replies to simple requests for information and the Court has never taken issue with this practice.

179 Lastly, Del Monte and Weichert consider that the Commission's concerns as to the deterrent effect of its fines are not plausible, the General Court having reduced the basic amount of the fine by 2%. Furthermore, should the Commission wish to avoid such reductions, it could adopt a decision under Article 18(3) of Regulation No 1/2003. Undertakings that reply to requests for information significantly facilitate investigations and waive a number of procedural rights.

#### Findings of the Court

180 The General Court found, at paragraphs 840 to 853 of the judgment under appeal, that Weichert's response to a request for information made pursuant to Article 18(2) of Regulation No 1/2003 justified the grant, on account of that company's cooperation during the administrative procedure, of a reduction of the fine.

181 In that regard, where, in accordance with Article 18(2) of Regulation No 1/2003, the Commission sends a simple request for information to an undertaking or an association of undertakings, it is required to state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided.

182 In the present case, it is common ground that Weichert was not obliged to provide information by formal decision for the purpose of Article 18(3) of Regulation No 1/2003 but was requested to do so by a simple request for information under Article 18(2) of that regulation.

183 As Weichert merely replied to a simple request for information, it is clear that it did not provide information to the Commission without having been requested to do so.

184 In that regard, as the Advocate General observed at point 246 of her Opinion, a reduction of a fine, as provided for in the 2002 Leniency Notice, is justified only where an undertaking provides information to the Commission without being asked to do so. It is established case-law that the conduct of the undertaking concerned must not only facilitate the Commission's task of establishing the existence of the infringement but also reveal a genuine spirit of cooperation (see, to that effect, judgments in *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 395 and 396, and *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 48).

185 Any other interpretation would undermine both the purpose and the incentive effect of the leniency provisions as, first, it would have the effect of granting to all parties participating in a cartel a reduction of the fine if they provided to the Commission, at the Commission's request, useful information and/or evidence and, second, it would encourage undertakings to adopt a 'wait-and-see' approach rather than supplying the Commission, on their own initiative, and as quickly and as comprehensively as possible, with such information and evidence.

186 Accordingly, the General Court erred in law by finding, at paragraphs 840 to 853 of the judgment under appeal, that the response to the request for information under Article 18(2) of Regulation No 1/2003 justified a reduction of the fine.

187 Moreover, as is apparent from paragraphs 853 to 856 and 880 of the judgment under appeal, the General Court made the same error in law by granting, in the exercise of its unlimited jurisdiction, a 10% reduction of the fine to Del Monte and Weichert in respect of Weichert's cooperation during the administrative procedure, even though Weichert's conduct could not be regarded as revealing a genuine spirit of cooperation.

188 In those circumstances, the Commission's first ground of appeal in Case C-294/13 P must be upheld and the first point of the operative part of the judgment under appeal set aside.

*The second ground of appeal in Case C-294/13 P, alleging that Del Monte and Weichert did not form an economic unit during the administrative procedure*

189 As the Commission's second ground of appeal was put forward in the alternative and the first ground of appeal has been upheld, there is no need to examine the second ground.

### **The cross-appeals of Weichert and Del Monte in Case C-294/13 P**

#### *Arguments of the parties*

190 Del Monte is of the view that, in the event that the Court should grant the Commission's first ground of appeal in Case C-294/13 P, it will be necessary to examine whether the Commission's requests for information required Weichert to admit that it had infringed Article 81 EC. As the General Court did not rule on whether Weichert was entitled not to reply on the basis that the requests for information sought self-incriminating statements, the judgment under appeal contains an error of law.

191 Weichert also contends that if the requests for information entailed a legal obligation to reply, the right to protection against self-incrimination would apply and the General Court's observation that Weichert was not entitled to rely on that protection is no longer tenable. As Weichert was asked to explain in detail what was discussed during bilateral pre-pricing communications, in circumstances in which the Commission suspected that the purpose of the communications was to restrict competition, the questions would have compelled Weichert to admit to an infringement which it was incumbent on the Commission to prove.

192 The Commission disputes the arguments put forward by Weichert and Del Monte. Furthermore, it considers that Weichert's cross-appeal in Case C-294/13 P is inadmissible.

#### *Findings of the Court*

193 It is for the Court to assess whether, in the circumstances of the case, the proper administration of justice justifies the dismissal of Weichert's cross-appeal in Case C-294/13 P on the merits without ruling on the plea of inadmissibility raised by the Commission (see, to that effect, judgment in *Council v Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 52).

194 The Court finds that that is the case here. Even if that plea of inadmissibility were to be accepted, it would be necessary to examine the substance of Del Monte's arguments, which are, in essence, the same as those put forward by Weichert.

195 It is established case-law that protection against self-incrimination is not affected by requests for information made on the basis of Article 18(2) of Regulation No 1/2003 (see, to that effect, judgments in *Dalmine v Commission*, C-407/04 P, EU:C:2007:53, paragraph 35, and *Erste Group Bank and Others v Commission*, C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 272).

196 Any failure to provide the information requested on that basis within the period prescribed cannot lead to the imposition of a fine or a periodic penalty payment under Articles 23 and 24, respectively, of Regulation No 1/2003. A simple request for information is thus different from a formal decision adopted on the basis of Article 18(3) of Regulation No 1/2003, for which that regulation provides that pecuniary penalties may be imposed if no reply is forthcoming.

197 In the present case, it is sufficient to observe that the Commission did not adopt a decision under Article 18(3) of Regulation No 1/2003 in respect of Weichert.

198 In those circumstances, Weichert and Del Monte cannot properly claim that Weichert was entitled not to be compelled by the Commission to admit that it participated in an infringement (see, to that effect, judgments in *Dalmine v Commission*, C-407/04 P, EU:C:2007:53, paragraph 35, and *Erste Group Bank and Others v Commission*, C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 272).

199 It follows that the cross-appeals of Weichert and Del Monte in Case C-294/13 P must be dismissed.

### **The dispute at first instance**

200 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

201 In the present case, as only the first point of the operative part of the judgment under appeal, concerning the amount of the fine, is to be set aside, the Court has the necessary information to give final judgment on that amount.

202 In that regard, in order to correct the error established at paragraph 187 above and in the light of the considerations set out at paragraphs 183 to 185 above, it is necessary to reverse the 10% reduction of the fine granted by the General Court in recognition of Weichert's cooperation during the administrative procedure and, accordingly, to set that fine at EUR 9 800 000.

### **Costs**

203 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

204 In accordance with Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

205 Under Article 140(3) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the Court may order an intervener to bear its own costs.

206 As Del Monte and Weichert have been unsuccessful in all the proceedings and the Commission has applied for an order that those companies pay the costs in all those proceedings, they must be ordered to pay the costs. However, Weichert must be ordered to bear its own costs relating to the proceedings brought by Del Monte and the Commission.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the appeal in Case C-293/13 P and the cross-appeals in Cases C-293/13 P and C-294/13 P;**
2. **Sets aside point 1 of the operative part of the judgment in *Fresh Del Monte Produce v Commission* (T-587/08, EU:T:2013:129);**
3. **Sets the amount of the fine imposed in Article 2(c) of Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39 188 — Bananas) at EUR 9 800 000;**
4. **Orders Fresh Del Monte Produce Inc. to pay the costs relating to (i) the main appeals in Cases C-293/13 P and C-294/13 P and (ii) its cross-appeal in Case C-294/13 P, with the exception of the costs incurred by Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG, which is to bear its own costs relating to all those proceedings;**
5. **Orders Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG to pay the costs relating its cross-appeals in Cases C-293/13 P and C-294/13 P.**

[Signatures]