



## Reports of Cases

**Case T-587/08**

**Fresh Del Monte Produce, Inc.**

**v**

**European Commission**

(Competition — Agreements, decisions and concerted practices — Market in bananas — Decision finding an infringement of Article 81 EC — Information exchange system — Concept of a concerted practice having an anti-competitive object — Causal link between the collusion and the conduct of the undertakings on the market — Single infringement — Imputation of the infringement — Rights of the defence — Fines — Gravity of the infringement — Cooperation — Mitigating circumstances)

Summary — Judgment of the General Court (Eighth Chamber), 14 March 2013

1. *Competition — Union rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment — Presumption that a parent company exerts a decisive influence over its wholly-owned subsidiaries — Rebuttable nature — Burden of proof*

*(Arts 81 EC and 82 EC; Council Regulation No 1/2003, Art. 2)*

2. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply competition rules — Decision relating to several addressees — Need for a sufficient statement of reasons particularly with regard to the body having to bear the burden of an infringement*

*(Arts 81 EC, 82 EC and 253 EC)*

3. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement and its duration on the Commission — Probative value of voluntary statements by an undertaking participating in a cartel in response to a request for information from the Commission — Statements going against the interests of that undertaking — High probative value*

*(Council Regulation No 1/2003, Art. 2)*

4. *Judicial proceedings — Application initiating proceedings — Statement in intervention — Formal requirements — Brief summary of the pleas in law on which the application is based — Analogous requirements with regard to grounds in support of a plea — General reference to documents annexed to the application — Inadmissibility — Imprecise formulation of a claim — Inadmissibility — Absolute bar to proceeding — To be considered of the Court's own motion*

*(Art. 256 TFEU; Statute of the Court of Justice, Art. 21; Rules of Procedure of the General Court, Arts 44(1)(c) and 113)*

5. *Acts of the institutions — Statement of reasons — Contradiction — Effects*

(Art. 253 EC)

6. *Agreements, decisions and concerted practices — Concerted practice — Concept — Coordination and cooperation incompatible with the obligation on each undertaking to determine independently its conduct on the market — Exchange of information between competitors — Presumption — Conditions*

(Art. 81(1) EC)

7. *Agreements, decisions and concerted practices — Concerted practice — Adverse effect on competition — Criteria for assessment — Anti-competitive object — Sufficient — No anti-competitive effects on the market — Irrelevant — Distinction between infringements by subject matter and by effect*

(Art. 81(1) EC)

8. *Agreements, decisions and concerted practices — Concerted practice — Concept — Exchange of information between competitors — Adverse effect on competition — Assessment having regard to the nature of the infringement — Discussion between competitors of price-setting factors and the evolution of prices before setting their quotation prices — Infringement by subject matter*

(Art. 81(1) EC)

9. *Agreements, decisions and concerted practices — Concerted practice — Concept — Exchange of information between competitors — Adverse effect on competition — Assessment having regard to the calendar and the frequency of communications — Circumstances specific to the market and the subject matter of the concertation — Criteria for assessment — Need for a causal link between the concertation and the market conduct of the undertakings — Presumption of the existence of that causal link*

(Art. 81(1) EC)

10. *Agreements, decisions and concerted practices — Concerted practice — Concept — Exchange of information between competitors — Adverse effect on competition — Assessment having regard to the normal conditions of the market in question — Market subject to a specific regulatory context and organised in weekly cycles — Criteria for assessment*

(Art. 81(1) EC)

11. *Agreements, decisions and concerted practices — Concerted practice — Concept — Anti-competitive object — Criteria for assessment — No direct link between the concerted practice and consumer prices — Irrelevant*

(Art. 81(1) EC)

12. *Judicial proceedings — Intervention — Pleas different from those of the main party supported — Admissibility — Conditions — Connection with the subject matter of the case*

(Art. 256 TFEU; Statute of the Court of Justice, Art. 40, fourth para.; Rules of Procedure of the General Court, Art. 116(4))

13. *Agreements, decisions and concerted practices — Prohibition — Infringements — Agreements and concerted practices constituting a single infringement — Undertakings that may be held responsible for participating in an overall cartel — Criteria — Imputation of liability to an undertaking by reason of participation in the infringement considered as a whole despite its limited role — Lawfulness — Account taken when assessing the gravity of the infringement*

(Art. 81(1) EC)

14. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Scope — Communication of responses to the statement of objections — Refusal to communicate a document — Consequences — Need to make a distinction, at the level of the burden of proof on the undertaking concerned, between inculpatory and exculpatory documents*

(Council Regulation No 1/2003, Art. 27(2); Commission Notice 2005/C 325/C, Sections 8 and 27)

15. *Competition — Administrative procedure — Access to the file — Documents not appearing in the investigation file and not used by the Commission for prosecution purposes — Documents capable of assisting the defence of the parties — No obligation on the Commission to make those documents available to the parties of its own initiative — Obligation of the parties to ask for them to be made available*

(Council Regulation No 1/2003, Art. 27(2); Commission Notice 2005/C 325/C, paras 8 and 27)

16. *Competition — Administrative procedure — Statement of objections — Necessary content — Commission decision finding an infringement — Decision not identical to the statement of objections — Infringement of the rights of the defence — Condition — Demonstration by the undertaking concerned of the imputation of new objections*

(Council Regulation No 1/2003, Art. 27(1))

17. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Discretion of the Commission — No binding or exhaustive list of criteria*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02)

18. *Competition — Fines — Guidelines for the calculation of fines — Legal nature*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02)

19. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Principle of the individualisation of sanctions*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02)

20. *Judicial proceedings — Introduction of new pleas during the proceedings — Conditions — New plea — Concept — Analogous solution for complaints raised in support of a plea*

(Art. 256 TFEU; Rules of Procedure of the General Court, Art. 48(2))

21. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances — Passive or ‘follow-my-leader’ role of the undertaking — Criteria for assessment — Discretion of the Commission — Judicial review — Unlimited jurisdiction*

(Art. 229 EC; Council Regulation No 1/2003, Arts 23(2) and 31; Commission Notice 2006/C 210/02, Section 29, third indent)

22. *Competition — Fines — Amount — Determination — Guidelines adopted by the Commission — Mitigating circumstances — Existence of reasonable doubt as to the infringing character of the conduct penalised — None — Protection of legitimate expectations — Conditions*

(Council Regulation No 1/2003, Art. 23(2); Commission Notices 98/C 9/03 and 2006/C 210/02)

23. *Competition — Administrative procedure — Request for information — Rights of defence — Right to refuse to provide an answer implying recognition of the existence of an infringement*

(Council Regulation No 1/2003, twenty-third indent and Art. 18)

24. *Competition — Fines — Amount — Determination — Criteria — Reduction in the amount of the fine in return for cooperation of the undertaking concerned — Conditions — Discretion of the Commission — Judicial review — Unlimited jurisdiction*

(Art. 229 EC; Council Regulation No 1/2003, Arts 23(2) and 31; Commission Notice 2002/C 45/03, Sections 21 and 22)

25. *Competition — Fines — Amount — Determination — Criteria — Account taken of the cooperation of the undertaking in question with the Commission — Reduction for not disputing the facts — Conditions — Discretion of the Commission — Judicial review — Unlimited jurisdiction*

(Art. 229 EC; Council Regulation No 1/2003, Arts 23(2) and 31; Commission Notice 2002/C 45/03, Sections 21 and 22)

26. *Competition — Fines — Amount — Determination — Criteria — Account taken of the cooperation of the undertaking in question with the Commission — Discretion of the Commission — Previous decision-making practice — Indicative character — Respect for the principle of equal treatment — Scope — Not possible for undertaking to invoke the principle of equal treatment in order to secure an unlawful reduction*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 2002/C 45/03, Sections 21 and 22)

1. See the text of the decision.

(see paras 50-58, 67, 260, 281)

2. See the text of the decision.

(see paras 61-63, 250)

3. See the text of the decision.

(see paras 104, 364)

4. See the text of the decision.

(see paras 268-271, 273, 394, 541, 542)

5. See the text of the decision.

(see paras 278, 279)

6. See the text of the decision.

(see paras 296-299, 301-303, 565, 566)

7. See the text of the decision.

(see paras 304-306, 400, 546, 547)

8. In competition matters, it is necessary to distinguish between, on the one hand, competitors gleaning information independently or discussing future pricing with customers and third parties and, on the other hand, competitors discussing price-setting factors and the evolution of prices with other competitors before setting their quotation prices. Although the first type of conduct does not raise any difficulty in terms of the exercise of free and undistorted competition, the same cannot be said of the second type, which runs counter to the requirement that each economic operator must determine independently the policy which it intends to adopt on the common market, since that requirement of independence strictly precludes any direct or indirect contact between such operators with the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

Although certain information exchanged could be obtained from other sources, the establishment of such an exchange system enables the undertakings concerned to become aware of that information more simply, rapidly and directly and to undertake an updated joint assessment of that information, creating a climate of mutual certainty as to their future pricing policies.

By means of pre-pricing communications, the undertakings concerned may disclose the course of action which they contemplated adopting or at least enabled each of the participants to estimate competitors' future behaviour and to anticipate their intended course of action with regard to their quotation prices to be set. Those communications may thus decrease uncertainty concerning competitors' future decisions on quotation prices, with the result that competition between undertakings is restricted.

In that regard, the first example of a cartel given in Article 81(1)(a) EC, expressly declared incompatible with the common market, is precisely that which 'directly or indirectly fixes purchase or selling prices or any other trading conditions'. Pre-pricing communications which relate to the coordination of quotation prices concern the fixing of prices and give rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.

(see paras 344, 345, 368, 369, 584, 585, 765, 768)

9. In competition matters, with respect to the conditions in which unlawful concerted action can be established in the light of the question of the number and regularity of the contacts between competitors, the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference



simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

What matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which have taken place afford them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings have successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.

(see paras 351, 352)

10. In order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition and that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted. The competition rules prohibit any contact between economic operators where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.

If supply on a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if supply is fragmented, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market. An information exchange system may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market.

Sharing, on a regular and frequent basis, of information relating to future quotation prices which has had the effect of artificially increasing transparency on a market where competition is already reduced as a result of the specific regulatory context and earlier exchanges of information, particularly in a market organised in weekly cycles, constitutes a breach of the competition rules.

(see paras 371, 430-432, 548)

11. In competition matters, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited. On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they directly or indirectly fix purchase or selling prices or any other trading conditions.

Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. In particular, the fact that a concerted practice has no direct

effect on price levels does not preclude a finding that it limited competition between the undertakings concerned. Therefore, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

(see paras 459, 460, 548, 549, 769)

12. See the text of the decision.

(see paras 536-538, 717, 718)

13. See the text of the decision.

(see paras 587, 588, 590, 591, 637-639, 648)

14. See the text of the decision.

(see paras 655, 656, 662-668, 670, 688-690, 724)

15. See the text of the decision.

(see paras 657, 659)

16. See the text of the decision.

(see paras 706, 707)

17. See the text of the decision.

(see para. 749)

18. See the text of the decision.

(see para. 751)

19. See the text of the decision.

(see paras 754, 755)

20. See the text of the decision.

(see para. 792)

21. See the text of the decision.

(see paras 799-803)

22. See the text of the decision.

(see paras 824-827)

23. See the text of the decision.

(see paras 834-837)

24. See the text of the decision.

(see paras 841-844, 851, 854)

25. See the text of the decision.

(see paras 857-859)

26. In competition matters, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination. The Commission enjoys a wide discretion in setting the amount of fines and is not bound by assessments made by it in the past. The mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure.

Those general and imprecise considerations are not such as to show that there has been an infringement of any provision, and of Article 23 of Regulation No 1/2003 in particular, or of a general principle of law that would prove that the contested decision is unlawful and warrant a reduction of the fine. The only meaningful comparison in the context of a proceeding under Article 81 EC is that between those entities which cooperate voluntarily and those undertakings which refrain from any cooperation, since the latter cannot claim to be disadvantaged in relation to the former.

The principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party. Where an undertaking has acted in breach of Article 81 EC, it cannot escape being penalised altogether on the ground that other traders have not been fined when those traders' circumstances are not even the subject of proceedings before the Courts.

(see paras 862, 863, 865, 866, 869, 870)