



## Reports of Cases

### JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

14 March 2013\*

(Competition — Agreements, decisions and concerted practices — Market in bananas — Decision finding an infringement of Article 81 EC — Concept of a concerted practice having an anti-competitive object — Information exchange system — Obligation to state the reasons on which the decision is based — Rights of the defence — Guidelines on the method of setting fines — Gravity of the infringement)

In Case T-588/08,

**Dole Food Company, Inc.**, established in Westlake Village, California (United States),

**Dole Germany OHG**, established in Hamburg (Germany),

represented by J.-F. Bellis, lawyer,

applicants,

v

**European Commission**, represented initially by X. Lewis and M. Kellerbauer, and subsequently by M. Kellerbauer and P. Van Nuffel, acting as Agents,

defendant,

APPLICATION 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 GENERAL COURT (Eighth Chamber),

composed of L. Truchot, President, M.E. Martins Ribeiro (Rapporteur) and H. Kanninen, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 25 January 2012,

gives the following

\* Language of the case: English.

## Judgment

### Facts giving rise to the dispute

- 1 Dole Food Company, Inc. ('Dole') is a United States company and a producer of fresh fruit, fresh vegetables and packed and frozen fruits. Dole Germany OHG is a subsidiary of Dole (together 'the applicants'), established in Hamburg (Germany) and formerly known as Dole Fresh Fruit Europe OHG ('DFFE').
- 2 On 8 April 2005 Chiquita Brands International, Inc ('Chiquita') lodged an application for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the Leniency Notice').
- 3 On 3 May 2005, after Chiquita had submitted new declarations and additional documents, the Commission of the European Communities granted it conditional immunity from fines, in application of point 8(a) of the Leniency Notice.
- 4 After carrying out inspections pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) at the premises of various undertakings and, in particular, DFFE and sending, between February 2006 and May 2007, a number of requests for information pursuant to Article 18(2) of Regulation No 1/2003, the Commission sent a statement of objections on 20 July 2007 to Chiquita, Chiquita International Ltd., Chiquita International Services Group NV, Chiquita Banana Company BV, Dole, DFFE, Fresh Del Monte Produce Inc. ('Del Monte'), Del Monte Fresh Produce International Inc., Del Monte (Germany) GmbH, Del Monte (Holland) BV, Fyffes plc ('Fyffes'), Fyffes International, Fyffes Group Ltd, Fyffes BV, FSL Holdings NV, Firma Leon Van Parys NV ('Van Parys') and Internationale Fruchtimport Gesellschaft Weichert & Co. KG ('Weichert').
- 5 The undertakings mentioned in paragraph 4 above were given access to the Commission's investigation file in the form of a copy on DVD, apart from the recordings and transcriptions of the corporate statements made orally by the applicant for immunity and the documents relating thereto, which were made available at the Commission's premises (recital 49 to the contested decision).
- 6 Following the hearing of the undertakings concerned, which took place on 4 to 6 February 2008, Weichert sent the Commission a letter on 28 February 2008 containing comments and annexes.
- 7 On 15 October 2008 the Commission adopted Decision C(2008) 5955 final relating to a proceeding under Article 81 [EC] (Case COMP/39 188 – Bananas) ('the contested decision'), which was notified to DFFE and Dole on 21 and 22 October 2008.

### Contested decision

- 8 The Commission states that the undertakings to which the contested decision is addressed participated in a concerted practice consisting in coordinating 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 (1 December 2002 for Chiquita) (recitals 1 to 3 to the contested decision).
- 9 At the material time imports of bananas into the European Community were regulated by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1), which provided for a regime based on import quotas and tariffs. The Commission observes that while import quotas of bananas were set annually and allocated on a

quarterly basis with certain limited flexibility between the quarters of a calendar year, banana shipments to Northern European ports and the volumes marketed in that region were determined each week by production, shipment and marketing decisions taken by producers, importers and traders (recitals 36, 131, 135 and 137 to the contested decision).

- 10 The banana business distinguishes three levels of banana brands, called ‘tiers’: premium Chiquita brand bananas, second-tier bananas (Dole and Del Monte brands) and third-tier bananas (also called ‘thirds’), which included a number of other banana brands. This brand-division was reflected in banana pricing (recital 32 to the contested decision).
- 11 During the relevant period the banana business in Northern Europe was organised in weekly cycles. Banana shipping from Latin American ports to Europe took approximately two weeks. Bananas shipments to Northern European ports generally arrived on a weekly basis and were made according to regular shipping schedules (recital 33 to the contested decision).
- 12 Bananas were shipped green and were green on arrival at the ports. They were then either delivered directly to buyers (green bananas) or ripened and then delivered approximately one week later (yellow bananas). Ripening could be carried out by the importer or on his behalf or be organised by the buyer. Importers’ customers were generally ripeners or retail chains (recital 34 to the contested decision).
- 13 Chiquita, Dole and Weichert set their 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 (recitals 104 and 107 to the contested decision).
- 14 The prices paid by retailers and distributors for bananas (known as ‘actual prices’ or ‘transaction prices’) could be the result either of negotiations taking place on a weekly basis, in fact between Thursday afternoon and Friday (or later in the current week or the beginning of the following week) or of the implementation of supply contracts with pre-established pricing formulae mentioning a fixed price or linking the price to a quotation price of the seller or a competitor or another quotation price, such as ‘the Aldi price’. The Commission states that 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, is generally set at around 2 p.m. From the second half of 2002 ‘the Aldi price’ began to be increasingly used as an indicator for banana pricing formulae for a number of other transactions, in particular those relating to branded bananas (recitals 34 and 104 to the contested decision).
- 15 The Commission observes that the undertakings to which the contested 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 concerned set their quotation prices, usually on Wednesdays, and all related to future quotation prices (recital 51 et seq. to the contested decision).
- 16 Dole thus communicated bilaterally with both Chiquita and Weichert. Chiquita was aware or at least foresaw that Dole had pre-pricing communications with Weichert (recital 57 to the contested decision).
- 17 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 morning (recital 54 to the contested decision).

- 18 The Commission states that, after setting their quotation prices on Thursday morning, the undertakings concerned exchanged their quotation prices bilaterally. That subsequent exchange enabled them to monitor the individual pricing decisions in the light of the previous pre-pricing communications and reinforced their links of cooperation (recitals 198 to 208, 227, 247 and 273 et seq. to the contested decision).
- 19 According to the Commission, 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 through formulae based on quotation prices (recital 115 to the contested decision).
- 20 The Commission considers that the undertakings concerned, which participated in the concerted arrangement and remained active in the banana trade, must necessarily have taken account of the information received from competitors when determining their conduct on the market, while Chiquita and Dole even expressly admitted having done so (recitals 228 and 229 to the contested decision).
- 21 The Commission concludes that the pre-pricing communications, which took place between Dole and Chiquita and between Dole and Weichert, were liable to influence operators' pricing behaviour and concerned the fixing of prices and that they gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC (recitals 54 and 271 to the contested decision).
- 22 The Commission considers that all the collusive agreements described in the contested decision constitute 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 in which it participated, namely the part of the infringement relating to the collusive agreements with Dole (recital 258 to the contested decision).
- 23 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 practices covered a significant part of the Community, the Commission considers that those agreements had an appreciable effect on trade between Member States (recital 333 et seq. to the contested decision).
- 24 The Commission states that no exemption under Article 81(3) EC could be granted in the absence of any notification of agreements or practice by the undertakings, which is a precondition for the application of Article 81(3) EC pursuant to Article 4(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), and even of any evidence that the conditions for the grant of an exemption were satisfied in the present case (recital 339 et seq. to the contested decision).
- 25 The Commission states that Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129), which was in force at the material time and provided that Article 81 EC was to apply to all agreements, decisions and practices relating to production of or trade in various products including fruit, provided in Article 2 for a number of exceptions to the application of Article 81 EC. As the conditions for the application of those exceptions were not satisfied in the present case, the Commission concludes that the concerted practice described in the contested decision could not be exempted under Article 2 of Regulation No 26 (recital 344 et seq. to the contested decision).
- 26 For the purposes of calculating the amount of the fines, the Commission applied, in the contested decision, the provisions of 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 of the Leniency Notice.

- 27 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 (recital 448 to the contested decision).
- 28 Those calculations resulted in a basic amount of the fine to be imposed of:
- EUR 208 000 000 for Chiquita;
  - EUR 114 000 000 for Dole;
  - EUR 49 000 000 for Del Monte and Weichert.
- 29 The basic amount of the fine to be imposed was reduced by 60% for all the addressees of the contested decision, in view of the specific regulatory regime in the banana sector and on the ground that the coordination related to the quotation prices (recital 467 to the contested decision). A reduction of 10% was granted to Weichert, which had not been informed of the pre-pricing communications between Dole and Chiquita (recital 476 to the contested decision).
- 30 Following adjustment, the basic amounts of the fines to be imposed were as follows:
- EUR 83 200 000 for Chiquita;
  - EUR 45 600 000 for Dole;
  - EUR 14 700 000 for Del Monte and Weichert.
- 31 Chiquita was granted immunity from fines under the Leniency Notice (recitals 483 to 488 to the contested decision). No other adjustment was made for Dole or for Del Monte and Weichert, for which the final amount of the fines corresponded to the basic amounts of the fines to be imposed referred to in paragraph 30 above.
- 32 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 1 December 2002;
- Chiquita International Ltd from 1 January 2000 until 1 December 2002;
- Chiquita International Services Group NV from 1 January 2000 until 1 December 2002;
- Chiquita Banana Company BV from 1 January 2000 until 1 December 2002;
- [Dole] from 1 January 2000 until 31 December 2002;
- [DFFE] from 1 January 2000 to 31 December 2002;
- [Weichert] from 1 January 2000 until 31 December 2002;

— [Del Monte] from 1 January 2000 until 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 [DFFE], jointly and severally: EUR 45 600 000;
- [Weichert] and [Del Monte], jointly and severally: EUR 14 700 000.
- ...

#### **Procedure and forms of order sought by the parties**

- 33 By application lodged at the Court Registry on 24 December 2008, the applicants brought the present action.
- 34 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the General Court, requested the Commission to lodge certain documents.
- 35 On 10 November 2011, the Commission lodged the documents requested, which were notified to the applicants on 18 November 2011. The applicants did not submit any observations either in writing or orally.
- 36 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 25 January 2012.
- 37 At the hearing, the applicants submitted a document and requested that it be placed in the procedural file, to which the Commission objected.
- 38 The applicants claim that the Court should:
- annul the contested decision;
  - annul or reduce the amount of the fine imposed;
  - order the Commission to pay the costs.
- 39 The Commission contends that the Court should:
- dismiss the application;
  - order the applicants to pay the costs.



## Law

### I – Admissibility of the document submitted by the applicants at the hearing

- 40 It should be borne in mind that, according to Article 48(1) of the Rules of Procedure, a party may offer further evidence in reply or rejoinder, although that provision specifies that the party must, however, give reasons for the delay in offering it.
- 41 According to the case-law, the lodging of evidence offered after the rejoinder remains possible only where the person offering the evidence was unable, before the end of the written procedure, to obtain possession of the evidence in question, or if evidence produced belatedly by the other party justifies completing the file so as to ensure observance of the rule that both parties should be heard (Case T-172/01 *M v Court of Justice* [2004] ECR II-1075, paragraph 44, upheld on appeal by judgment of 14 April 2005 in Case C-243/04 P *Gaki-Kakouri v Court of Justice*, not published in the ECR, and Case T-51/07 *Agrar-Invest-Tatschl v Commission* [2008] ECR II-2825, paragraph 57).
- 42 As the Court of Justice has held, since it is an exception to the rules governing the lodging of evidence offered, Article 48(1) of the Rules of Procedure requires parties to give reasons for the delay in offering their evidence. That obligation implies that the court has the power to check the merits of the reasons given for the delay in lodging the evidence offered and, depending on the case, the substance of that evidence, as well as the power to disregard the evidence if the application is not sufficiently founded. The same applies, *a fortiori*, to offers of evidence made after the rejoinder is submitted (*Gaki-Kakouri v Court of Justice*, paragraph 41 above, paragraph 33).
- 43 In the present case, at the hearing, the applicants requested that a document containing statements by Chiquita regarding the supply of Aldi by Atlanta, a ripener-distributor, and the conditions, including the temporal conditions, under which that retailer made its offer on the banana market be added to the procedural file.
- 44 First, it is common ground that those statements by Chiquita were taken during the administrative procedure and are part of the Commission's investigation file.
- 45 Second, the applicants merely stated that the lodging of the document in question was explained by the need to reply to paragraph 49 of the Commission's rejoinder concerning the discussion on the distinction between green bananas and yellow bananas.
- 46 It is sufficient to note, in that regard, that, in that paragraph of the rejoinder, the Commission merely reproduces the language of the contested decision, according to which whether the importer would refer to a yellow price or green price may depend on how it organises sales of bananas and merely highlights the applicants' own statements, contained in the application, regarding the fact that the 'Aldi price', relating to the purchase of yellow bananas, was a very relevant factor for sales of green bananas.
- 47 The evidence offered in support by the applicants does not therefore relate to any new point, but deals with an issue raised from the start of the dispute, by the applicants, on the alleged distinction that must be drawn between green bananas and yellow bananas and the influence of the 'Aldi quote' on transaction prices.
- 48 Accordingly, the Court declares that the document submitted late by the applicants at the hearing is inadmissible.

## II – *The claims for annulment of the contested decision*

- 49 The applicants put forward a single plea in law, alleging that the Commission erred in finding the existence of a concerted practice having an anti-competitive object.
- 50 It is apparent from the applicants' pleadings that, in that plea, the applicants allege infringement, first, of Articles 81 EC and 253 EC and, second, of the rights of the defence and of Article 253 EC.

### A – *The infringement of Articles 81 EC and 253 EC*

1. Whether an exchange of information can be classified as a concerted practice having an anti-competitive object

- 51 In the first place, the applicants assert that the conduct in issue consisted in a mere exchange of information that did not form part of a broader cartel and was thus not a restriction of competition by object. They maintain that, according to the case-law, the mere fact that an information exchange might potentially reduce uncertainty over future pricing policies does not provide sufficient grounds to classify it as a restriction of competition by object.
- 52 The applicants state that the Commission wrongly relies on a number of cases involving exchanges of information which formed part of broader cartel arrangements, whereas the Commission does not maintain, as various passages of the contested decision show, that the undertakings involved in this case participated in an agreement or a concerted practice designed to fix actual prices, or in an agreement relating to quotation prices, or even in an agreement or a concerted practice designed to fix specific price increases or reductions.
- 53 First, with respect to the infringement referred to in the contested decision, it is unequivocally clear from the terms of that decision that the Commission alleges that the applicants coordinated quotation prices by means of bilateral pre-pricing communications, a situation which characterises a concerted practice concerning the fixing of prices and therefore having as its object the restriction of competition within the meaning of Article 81 EC (see, *inter alia*, recitals 1, 54, 261, 263 and 271 to the contested decision); this is not precluded by the fact that the Commission did not find, in the present case, that there had been an agreement or a concerted practice designed to fix actual prices, or an agreement relating to quotation prices, or even an agreement or a concerted practice designed to fix specific price increases or reductions.
- 54 It is therefore apparent that the exchange of information in question constitutes, according to the Commission, a cartel, which falls within the specific legal classification of a concerted practice.
- 55 In that regard, it should be borne in mind that the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, Case C-49/92 P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 131).
- 56 With regard to the definition of concerted practice, the Court of Justice has made clear that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 26; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 63; and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 26).



- 57 The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. In that regard, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period (Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 161 to 163, and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 51).
- 58 In the present case, the applicants may not rely on certain passages of the contested decision distinguishing the concepts of concerted practices and agreements as a basis for their claims regarding the absence of any objection, in that decision, concerning the fixing of prices.
- 59 Second, it should be noted that the argument that an exchange of information can constitute a restriction of competition by object only if it forms ‘part of broader cartel arrangements, such as cartels to fix actual prices or share markets’ lacks any foundation in law.
- 60 With regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (*Suiker Unie and Others v Commission*, paragraph 56 above, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others v Commission*, paragraph 56 above, paragraph 63; Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 86; and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 32).
- 61 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market 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 (see, to that effect, *Suiker Unie and Others v Commission*, paragraph 56 above, paragraph 174; *Züchner*, paragraph 60 above, paragraph 14; *John Deere v Commission*, paragraph 60 above, paragraph 87; and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 33).
- 62 It follows 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 (*John Deere v Commission*, paragraph 60 above, paragraph 90; Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 81; and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 35).
- 63 The Commission considers that the bilateral pre-pricing communications decreased uncertainty surrounding the future decisions of the undertakings concerned on quotation prices, which constitute announced prices, and adds, correctly, that concertation on such prices may also constitute an infringement by object (recital 284 to the contested decision).
- 64 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’ (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraphs 36 and 37).

- 65 In any event, 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. 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 (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraphs 38 and 39).
- 66 Irrespective of the reference, in the contested decision, to certain judicial decisions, it is for the General Court to ascertain whether, in the circumstances of the present case, the Commission was entitled to find that the exchanges of information between, on the one hand, Dole and Chiquita and, on the other hand, Dole and Weichert constituted a concerted practice having as its object the restriction of competition.
- 67 In the second place, the applicants claim that the Commission was wrong to find that the information exchange in issue constituted a restriction of competition by object and that, by doing so, it avoided the obligation to consider whether that information exchange had any anti-competitive effect.
- 68 As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the use of the conjunction ‘or’, means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, the analysis of the terms of the concerted practice does not reveal a sufficient degree of harm to competition, the consequences of the concerted practice should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see, to that effect, Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 15, and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 28).
- 69 In deciding whether a concerted practice is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraph 125; and *Beef Industry Development Society and Barry Brothers*, paragraph 68 above, paragraph 16). The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (*Beef Industry Development Society and Barry Brothers*, paragraph 68 above, paragraph 17, and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 29).
- 70 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. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 31).

- 71 In the present case, since the Commission found that the pre-pricing communications between the undertakings concerned had given rise to a concerted practice having an anti-competitive object, it was not required, in accordance with the abovementioned case-law, to examine the effects of the impugned conduct in order to be able to find that there had been an infringement of Article 81 EC.
- 72 In the third place, the applicants claim that, in order to depart from the case-law which has established that information exchanges are not generally ‘sufficiently deleterious’ to merit being classified as restrictions of competition by object, even where the information exchanged is intended actually to influence the fixing of prices, the Commission, in recital 315 to the contested decision, drew an artificial distinction between ‘pre-pricing’ communications and ‘ex post’ exchanges of information and maintained that the present case concerns the former, which are considered more serious. That distinction is not supported by any judicial decision and even contradicts the case-law which requires that the structure of the market and the characteristics of the communications be taken into consideration.
- 73 As the Commission rightly states, that argument of the applicants is based on an incomplete reading of the contested decision, since recital 315 must be read in the light of all the analysis carried out by the Commission in that decision.
- 74 The Court notes, in that regard, that the Commission uses the generic expression ‘pre-pricing communications’ to designate the concerted practice concerning the coordination of quotation prices and having as its object a restriction of competition within the meaning of Article 81 EC following the analysis carried out in recitals 259 to 272 to the contested decision. The pre-pricing communications are defined in recitals 51, 148 and 182 to the contested decision as exchanges during which the undertakings concerned discussed banana price factors, that is to say, factors relevant to the setting of quotation prices for the forthcoming week, discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week. Those communications took place before the parties set their quotation prices and all related to future quotation prices.
- 75 The Commission also refers to an ‘exchange of quotation prices’, the terms of which are also set out in recital 51 to the contested decision, as follows:
- ‘... Once they had set their quotation prices on Thursday mornings, the parties bilaterally exchanged these prices or at least had a mechanism in place, which enabled them to bilaterally exchange information about quotation prices set ...’
- 76 It is apparent from recitals 51, 198, 227, 248, 250 and 257 to the contested decision that, for the Commission, those exchanges of quotation prices formed an element of the undertakings’ cartel arrangements, since they served to monitor individual pricing decisions taken on the basis of the information exchanged in the pre-pricing communications, and did not therefore constitute a separate infringement, but a mechanism for monitoring the outcome that contributed to the same aim.
- 77 As regards recital 315 to the contested decision, its purpose is merely to reply to an argument of the undertakings to which the statement of objections is addressed according to which the pre-pricing communications are merely exchanges of information, which can infringe Article 81 EC only if anti-competitive effects are established. In that recital, the Commission draws a distinction between the present case and the case, relied upon by those undertakings, which led to the adoption of Commission Decision 92/157/EEC of 17 February 1992 relating to a proceeding pursuant to Article [81 EC] (Case IV/31.370 and 31.446 – UK Agricultural Tractor Registration Exchange) (OJ 1992 L 68, p. 19), concerning an information exchange system that gave rise to an infringement of Article 81 EC on account of its anti-competitive effects on the market.

- 78 The Commission confines itself to stating that the pre-pricing communications were not ex-post exchanges of information, that is to say relating to transactions that had already been completed, as in the UK Agricultural Tractor Registration Exchange case, but that they gave rise to the disclosure of the course of conduct which competitors contemplated adopting in the market concerning the future setting of their quotation prices.
- 79 Contrary to the applicants' assertions, the Commission does not carry out, on this occasion, any comparison or classification of the types of exchanges of information in terms of harmfulness for competition according to whether they took place before or after the fixing of the transaction prices and does not claim that the first type of exchange is more serious and is sufficient to establish, without any further assessment, a restriction of competition by object.
- 80 The only distinction on which the Commission relies in recital 315 to the contested decision is that between agreements having an anti-competitive object and those having an anti-competitive effect, a distinction which is permitted by the case-law.
- 81 Referring to recitals 263 to 271 to the contested decision, the Commission states that the concerted practice involving Dole has as its object a restriction of competition within the meaning of Article 81 EC and that, '[t]herefore, the Commission does not need to analyse the structure of the market' or 'characteristics of the communications or information communicated in the light of criteria set out in the UK Agricultural Tractor Registration Exchange case'.
- 82 It is not permissible to interpret that citation, as the applicants do, as proof that the Commission failed to have regard, in the present case, to the requirements laid down by case-law concerning the assessment of whether exchanges of information between competitors are consistent with the competition rules. The only significance of that citation is the mere differentiation that must be made with a situation in which a finding of infringement of Article 81 EC results from taking into account the restrictive effects on competition of an information exchange system.
- 83 The express reference to recitals 263 to 271 to the contested decision, in which the Commission draws attention to certain characteristics of the information exchange system between the undertakings concerned and to the fact that it took account of the context in which that system was conducted, is sufficient to contradict the applicants' interpretation.
- 84 In any event, as will be explained below, the Commission evaluated the practice in issue by taking account of the content, frequency and duration of the bilateral communications and of the legal and economic context in which those discussions took place.
- 85 It follows that the Court must reject the applicants' argument mentioned in paragraph 72 above.

## 2. The existence of a concerted practice having an anti-competitive object

### a) Chiquita's lack of credibility

- 86 The applicants claim that the Commission's conclusion that the information exchange in question constitutes a concerted practice on price-fixing, and therefore a restriction of competition by object, is based virtually exclusively on the way in which Chiquita described that conduct during the administrative procedure, even though that undertaking is entirely lacking in credibility.
- 87 They plead, in that regard, the personal interest that Chiquita had in characterising the conduct in question as an infringement, the very telling manner in which the administrative procedure was conducted and the existence of manifest contradictions.



- 88 It must be stated, as a preliminary point, that the applicants' arguments, which seek to discredit in a general manner Chiquita's evidence, are based on an incorrect premiss, since Chiquita's statements are only one of the elements taken into account by the Commission as a basis for its findings, in combination with Dole's and Weichert's own statements and documentary evidence, such as telephone records and electronic messages, all those elements having been examined and compared in such a way as to disclose both the evidence for and against the existence of a concerted practice.
- 89 The specific nature of the practice in issue, namely the fact that the bilateral communications in issue took place orally and that the parties informed the Commission that they had no notes or records of those communications none the less explains the importance of the statements made by the undertakings during the administrative procedure.
- 90 In the first place, as regards the personal interest that Chiquita had in classifying the conduct in issue as an infringement, the applicants state that Chiquita's submission, on 8 April 2005, of an application for immunity on the basis of the Leniency Notice was linked with the acquisition, announced six weeks earlier, of the 'Fresh Express' business from the Performance Food group. In the applicants' submission, Chiquita could not finalise its acquisition of the 'Fresh Express' business, which was of considerable strategic importance for Chiquita, without removing the concerns expressed by the banks financing the operation, following the review of Chiquita's operations, and it was only on 28 June 2005, after obtaining conditional immunity on 3 May 2005, that Chiquita announced the completion of the acquisition.
- 91 The Court observes that the applicants' argument does not correspond to the inherent logic of the procedure provided for in the Leniency Notice. The fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice (Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, paragraph 70).
- 92 On the assumption that the applicants' claims as to the motives for the immunity application submitted by Chiquita are correct, they are not such as to remove all credibility from the statements of that undertaking. The existence of a personal interest in reporting the existence of a concerted practice does not necessarily mean that the person doing so is unreliable.
- 93 The concerns of the operators who were to finance the acquisition of Chiquita and their interest, to that end, in determining as well as they could the risk relating to the situation of the borrower may equally be regarded as concrete evidence reinforcing the evidential value of Chiquita's statements as to the actual existence of a cartel.
- 94 Moreover, and above all, the applicants' portrayal of the action taken by Chiquita on 8 April 2005 as being solely to Chiquita's advantage is misleading since it disregards a certain and potentially negative consequence relating to Chiquita's recognition of its participation in a cartel. Although the application for immunity gave Chiquita grounds for hoping that it would escape any punishment by the Commission, its admission of its participation and the Commission's subsequent decision finding an infringement of Article 81 EC exposes that undertaking to an action for damages by third parties in order to compensate the loss suffered on account of the anti-competitive conduct in issue, which may lead to serious financial consequences for Chiquita.
- 95 That conclusion is also such as to qualify the applicants' claim on Chiquita's alleged expectation that the competing undertakings would bear a financial handicap at the end of the administrative procedure.



- 96 In the second place, the applicants refer to the conduct of the administrative procedure, claiming that the Commission itself stated that Chiquita lacked credibility, since it rejected virtually all the allegations put forward by Chiquita on the ground that they were unfounded, including in relation to the participation of Fyffes and Van Parys in the alleged cartel, and was forced to hold a ‘state of play’ meeting with Chiquita. The latter identified the bilateral communications in issue and stated that they had an anti-competitive object only after that meeting.
- 97 The applicants observe that Chiquita’s leniency application of 8 April 2005 contained the following passage:
- ‘The application concerns the business of distribution and marketing of imported bananas, as well as pineapples and other fresh fruit. Major banana suppliers in Europe including Switzerland and Norway are [Chiquita], [Dole], Del Monte, [Fyffes], Ireland and Grupo Noboa SA Ecuador hereinafter Noboa.
- Among the banana importers concerted actions in breach of Article 81 [EC] took place from approximately the beginning of the 1990s (or earlier) until April 2005. In the past four to five years participants of the concerted actions were Chiquita, Dole, Del Monte, Fyffes and Noboa, and maybe still today or previously also other smaller banana suppliers like Durbeck. In the banana segment, the above mentioned companies engaged in the regular exchange of volume and price information for future deliveries to Europe and to their individual European customers.
- The companies also engaged in direct concerted actions on prices, be it on overall reference prices for Europe with respect to certain European customers.’
- 98 It is therefore apparent that the leniency application related specifically to ‘banana importers’ and their participation in concerted action ‘in the past five years’.
- 99 The terms of the contested decision show that Chiquita’s statements, unlike the applicants’, were largely taken into account by the Commission. First, it is common ground that, of the five importers mentioned, three were addressees of the contested decision. Second, it was found in the Decision that volume information had been exchanged, although that exchange was not ultimately relied upon as a constituent element of the infringement (see recitals 136 and 272 to the contested decision). Third, an exchange of information, in the form of pre-pricing communications, relating to importers’ and suppliers’ quotation prices, was relied upon in the contested decision to establish the existence of a concerted practice having an anti-competitive object of three years’ duration, which was included in the limited period referred to more specifically in the leniency application.
- 100 In any event, the finding that the infringement ultimately established in the contested decision does not correspond on all points to the information contained in the leniency application in relation to the object of the unlawful conduct, its duration and the number of undertakings concerned and punished is not capable of showing that the author of that application and its statements, on which the Commission’s findings on the existence of an infringement of Article 81 EC are based in part, are devoid of credibility.
- 101 The outcome – highlighted by the applicants – of the administrative procedure carried out by the Commission even contradicts their assertion that ‘the Commission too easily accepted Chiquita’s claim that there was some form of a cartel among banana importers in Northern Europe’ and did not carry out a ‘critical review’ of Chiquita’s statements.
- 102 The applicants’ desire to discredit Chiquita’s evidence led them to put forward contradictory reasoning by which they seek both to criticise the Commission for having relied almost exclusively on Chiquita’s statements, unreservedly and without critical analysis, and to underline the differences between those statements and the content of the contested decision.

- 103 Moreover, Chiquita's evidence cannot be discredited in a wholesale manner on the basis of a Commission letter requesting Chiquita to submit its observations on 'possible' discrepancies between the initial leniency application and subsequent statements, and from the holding of a meeting on 20 October 2006, during which the Commission and Chiquita had an exchange of views on the comparison of evidence contained in the leniency application and that resulting from inspections and requests for information.
- 104 The Court notes that the applicants, which had access to the investigation file, assert merely that Chiquita mentioned pre-pricing communications after the state-of-play meeting of 20 October 2006 and do not provide any evidence such as to contradict the Commission's observation that Chiquita first mentioned those pre-pricing communications in July–August 2005 (statements Nos 11 and 12), that is more than one year before that meeting was held.
- 105 In recital 149 to the contested decision, in which it is stated that, '[w]hen Chiquita informed the Commission about its pre-pricing communications with Dole, it submitted that their topics had been sales and market conditions and price factors as well as official price quotes concerning bananas', reference is made to page 9 227 et seq. of the Commission's file, which corresponds to Chiquita corporate statement No 12, of 25 August 2005. Moreover, Annex A 6 to the application corresponds to Chiquita statement No 28, in which Chiquita provides clarification on the conduct of its former employee, Mr B., who was engaged in communications with competing undertakings, and recalls having described what it knew of those communications in the earlier statements No 11, of 4 July 2005, No 12, of 25 August 2005, and No 13, of 20 January 2006.
- 106 In the third place, Dole observes that the evidence of Chiquita's employee, Mr B., concerning the bilateral communications with one of Dole's employees, Mr H., contains a number of internal inconsistencies which raise serious doubts as to its accuracy and its reliability and is also contradicted by the evidence supplied by Dole's employee.
- 107 First, the applicants refer to the variations of Chiquita's statements concerning the timing of the communications, in which Chiquita claims that exchanges took place on Mondays and Tuesdays and then on Wednesdays and Thursdays.
- 108 That situation is clearly explained in recitals 71 to 74, and 156 to the contested decision, from which it is apparent that, after additional interviews with Chiquita's present and former employees and a review of the phone records of its former employee, Mr B., Chiquita clarified its initial statement by stating that the calls generally took place on Wednesday late afternoons and typically there was a second call early on Thursday morning, before, or sometimes immediately before, the internal Chiquita conference call that preceded its pricing decision.
- 109 The Court would point out that Dole consistently admitted, in its replies to requests for information, that the telephone calls took place on Wednesday afternoons and, albeit very rarely in Dole's submission, on Thursday mornings (recital 73 to the contested decision), and that the corporate statements are supported by the available phone records of Mr B., which show the telephone calls made by Mr B. to Mr H., records in relation to which the applicants submitted no observations.
- 110 Second, as regards the origin of the phone calls, the applicants draw attention to an initial statement by Chiquita according to which '[s]ometimes Mr H. of Dole called Mr B. first, sometimes Chiquita called Dole first', then a second statement according to which 'most of the time, Mr H. called Mr B.'; that second statement was moreover contested by Mr H.
- 111 The abovementioned statements by Chiquita do not disclose a genuine contradiction, but a clarification regarding the prevailing origin of the calls, and it cannot be validly claimed on the basis of Dole's objection on that point that Chiquita's evidence is entirely unreliable, whereas that evidence is supported by Dole, which stated that its employees, Messrs H. and G., were in communication with

Mr B., a Chiquita employee, and that, ‘Mr H. may have very rarely contacted Mr B. on Wednesday afternoon if Dole had not heard from him on Wednesday afternoon, and in particular, if there was some unusual circumstance in market developments’ (recitals 60 and 61 to the contested decision).

112 On the basis of those elements, the Commission was entitled to find, without being challenged in that respect by the applicants, that Chiquita and Dole had indeed been in communication, even if the parties have a different recollection as regards the person at the origin ‘most of the time’ of the contacts and that, moreover, both parties admit that their own employees also contacted the other party on occasions (recital 62 to the contested decision).

113 Third, the applicants observe that Mr B. claimed that Dole would communicate its ‘likely intention ... on how Dole set the prices for the upcoming week’, and then claimed later in the same statement that the purpose of the calls was to get a ‘final indication from Dole as to its intention on the expected price setting’.

114 That same complaint was set out by Dole in its reply to the statement of objections, which prompted the following response by the Commission in recital 169 to the contested decision:

‘As a general remark, the Commission observes that given that these communications were pre-pricing communications, the pricing indications or intentions communicated to competitors could not have been a final quotation price, which was set only the following day. Moreover, Chiquita in its corporate statement indicates that for it the purpose of communications was to get a “final indication” from Dole as to “its intention on the expected price”. This clearly shows that Chiquita did not claim that what was communicated by Dole was a final price. Chiquita furthermore submits that Mr B.’s pricing recommendation was based on “the likely intention of Dole” which he learned during his pre-pricing communications with Dole. The Commission considers that these statements are not inconsistent and it is clear from them what the purpose of these communications was for Chiquita.’

115 The mere mention, in the application, that Mr H. recalled only discussions relating to ‘indicative quotation price trends’ is not capable of contradicting the Commission’s finding referred to above and of substantiating the claims of inconsistency and ensuing unreliability of Chiquita’s evidence.

116 Fourth, the discrepancy between Chiquita and Dole in terms of the determination of the exact frequency of the exchanges does not necessarily mean, as the applicants imply, that Chiquita’s evidence is unreliable.

117 The issue of the frequency of the bilateral communications between Dole and Chiquita is examined in recitals 76 to 86 to the contested decision and the Commission took account of the replies of Dole, which admitted that those bilateral communications took place approximately 20 times per year (recital 83 to the contested decision).

118 It follows from all the foregoing considerations that the applicants’ arguments by which they seek to discredit in a general manner Chiquita’s evidence because that evidence allegedly lacks credibility must be rejected.

b) The incompatibility of Dole’s and Chiquita’s operating methods with the collusion alleged

119 The applicants claim that the Commission’s theory that the purpose of the bilateral communications between the parties was to coordinate their quotation prices is inconsistent with the fact that Chiquita and Dole were each setting quotation prices for different products, different customers and different weeks in the banana market three-week cycle. In the applicants’ submission, it was not even

theoretically possible to coordinate quotation prices on the basis of the information exchanged, since the products sold by Chiquita and those sold by Dole were two entirely different products which did not compete on the same market.

- 120 The quotation price set by Chiquita related to ripened bananas to be delivered to retailers, while the quotation price set by Dole related to unripened bananas to be delivered to ripener-distributors. The applicants maintain that Chiquita set its yellow quotation price for bananas that had arrived in Northern European ports the previous week and were delivered to retailers the following week, whereas Dole set its green quotation price for bananas arriving in Northern Europe the following week and were delivered to retailers only after two weeks.
- 121 That situation was not unique to Germany, where the only price that Chiquita made available externally to its customers was a yellow quotation price, since its subsidiary Atlanta acted as ripener/distributor. Chiquita informed the Commission that the pricing decisions taken on Thursdays for the Nordic countries also related to bananas that were already being ripened.
- 122 Lastly, the applicants allege that the Commission failed to explain clearly and unequivocally its position, thereby infringing Article 253 EC, and, in particular, by failing ‘to adequately explain how the exchange of information of factors allegedly relevant to the establishment of quotation prices for green bananas could be of any relevance for the prices of yellow bananas’.

#### The alleged infringement of Article 253 EC

- 123 It is apparent from the wording of the complaint set out in the preceding paragraph, and more specifically from the use of the adverb ‘adequately’, and from the content of the arguments set out by the applicants, that that complaint does not relate, strictly speaking, to an infringement of essential procedural requirements for the purposes of Article 230 EC. The complaint in issue overlaps, in reality, with the criticism of the merits of the contested decision and therefore of the substantive legality of that act, which is alleged to be illegal in view of the Commission’s failure to demonstrate the existence or even the very possibility of the existence of unlawful coordination between Dole and Chiquita.
- 124 Moreover, even on the assumption that an infringement of Article 253 EC has been pleaded, it would be unfounded.
- 125 The Court observes that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission v Sytraval and Brink’s France* [1998] ECR I-1719, paragraph 63 and the case-law cited).
- 126 In addition, while, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 253 EC to set out at least the facts and considerations having decisive importance in the scheme of the decision, thereby enabling the Union judicature and the persons concerned to know the



circumstances in which it has applied the Treaty (see, to that effect, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141, paragraph 95 and the case-law cited).

- 127 In the present case, the Commission, in recitals 4, 5, 32, 34, 104, 141 to 143, 182, 196 and 287 to the contested decision, explained with sufficient precision and clarity its position as regards the single nature of the relevant product, namely fresh bananas, the specific nature of that product, namely fruit which is imported green and sold for public consumption once it has become yellow, after it has been ripened, the manner in which ripening is organised and, subsequently, in which bananas are marketed, the process of commercial negotiation with quotation prices and the link between the quotation prices of green and yellow bananas.
- 128 Moreover, the Court would point out that the applicants' arguments by which they seek to establish, in essence, that Dole's and Chiquita's activities were compartmentalised and desynchronised, thus making collusion on quotation prices by means of the bilateral communications impossible were not raised during the administrative procedure.
- 129 It is common ground that the statement of objections stated expressly that the relevant product consisted of banana (fresh fruit) and alleged three collusive practices, namely:
- exchanges of information concerning arrival volumes of bananas into Northern Europe (exchange of volume information);
  - bilateral communications on banana market conditions, price trends or indications of quotation prices before those prices were set;
  - exchange of banana quotation price information (exchange of quotation prices).
- 130 In paragraph 429 of the statement of objections, the Commission found unequivocally that 'each complex of bilateral arrangements' and the network of arrangements constituted an infringement having an object of restricting competition in the Community and the European Economic Area (EEA) within the meaning of Article 81 EC and Article 53 of the EEA Agreement.
- 131 In its reply to the statement of objections, Dole contested the existence of any infringement, but did not in any way, to that end, claim that there was a substantial difference in the manner in which its bananas were marketed by reference to Chiquita's. Although it is indicated that, unlike for Dole and the remainder of the sector, quotation prices had some very limited and discrete uses for Chiquita because of its own particular business practices, that observation relates solely to 'Dole plus' agreements where the transaction price of Chiquita-branded bananas depended in actual fact on the weekly quotation price set by Dole.
- 132 Attention is even drawn, in Dole's reply to the statement of objections, to the constant rivalry that existed between the banana importers and, 'in particular, between Dole and Chiquita', the latter being described as Dole's 'biggest rival'.
- 133 It is appropriate at this stage to recall that explanations or clarifications capable of casting light on the wording of the contested act may be provided in the course of the proceedings (see, to that effect, Joined Cases 36/59, 37/59, 38/59 and 40/59 *Präsident and Others v High Authority* [1960] ECR 423, at p. 440; Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 11, and the Opinion of Advocate General Léger in that case, ECR I-867, point 24). The Court of Justice has held that where the author of a contested decision provides explanations to supplement a statement of reasons which is already adequate in itself, that does not go to the question whether the duty to state reasons has been complied with, though it may serve a useful



purpose in relation to review by the Courts of the European Union of the adequacy of the grounds of the decision, since it enables the institution to explain the reasons underlying its decision (see, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 61).

134 In the present case, the clarifications made in the course of the proceedings by the Commission, in reply to the specific complaint raised by the applicants for the first time during the procedure before the Court, merely elucidated the statement of reasons already contained in the contested decision, that statement of reasons encompassing the various ways in which bananas imported into Northern Europe were distributed, inter alia by Dole and Chiquita.

135 It follows that no infringement of Article 253 EC can in any event be alleged against the Commission.

#### Substance

136 The Court takes the view that the complaint put forward by the applicants cannot be upheld, since it is based on an unsubstantiated and incorrect premiss, according to which green and yellow bananas are entirely different products which fall within two separate markets on which Dole, on the one hand, and Chiquita, on the other, operated exclusively.

137 The applicants' proposition does not correspond to the reality of the relevant market as it ensues from the Commission's findings in the contested decision, statements made by Dole and Chiquita during the administrative procedure and the applicants' own pleadings.

138 As is apparent from the grounds set out below, those findings and statements, which are supported by documentary evidence, reveal the existence of a banana market (fresh fruit) characterised by a coexistence and concomitance of Dole's and Chiquita's activities of sales of green and yellow bananas, communication between those two undertakings, in a spirit of perfect mutual understanding, on the price of green bananas for Northern Europe and the fact that the price of yellow bananas was set on the basis of the price of green bananas.

139 In the first place, the Court would point out that, in the contested decision, the Commission clearly defines the relevant sector and, in particular, the relevant product as fresh bananas, as well as the functioning of the relevant market.

140 The Commission specifies that both unripened (green) bananas and ripened (yellow) bananas are covered by the contested decision and that sales of fresh bananas are defined as sales of bananas minus dried bananas and plantains (recital 4 to the contested decision).

141 It is apparent from the contested decision that bananas imported into Northern Europe were grown mostly in the Caribbean region, Central America and some African countries (recital 5 to the contested decision). During the relevant period the banana business in Northern Europe was organised in weekly cycles. Banana shipping from Latin American ports to Europe took approximately two weeks. Banana shipments to Northern European ports generally arrived on a weekly basis and were made according to regular shipping schedules (recital 33 to the contested decision). Bananas were shipped green and were green on arrival at the ports. Before they could be consumed they needed to be ripened (recital 34 to the contested decision).

142 The Commission states that bananas were either delivered directly to buyers (green bananas) or ripened and then delivered approximately one week later (yellow bananas), which reflected the fact that ripening could either be organised by the buyer, or carried out by the importer or on his behalf (recital 34 to the contested decision).

- 143 According to the Commission, Chiquita, Dole and Weichert set their quotation prices for their branded bananas each week, in practice on Thursday mornings, and communicated them to their customers (recitals 34 and 104 to the contested decision). The expression ‘quotation prices’ usually referred to quotation prices for green bananas (‘green quote’). Quotation prices for yellow bananas (‘yellow quote’) were normally the green quote plus a ripening fee (recital 104 to the contested decision), quotation prices for green bananas determining quotation prices for yellow bananas (recital 287 to the contested decision).
- 144 Quotation prices set by the parties weekly were relevant for Northern Europe. Chiquita stated that ‘[q]uote prices related to “Northern Europe” were set to Germany (including Austria, Sweden, Finland and Denmark) and the Benelux countries’ and that, when it talked about the German ‘green price’ with Dole, ‘that covered the prices relevant for the other Northern European countries’ (recitals 104 and 141 to the contested decision).
- 145 The documents found at Dole during the inspection show that that undertaking had a quotation price known as the ‘North Europe EU 15’ price and separate prices for Norway, ‘North Europe EU 10’ countries, France, Italy and the United Kingdom. Dole stated, in its reply to the statement of objections, that this price was a German price. Dole also clearly explained that its ‘green sales are generally based on one weekly price’ and that ‘presumably all competitors knew that quotation prices [discussed at pre-pricing communications] referred to the EU-15 [not disclosed information] markets’ (recitals 104, 142 and 143 to the contested decision).
- 146 The Commission states that on Thursday afternoons and Fridays (or later in the current week or the beginning of the following week), banana importers negotiated prices with customers, when transactions were based on weekly negotiated prices. Importers’ customers were generally ripeners or retail chains. The yellow price was the price for ripened bananas, whereas the green price was the price for unripened bananas (recital 34 to the contested decision).
- 147 The Commission also explains that there is a certain level of differentiation through brand preference. The banana business distinguished three levels of banana brands, called ‘tiers’: premium Chiquita brand bananas, second-tier bananas (Dole and Del Monte brands) and third-tier bananas (also called ‘thirds’, which included a number of other banana brands). This brand-division is reflected in banana pricing, with Chiquita bananas commanding the highest price, followed by Dole- and Del Monte-branded bananas, the third-tier bananas being at the lower scale (recital 32 to the contested decision).
- 148 According to the Commission, it is in the context of the functioning of the banana market thus described that the various pre-pricing communications between Dole and Chiquita occurred, during which those two undertakings discussed demand and supply conditions or, in other words, price-setting factors, that is, factors relevant to the setting of quotation prices for the forthcoming week and discussed or disclosed price trends and indications of quotation prices for the forthcoming week before quotation prices were set (recitals 148, 182 and 196 to the contested decision).
- 149 In the second place, the Court would point out that, in support of the complaint alleging that there was not even any possibility of collusion between Dole and Chiquita on quotation prices and in response to that complaint, the parties each provided clarifications on the manner in which those two undertakings operated.
- 150 First, as regards Dole, the Commission states that its German subsidiary, DFFE, sold ‘mainly’ green bananas to German retailers who had their own ripening capacity and to European ripeners (recital 12 to the contested decision).
- 151 It is apparent from the case-file and the applicants’ pleadings that Dole’s business also involved the sale of yellow bananas.

- 152 Thus, during the administrative procedure, Dole referred to the situation of retailers requesting DFFE to communicate a yellow quote (Annex B 9).
- 153 The applicants also explained that Dole owned several subsidiaries operating as ripeners-distributors in Northern Europe, namely Kempowski, Saba and VBH. Those undertakings sold Dole-branded yellow bananas, which were purchased green, inter alia, from Dole, in the case of Saba and VBH. Moreover, a small part of Dole's sales of yellow bananas in 2002 in Belgium and Luxemburg was carried out by its French subsidiary.
- 154 It is apparent from the data communicated by the applicants that Dole's subsidiaries sold EUR 98 177 616 of yellow bananas in 2002, whilst the total amount of Dole's sales of fresh bananas in 2002 amounted to EUR 198 331 150, a figure revised downwards to EUR 190 581 150 after subtracting the amount of bananas purchased from the other addressees of the contested decision (recitals 451 to 453 to the contested decision).
- 155 Saba and VBH sold EUR 64.4 million and EUR 13.9 million of bananas in Northern Europe in 2002, respectively, of which EUR 29.4 million and EUR 8.3 million was accounted for by Dole-branded bananas. The German subsidiary Kempowski, which purchased its bananas from Cobana rather than from Dole, sold EUR 16.8 million of bananas in Northern Europe in 2002, of which approximately EUR 2.9 million were Dole-branded bananas. The total amount of sales of Dole-branded bananas by subsidiaries of Dole acting as ripeners amounted in Northern Europe in 2002 to EUR 40.6 million, that is slightly less than half the value of DFFE's sales of green bananas, which was estimated at EUR 99 451 555 during the administrative procedure and subsequently at EUR 98 997 663 in these proceedings.
- 156 Moreover, it should be noted that one of the complaints made by the applicants in relation to the Commission's determination of the sales values for the purpose of calculating the amount of the fine is a specific complaint about the extent of the sales volume of yellow bananas by Dole.
- 157 It is apparent from the findings referred to above that, according to the applicants' own reasoning in relation to Chiquita's control of Atlanta, Dole conducted a business of selling yellow bananas to retailers that did not have their own ripening capabilities and had a genuine interest as regards that business. Although the documents produced by the applicants at the hearing show that there was some form of concrete affiliation of Atlanta to Chiquita before 2003, the year during which Chiquita increased its initial shareholding by only 5% in order to take official control of Atlanta, there can be no doubt whatsoever that Kempowski, Saba, VBH and Dole France were subsidiaries throughout the infringement period, since this was fully acknowledged by the applicants.
- 158 Second, with respect to Chiquita, it is apparent from the case-file that, according to the applicants' own definition used in paragraph 31 of the application, the term 'quotation prices' can 'mean either green or yellow quotation prices'.
- 159 In the course of the proceedings, the Commission produced internal reports on Chiquita's prices entitled 'European price updates'.
- 160 Those reports include, for each week of a calendar year, tables mentioning, on the one hand, arrival volumes of Chiquita bananas, aggregated banana arrival volumes of its competitors and of banana undertakings and, on the other hand, Chiquita's prices and those of its competitors. Those tables also make comparison possible with data pertaining to the previous week and to the same week of the previous year.

161 With respect to Chiquita's prices, the reports systematically contain the entry 'Germany (Euro) Yellow' followed by a price then, on the same line, another price EUR 2 lower, corresponding to the 'Euro Quote', followed by an entry referring to the German mark mentioning a differential of 4 German marks (DEM) between the two prices.

162 Internal emails are often annexed to those reports and those emails set out the essential information and, in particular, for a given week, Chiquita's 'green price' and 'yellow price' referred to above, the yellow price being systematically EUR 2 higher than the green price.

163 Those documents throw light upon Chiquita's statement according to which '[r]oughly speaking, the green quote is the yellow quote minus Euro 2' and, thereby, the convertible nature of those prices.

164 In corporate statement No 1, Chiquita states as follows:

'Every Thursday morning, Chiquita internally determined the Chiquita quoted green price for the following week. In hardly any case, the list price is the actual price charged to Chiquita's customers. The quote prices are wholesale reference prices before discount and rebates. Upon that internal decision, Chiquita's Country Managers informed their customers about the quote for the next week.'

165 It should be noted that, during the administrative procedure, Chiquita stated that, '[w]ithin Europe, the fruit is distributed either to wholesalers/ripeners like Atlanta (Germany) or directly to retailers (doing their own ripening)'. As regards specifically its business in Germany, Chiquita stated that it sold bananas to Atlanta, to wholesalers and directly to retailers, whilst specifying that in recent years it had continuously started selling bananas directly to retailers.

166 It is therefore apparent that green sales were not made only to Atlanta, a ripener-distributor with which Chiquita had close links, and that Dole and Chiquita shared a common customer base.

167 An internal email from Mr B. to Mr P. (both managers of Chiquita) on 30 April 2001, which is referred to in recital 107 to the contested decision, corroborates the existence of sales of green bananas by Chiquita. That email is worded as follows:

'It has been proven that as soon as [Dole/Del Monte/Tuca] reach a quote of DEM 36.00 their customers (retailers) resist as at that quote level the consumer price has to go over DEM 3.00/kg. No doubt this "phenomena" will stay with us for a while. This would mean our ceiling quote will be DEM 40.00 (green quote).'

168 The express wording of that email shows that, contrary to the applicants' assertions, Chiquita's green price was not merely a theoretical concept aimed at facilitating, internally, comparison with competitor's quotes.

169 Dole's own statements confirm the fact that Chiquita had a green quote for its bananas.

170 Thus, it is stated in the application that Saba, Dole's Swedish subsidiary that operated as a ripener-distributor, sourced green bananas from various importers, including Chiquita.

171 In its reply to the statement of objections, Dole criticised the Commission's definition of its market share resulting from the Commission's taking account of the sale of yellow bananas whereas the investigation related to imports of green bananas. Dole added that the double-counting issue was not limited to its case and stated that 'Chiquita has both green sales to retail and wholesale customers, as well as yellow sales that are distributed by its ripening networks in the Benelux, Germany and Austria'.

- 172 That statement, in which Chiquita's business of sales of green bananas is placed on the same footing as that of its sales of yellow bananas, also shows that it is not possible to argue that the distribution of Chiquita's yellow bananas was carried out solely by Atlanta.
- 173 The Court notes, in that regard, that Chiquita was the largest supplier of bananas in Europe (recital 8 to the contested decision) and that, in 2001, the total amount of its sales of fresh bananas amounted to EUR 347 631 700 (recitals 451 to 453 to the contested decision).
- 174 It is apparent from the foregoing considerations that an analysis of the market which seeks to portray Dole and Chiquita as merely carrying out a single marketing activity, of green bananas in Dole's case, and of yellow bananas in Chiquita's case, with an exclusive relationship between Chiquita and Atlanta, is unfounded.
- 175 Both Dole and Chiquita sold, first, green bananas to ripeners and retailers who themselves organised the ripening of the fruit and, second, yellow bananas through subsidiaries and a linked company or, in the case of Chiquita, by organising ripening and by using external ripeners to that end.
- 176 An excerpt from the economic study of 10 April 2007, submitted by Dole, confirms the variable nature of the contractual arrangements concluded between the various 'banana' market players. It states that, '[s]ometimes green bananas are sold by banana companies directly to supermarkets, who then pay a ripener a service fee to transport and ripen the bananas', that, '[i]n other cases the ripeners buy the green bananas from the banana companies and negotiate on their own behalf with retailers' and that 'some of the banana companies own their own ripeners; others rely on third parties to ripen their product'. Chiquita also stated that, sometimes, importers ripened the fruit themselves and 'sold yellow' and that some retailers had their own ripening centres and 'bought green'.
- 177 It is therefore apparent, as the Commission rightly maintains, that whether an importer refers to a yellow price or to a green price depends simply on the way in which it organises its sales of bananas: if it sells them to ripeners green, or to retailers which organise the ripening of the fruit themselves, it will communicate a green quotation price, whilst if it arranges for the ripening itself by using an external ripener or ripens the fruit in the facilities of its subsidiaries or similar companies and then sells the bananas ripe to retailers, it will use a yellow quotation price.
- 178 Third, it should be noted that all the abovementioned activities took place within a single time 'pattern' which was described in the same terms by Dole and Chiquita during the administrative procedure.
- 179 Dole and Chiquita describe a chronology for selling bananas corresponding to a three-week cycle which can be broken down as follows:
- Thursday morning of the first week: importers set the quotation prices of their bananas and announce them to their customers;
  - Thursday afternoon of the first week, to the end of that week, or to Monday of the second week: importers negotiate transaction prices with purchasers;
  - Monday of the second week (sometimes end of the second week): vessels arrive in European ports, the bananas are discharged and transported to ripening centres;
  - beginning of the third week (sometimes end of the second week): ripened bananas are placed on the market for consumption.



- 180 That timetable is consistent with the Commission's finding in recital 34 to the contested decision, according to which bananas were either delivered directly to buyers (green bananas) or ripened and then delivered approximately one week later (yellow bananas), a formulation which summarises the distribution process and highlights the fact that the ripening period for all bananas could not readily be reduced.
- 181 Setting out in paragraph 34 of the application the abovementioned time 'pattern', the applicants stated that the 'banana market' traditionally followed a very tight pre-set weekly timetable in terms of how and when pricing negotiations between 'importers and their respective customers' took place. In addition to making that statement of a general nature concerning the functioning of a single market that included all the importers, the applicants specified the objective and overriding reason which dictated such a timetable, namely the fact that bananas are highly perishable products, which means that it is necessary to set rapidly the transaction price for the purposes of efficient clearance of banana arrivals each week.
- 182 It should be noted that it is in the context of that three-week cycle thus described that Dole- and Chiquita-branded bananas were marketed by subsidiaries or a linked company, operating as ripener-distributors, by means of a yellow quotation price announced to retailers on the Thursday morning of the second week.
- 183 As is apparent from a statement by Chiquita set out in Annex C 5 to the reply, relating to transactions effected in certain Nordic countries, and from the content of an email sent, on 2 January 2003, by an Atlanta employee to a Chiquita employee, that yellow quotation price was set while the bananas were in the process of being ripened, therefore during the second week, and those bananas were delivered yellow to retailers as of the following week, that is at the beginning of the third week.
- 184 According to Dole's own statement, the time 'pattern' according to which Saba and VBH distributed yellow bananas corresponded to that of Atlanta; a yellow price was communicated to customers on the Thursday of the second week for fruit that was being ripened and which had been purchased green the previous week, and the yellow bananas were delivered to retailers at the beginning of the following week.
- 185 In the third place, it must be observed that a market configuration marked by a coexistence and concomitance of the activities of selling green and yellow bananas carried out by Dole and by Chiquita is consistent with the Commission's finding that there was unlawful collusion between those two undertakings.
- 186 It is necessary, in that regard, to assess the statements of Dole and Chiquita and the documentary evidence relating to the activities of those undertakings in the light of two elements.
- 187 First, it is apparent from the file that Dole and Chiquita discussed, during their various pre-pricing communications, demand and supply conditions or, in other words, price-setting factors, that is, factors relevant for the setting of quotation prices for the forthcoming week and discussed or disclosed price trends and indications of quotation prices for the forthcoming week before quotation prices were set (recitals 148, 182 and 196 to the contested decision).
- 188 In its oral statement 28, in which it described its communications with Dole, Chiquita stated that 'Chiquita and Dole referred to European quotes, i.e. the German "official price", green'. It should be recalled that the internal reports on Chiquita's prices systematically contain the entry 'Germany (Euro) Yellow' followed by a price then, on the same line, another price EUR 2 lower, corresponding to the 'Euro Quote', that is to say Chiquita's green price.
- 189 Chiquita added that, when it talked with Dole about the German 'green price', 'that covered the prices relevant for the other Northern European countries'.

- 190 The Commission states that the documents found at Dole during the inspection show that that undertaking had a 'North Europe EU 15' price, described by that undertaking as a German price, which does not contradict Chiquita's explanation (recital 143 to the contested decision). Dole states, in reply to a request for information, that 'presumably all competitors knew that quotation prices [discussed at pre-pricing communications] referred to the EU-15 [not disclosed information] markets' (recital 143 to the contested decision).
- 191 When asked what prices Dole and Chiquita discussed or disclosed in their 'pre-pricing communications', in response to a request for information, Dole answered that '[t]he quotation price referred to the EU-15 Northern markets'.
- 192 It should be borne in mind that Dole stated, at page 130 of its reply to the statement of objections, that 'Mr. [H.] has explained that he and Mr. [B.] might sometimes say that they expected prices to go up by 1 Euro or 50 cents, but no agreement on a price increase ever existed' and that '[a]t most, the men simply were exchanging their personal views as to how the quotation prices of Chiquita and Dole may evolve' (recital 158 and recital 170 to the contested decision, footnote 217).
- 193 As regards the discussions on indicative quotation prices or price trends, Dole itself submits that that 'occurred during about half of the Wednesday afternoon discussions with Chiquita' (recital 153 to the contested decision).
- 194 The statements by Dole and Chiquita and the Commission's findings reveal the situation of two undertakings communicating, in a spirit of perfect mutual understanding, on the price of green bananas for Northern Europe.
- 195 It must be stated that the applicants do not contest that bilateral discussions took place and the Commission's findings, but seek to reduce the significance of the communications in issue to mere gossip on general market conditions, that gossip itself forming part of a permanent exchange of information, generally known as 'Radio Banana', between operators on that market.
- 196 The content of the bilateral communications, as reported by Dole itself, is not, however, consistent with that view of the applicants, and nor is it consistent with a banana market characterised by the compartmentalisation and desynchronisation of Dole's and Chiquita's activities.
- 197 Second, it is apparent from the case-file that the quotation price of green bananas is decisive for that of yellow bananas.
- 198 As is apparent from paragraphs 157 to 161 above, examination of the internal reports on Chiquita's prices reveals a yellow price corresponding to the green quote plus a EUR 2 ripening fee.
- 199 Dole clearly admitted and explained the link between the price of green bananas and yellow bananas.
- 200 First of all, Dole stated, during the administrative procedure (Annex B 9), that the green purchase price provided the basis for determining the price of yellow bananas sold by Saba, Kempowski and its French subsidiary. When describing the business of its French subsidiary, Dole also explained that green purchase prices served to prepare yellow quotation prices that were subsequently sent to customers by email, fax, or notified to them by telephone.
- 201 Dole explained that its Belgian subsidiary VBH sent its weekly price to certain customers (Metro, Delhaize, Carrefour) for bananas delivered yellow, and that that price was based on the green quotation price sent by DFFE, plus the add-ons specified in VBH's contract with its customer. Dole stated that '[t]his yellow price includes ripening, delivery [and] distribution, bagging, and other product specifications that each customer may request' and that 'the price varies with the weekly

green price and add-ons'. Dole also stated that '... the retailer contracts ... provide for a price formula (i.e., yellow price = (green price communicated by DFFE (+) add-ons due to product specifications and logistics costs (-) rebates))'.

202 Having submitted, in the application, that Dole's subsidiaries set yellow banana prices 'without reference to any green quote', the applicants claimed, in the reply (footnote 5), that, while it is true that VBH set its pricing for three customers in the manner set out in the previous paragraph, this was only 'after' the alleged infringement ended. In particular, VBH applied such pricing to Delhaize and Carrefour during the period 2004 and 2005, and Metro during the period 2004 to 2006. They claimed that these contracts were referred to in Dole's response to the Commission's request for information dated 10 February 2006 which covered the period 'from 2000 to date'. When the Commission decided to limit its finding of an infringement to the period 2000-2002 in the contested decision, it failed to check whether the information provided concerned that period.

203 It must be stated that examination of the annexes to the defence has not brought to light anything to justify the applicants' claims as to the application *ratione temporis* of the method of setting the prices in question. Moreover, the applicants do not adduce any specific and objective evidence capable of proving the veracity of their claims, and do not even provide any information on how VBH determined its prices for the period 2000 to 2002. It was clear that, in the Commission's request for information of 10 February 2006, the period referred to started on 1 January 2000. Since Dole's reply does not provide any information of a restrictive nature regarding the date of implementation of the method of setting the prices in question in the contracts between VBH and its customers Metro, Delhaize and Carrefour, it is not possible to argue that that reply could not cover the entirety of the period referred to, including the period from 2000 to 2002.

204 In any event, leaving aside any question of a temporal nature, those statements of Dole made during the administrative procedure support Chiquita's statements and the information provided by the applicants themselves in the application on the link between prices of green and yellow bananas, which was known to the market before, during and after the infringement period referred to in the contested decision.

205 The applicants explain, in the application (paragraph 41), that DFFE sold green bananas by means of agreements negotiated on a weekly basis or of long-term supply agreements with a fixed price formula called 'Aldi plus agreements'. With respect to those agreements, the applicants state that, 'although these agreements concerned the sale of green bananas to ripener/distributors, the prices were based on the purchase price set by Aldi for yellow bananas converted into an equivalent green banana price' and that 'this would be done by deducting from the Aldi (yellow) price a standard charge of € 3.07 per box, representing the charges for (green) banana transportation from the port to the ripening centre, ripening fees, pre-packaging fees, and transportation fees incurred from the ripening facility to the Aldi distribution centre'.

206 In this respect, it should be observed that the applicants submit that the decisive factor for the actual price of bananas in Northern Europe was the quote made by Aldi, a very important retailer on the German market, the largest market in Northern Europe, which sourced only non-branded yellow bananas. The applicants assert, in paragraph 47 of the application, that 'Aldi's pricing for yellow bananas served as a reference price for all purchasers of bananas, whether green or yellow, in Northern Europe'. They therefore claim that the yellow 'Aldi price' served as a reference for the sale of green bananas.

207 Lastly, the Court observes that the applicants referred, in their arguments relating to the necessary distinction between green and yellow bananas put forward in support of the complaint alleging that Dole's and Chiquita's operating methods were incompatible with the collusion alleged, to Saba's, Kempowski's, VBH's and Dole France's autonomy in determining their pricing policy.

- 208 That argument is irrelevant since the Commission found that the infringement of Article 81 EC was committed by Dole, the ultimate parent company of the Dole group, and since, although that undertaking claimed that there had not been any anti-competitive conduct, it did not, however, dispute in these proceedings its liability as parent company of the Dole group.
- 209 Moreover, the applicants confined themselves to communicating statements by the directors of Kempowski and Saba alone, claiming that those companies were autonomous whilst acknowledging that they were exclusive subsidiaries of Dole, from 1 January 2005 in the case of Saba.
- 210 It should be noted that, during the administrative procedure (Annex B 9), Dole stated that all Dole's sales to Saba were managed by Dole's commercial team for Northern Europe, that is to say by DFFE, independently of Dole's directors in Saba. Dole also specified that VBH sourced bananas from DFFE and that, each Thursday, DFFE communicated its green price (or Dole quotation price) to VBH for the following week. In Dole's submission, VBH did not play any role in setting or modifying the green price, as it did not act as an importer, but only as a ripener-distributor.
- 211 In any event, the alleged autonomy of Dole's subsidiaries does not contradict the fact that the price of green bananas served as the basis for the price of yellow bananas.
- 212 Next, the applicants stated, at the hearing, that Dole's quotation prices for green bananas, which were set on the Thursday of the first week, reflected the anticipated conditions on the retail market in the third week, given that, after the fruit was ripened during the second week, yellow bananas were delivered to retailers at the beginning of the third week.
- 213 Finally, that latter observation must be examined in conjunction with the content of the pre-pricing communications between Dole and Chiquita, as reported by those undertakings.
- 214 Chiquita stated *inter alia* that it evaluated with Dole 'sales and other price factors relevant for the price determination of the upcoming week', Chiquita and Dole informing 'each other about the conditions of their respective sales at the retail level i.e. yellow sales' (recital 149 to the contested decision).
- 215 Dole confirmed that its communications with Chiquita concerned 'market conditions' and that market condition assessments included, *inter alia*, 'ripeners' yellow stocks' (recital 152 to the contested decision).
- 216 The Court observes that, with respect to the communications with Weichert, which, it is not claimed, was engaged exclusively in sales of yellow bananas, Dole stated that, on Wednesday afternoons, there was a discussion as to how it and Weichert 'saw the market in the current week and how they thought the market might develop in the following week'. Dole added that '[e]xpected market demand was assessed by discussing the market situation (such as whether there were anticipated left-over import stocks at the ports or whether ripeners' stocks of yellow bananas were not being ordered by supermarkets due to declining consumer demand)' (recital 183 to the contested decision and Dole's reply to the request for information of 30 March 2006).
- 217 The foregoing considerations demonstrate the relevance of the finding that there was concerted action between Dole and Chiquita in order to set, during the first week, the price of green bananas, which was announced to ripener-distributors and retailers who themselves organised ripening of the fruit and which constituted the basis for the price of yellow bananas, which was announced to retailers in the first or second week according to the manner of distribution of the fruit, which was delivered at the beginning of the third week.



- 218 In the fourth place, it is in the context of the functioning of the banana market, as set out above, that it is necessary to place and assess the two main documents on which the applicants rely in support of the claim that Chiquita and Dole were each setting quotation prices for different products, different customers and different weeks in the banana market three-week cycle.
- 219 The applicants relied, first of all, on a statement by Chiquita annexed to the reply, relating to its pricing policy in certain Nordic countries, which states that, ‘as a general rule, pricing decisions are taken in Week A for Week B, i.e. the fruit contracted on Thursday will be delivered in the following week’ and that ‘the fruit is already ripening when negotiations with customers are taking place’.
- 220 The applicants then refer to the content of an email of 2 January 2003 from an Atlanta employee to a Chiquita employee, which reads as follows:
- ‘Although I realize that Chiquita in the last couple of weeks has always followed the Dole pricing (namely downwards), in this case the Dole recommendation could not and should not have been followed. The pricing of Chiquita is a yellow quote which is true for deliveries as of next week Monday. The Dole quote, that was originally increased by Euro 0,50 this morning, is a green quote which will be materialized in yellow only the week after next week, not before.’
- 221 An examination of the entire content of the message shows that it relates to a change in the yellow quotation price of Chiquita-branded bananas distributed by Atlanta, which had already been communicated to customers following an increase in the quotation price of Dole’s green bananas that occurred on the same morning that that message was sent, namely on Thursday 2 January 2003. That date is immediately after the infringement period and the message, which also mentions pricing movements during the last two weeks of 2002, therefore remains relevant for the purposes of understanding how the relevant market functioned.
- 222 As was explained in paragraphs 182 to 184 above, the two documents in question concern one of the various ways in which bananas are marketed, in this instance the situation in which the importer sells its green bananas to a subsidiary or a linked company operating as a ripener-distributor, which then markets, by means of a yellow quotation price set on the Thursday of the second week while the fruit is being ripened, those bananas which are delivered yellow to retailers at the beginning of the third week.
- 223 Contrary to the applicants’ assertions, that situation does not reflect a systematic time-lag of one week in the process of marketing Dole’s and Chiquita’s bananas, resulting in the desynchronisation of the activities of those undertakings which is incompatible with the unlawful coordination alleged against them.
- 224 The abovementioned situation necessarily falls within the single time ‘pattern’ described by the applicants themselves and recalled in paragraph 179 above.
- 225 The email in question mentions an upwards movement in the yellow quotation price of Chiquita-branded bananas distributed by Atlanta, which was set and announced on the Thursday of the second week for fruit in the process of ripening, which had arrived green on the Monday of the second week and had to be delivered yellow at the beginning of the third week, following an increase in the quotation price for Dole’s green bananas, which was set and communicated on the same Thursday of the second week for fruit in the process of being transported before arriving green on the Monday of the third week and being delivered yellow two weeks later, at the beginning of the fourth week.
- 226 That situation must be assessed not in isolation but set in the context of a continuously operating market, with a shipment of green bananas arriving at Northern European ports at the beginning of each week, the bananas being placed in ripening centres for the same period of approximately one



week, and then yellow Dole- and Chiquita-branded bananas being put on the market. Both Dole- and Chiquita-branded bananas were initially green before becoming yellow after ripening and appearing on the same supermarket or other retailers' shelves for final consumers throughout the year, in accordance with the same time 'pattern'.

- 227 Thus, the yellow Chiquita bananas referred to in the email from the Atlanta employee were part of a green banana shipment arriving in Northern European ports at the beginning of the second week and for which a green price had been set on the Thursday of the first week. Within the same timeframe, there would be a shipment of green Dole bananas and a quotation price would be set for them.
- 228 All those bananas were intended to be placed on the market for consumption within the same period of time, that is approximately a week after their discharge and placement in ripening centres, in accordance with various arrangements, and thus at the beginning of the third week.
- 229 That last finding must be viewed in conjunction with another observation of the Atlanta employee.
- 230 In his email of 2 January 2003, that employee criticises the increase in the yellow quotation price, which had already been communicated to customers. That employee states that that decision is a commercial error, since 'the price difference in the market has risen' and that it 'will be more difficult for next week to find and keep Chiquita customers'.
- 231 That statement attests, in addition to the importance of the issue of price differentials between the various banana brands, to the existence of a competing supply of yellow bananas during the third week. That is precisely the time when Dole-branded bananas – which arrived at the ports at the beginning of the second week and were distributed yellow by ripeners, independent undertakings or subsidiaries of Dole – were placed on the retail market.
- 232 In addition to those chronological considerations, which are apparent from the analysis of the document relied upon by the applicants, it should be borne in mind that the first step in the marketing of an arrival of bananas for a given week consisted in the setting of a green price by all importers on the same day, Thursday, which represented both the quote for green bananas addressed to ripener-distributors or to retailers who themselves organised the ripening of the fruit, and the basis for the yellow price announced to retail customers by the importer or by ripener-distributors.
- 233 Lastly, it can be observed that the email in question also corroborates the existence of a variety of activities by Chiquita and of its green quote. Thus, the Atlanta employee argues that the criticism made in the case of an increase in Dole's quotation price does not apply in the event of a price reduction. He observes that price reductions are always 'true' not only for the 'coming week green' but also for the fruit which is in the ripening rooms.
- 234 In the fifth place, it should be noted that the applicants claim, as was observed by the Commission in recital 106 to the contested decision, that quotation prices were published in the trade press. An examination of issues of the *Sopisco News* magazine – which was published each Saturday prior to the conclusion of the commercial negotiations according to Dole – concerning two weeks of 2002 reveals the existence of a table entitled 'Banana selling prices in Euro at the Hamburg market for deliveries next week'.
- 235 That table mentions a quotation price by importer and a range of actual prices by importer, except in respect of Chiquita, in relation to which the maximum actual price corresponded to the quotation price indicated. Thus, the *Sopisco News* publication refers only to a single quotation price which is comparable for all the importers, including Dole and Chiquita.

- 236 At the hearing, the applicants claimed that the official price concerning Chiquita referred to in that publication was a yellow price and that there was no indication of that undertaking's actual prices since no data relating to sales of green bananas were sent to *Sopisco News*.
- 237 However, it must be observed that the quotation prices for Chiquita set out in the two issues of *Sopisco News* submitted during the proceedings correspond to the green prices of that undertaking, as referred to, under the expression 'actual week', in the internal reports on Chiquita's updated prices on 27 June and 18 July 2002, and that the same correspondence therefore also exists with Dole's and Del Monte's quotation prices.
- 238 The mere fact that data on Chiquita's green sales were not sent to *Sopisco News* cannot necessarily lead to the conclusion that no such sales existed.
- 239 Moreover, it is common ground that the table set out in the *Sopisco News* publication concerns only the activity of importers relating to the port of Hamburg (Germany), whereas those operators also used other ports and, in particular, those of Antwerp (Belgium), Gothenburg (Sweden), Bremerhaven (Germany), where Atlanta's headquarters were located, and Zeebrugge (Belgium). It should be noted that the two issues of *Sopisco News* submitted at the hearing also contain tables providing information on the transport and arrivals of bananas, as well as on vessel names, shippers with the volume transported and the destination ports of the goods. It is apparent from those issues that only the port of Hamburg, unlike the ports of Gothenburg and Bremerhaven, was not used by Chiquita as a destination and unloading point, in Northern Europe, for vessels loaded with bananas.
- 240 It follows from all the foregoing considerations that the applicants' complaint that it was not possible that there was any unlawful coordination between Dole and Chiquita because of the difference in their operating methods is unfounded.
- 241 It should be added, in this respect, that with the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (Case C-389/10 P *KME Germany and Others v Commission* [2011] ECR I-13125, paragraph 131).
- 242 That requirement, which is procedural in nature, does not conflict with the rule that, in regard to infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded (*KME Germany and Others v Commission*, paragraph 241 above, paragraph 132).
- 243 In the present case, the Court takes the view that the Commission has demonstrated to the requisite legal standard that, in the context of the organisation and functioning of the banana market at the material time, banana importer-suppliers, of which Dole and Chiquita formed part, were able, by means of their bilateral discussions, to coordinate unlawfully quotation prices in respect of their branded bananas for the following week.
- 244 The written observations and the documents submitted to the Court by the applicants are, by contrast, insufficient to show that Dole's and Chiquita's respective operating methods were incompatible with such coordination and some of those observations and documents have even corroborated the collusion alleged against those two undertakings.

- 245 At the hearing, the applicants also asserted that Chiquita sold its green bananas above all to its subsidiary Atlanta. Referring to the undisputed fact that Chiquita had ‘Dole plus agreements’, the applicants argued that Chiquita’s weekly sales of green bananas were very limited. They also claimed that Chiquita’s quotation price remained ‘yellow’ for sales of green bananas.
- 246 It must be stated that those assertions are not substantiated by any specific and objective evidence and that the mere finding of the proven existence of ‘Dole plus agreements’ does not provide a basis for drawing conclusions on the transaction volume of Chiquita green bananas.
- 247 The applicants’ statements on the sale by Chiquita of green bananas by means of a yellow quote moreover merely underline the limited autonomy of yellow and green prices – an autonomy on which the applicants base their arguments – which has already been demonstrated by the convertible nature of those prices.
- 248 It follows that the complaint that Dole’s and Chiquita’s respective operating methods were incompatible with coordination of their quotation prices as alleged by the Commission must be rejected.

c) The unlawful coordination of Dole’s, Chiquita’s and Weichert’s quotation prices

Identification of the unlawful discussions

- 249 The applicants state that the Commission has not identified in a clear and unequivocal fashion the different kinds of information being exchanged that it considered to be unlawful.
- 250 It is apparent from the wording of that complaint that the applicants seek thereby to criticise the Commission’s observance of the obligation to state reasons laid down in Article 253 EC.
- 251 The Commission describes the content of the pre-pricing communications in section 4.4.4 of the contested decision. After stating that the bilateral communications in issue were conducted over the telephone and that the undertakings concerned informed the Commission that they had no notes or records of those communications, the Commission specifies that it relied on the statements of those undertakings and on contemporaneous documents in order to describe with sufficient precision the content of the bilateral communications in issue.
- 252 The Commission asserts that Dole and Chiquita, as well as Dole and Weichert, discussed, during their various pre-pricing communications, conditions of supply and demand or, in other words, price-setting factors, that is, factors relevant for the setting of quotation prices for the forthcoming week and discussed or disclosed price trends and indications of quotation prices for the forthcoming week before quotation prices were set (recitals 148, 182 and 196 to the contested decision).
- 253 In support of that claim, the Commission refers to the relevant statements of Dole and Chiquita, in recital 149 et seq. to the contested decision, as follows:

‘(149) When Chiquita informed the Commission about its pre-pricing communications with Dole, it submitted that their topics had been sales and market conditions and price factors as well as official price quotes concerning bananas. In its later corporate statements Chiquita elaborate[d] on its initial statements. It submits that such communications on Wednesday afternoons “covered in general the market situation and other important market factors as well as a general pricing intention” ... According to Chiquita, during pre-pricing communications, Mr [B.] (Chiquita) and Mr [H.] (Dole) “evaluated sales and other price factors relevant for the

price determination of the upcoming week”. ... “In addition, Chiquita and Dole informed each other about the conditions of their respective sales at the retail level i.e. yellow sales (Abverkauf)” ...

- (150) Chiquita submits that “Dole usually declared vis-à-vis Chiquita whether its prices would ‘go up’ (gehen wir hoch), ‘go down’ (gehen wir runter) or ‘stay put’ (bleiben wir beim Preis stehen) in the upcoming week compared to the prices of the current week. The response of Chiquita could be either a statement like ‘that sounds reasonable’ or like ‘we will see what we will do’. Sometimes, Chiquita was more specific and also declared what Chiquita intended to do in the upcoming week.” According to Chiquita, in practically all of these communications, Mr [B.] and Mr [H.] discussed the price intentions.
- (151) Chiquita submits that “... the ultimate topic in Mr [B.]’s calls with Mr. [H.] was to evaluate whether there were chances to increase the prices in the upcoming week, i.e. whether it would be also the intention of the respective other company to increase the prices. It was important to find out whether there was still room for price increase.” Chiquita states that “[i]f the information on next week’s price changes was not specific the general understanding was that the current price would go up or down by 50 cents. However, sometimes Dole and Chiquita also discussed by which amount they intended their prices to go up or down (for example, ‘we should go up by [EUR] 1’).”
- (152) In response to a request for information, Dole states that its communications with Chiquita concerned “market conditions and, in this context, sometimes indicative quotation price trends”. Dole states that “... market condition assessments included weather conditions, ripeners’ yellow stocks, estimated green port stocks and other factors influencing supply vs. demand. In conjunction with this market discussion, indicative quotation prices might also be mentioned as a reflection of whether the market was going up or down”.

...

- (154) Moreover, Dole states that Chiquita and other competitors would occasionally call Dole seeking to verify customer claims about market developments. “For example, ... whether Dole was really having a promotion in a particular country”.

...

- (158) Furthermore, Dole claims [at page 130 of] its reply to the Statement of Objections that ... “Mr. [H.] has explained that he and Mr. [B.] might sometimes say that they expected prices to go up by 1 Euro or 50 cents, but no agreement on a price increase ever existed” ...
- (159) Dole claims, in its reply to the Statement of Objections, that neither Mr [B.] nor Mr [H.] had the ultimate authority to set prices, therefore they were exchanging their personal views [on the manner in which Chiquita’s and Dole’s reference prices might evolve ...].’

<sup>254</sup> With respect to the bilateral communications between Dole and Weichert, Dole stated, as is apparent from recital 183 to the contested decision and from Dole’s reply to the request for information of 30 March 2006, that those communications concerned ‘general discussion of market conditions (current and expected developments), overall market volumes’ and that, on Wednesday afternoons, there was a discussion as to how it and Weichert ‘saw the market in the current week and how they thought the market might develop in the following week’. Dole added as follows:

‘Expected market demand was assessed by discussing the market situation (such as whether there were anticipated left-over import stocks at the ports or whether ripeners’ stocks of yellow bananas were not being ordered by supermarkets due to declining consumer demand).’

255 The Commission also refers to other relevant statements by Dole and Weichert in recital 184 et seq. to the contested decision, as follows:

‘(184) Dole states that “[b]ased on their discussions of market conditions, they would also discuss the likelihood of a general market increase or decrease in banana prices or whether prices would generally remain at status quo. In conjunction with this, they might also discuss their opinions about how the ‘Aldi price’ might change ...”.

...

(186) Dole states that competitors would occasionally call it seeking to verify customer claims about market developments. “For example, ... whether Dole was really having a promotion in a particular country”.

(187) Dole admits in its reply to a request for information that on certain occasions it would also specifically disclose to Weichert its “possible quotation trend”. Dole states that when Mr [S.] (Dole) communicated with his contacts at Weichert, “Weichert would also ask regularly, though not every week, the possible quotation trend for the following week. If Dole already had an idea of the quotation price trend for the following week, Dole would respond”.

(188) Weichert states, in its reply to a request for information, that bilateral communications with Dole “concerning general conditions prevailing on the market” were “generic conversations with no organised or predefined agenda, where discussions may have touched any one or more of the following topics” and lists the following: market perception, market trends, weather conditions in Europe, weather conditions in the countries where bananas are produced, imports of bananas into the EEA, the level of demand on the market, the evolution of demand on the market, sales situation on retail level, sales situation on ripener level, regulatory issues, such as potential changes to the Community banana regime and/or general industry gossip (employees leaving/joining, announced joint-ventures/acquisitions etc.) ...

(189) Moreover, Weichert states that “[o]n some occasions Dole called Weichert to exchange views about general conditions prevailing on the market ... and rarely also the possible evolution of official prices prior to the communication of official prices among banana importers on Thursday”.

(190) In its reply to the Statement of Objections Dole also states that sometimes Weichert “requested the possible quotation trend for the following week as a yard stick against which [Weichert] could measure the accuracy of [its] own estimates ...

...

(195) ... [I]n response to a request for information Dole states that “[t]he purpose of the contacts was to exchange information to allow each importer to better assess market conditions. Using the general information/market opinions obtained from the contact, Dole would estimate the likely demand in the market place, the likely supply available to meet the demand, and whether Dole’s initial price idea would match the real market conditions” ...’

256 It is therefore apparent that, on the basis of the statements of the undertakings concerned, the Commission clearly identified and distinguished two types of information exchanged, namely (i) price-setting factors, that is, factors relevant for the setting of quotation prices for the forthcoming week and (ii) price trends and indications of quotation prices for the forthcoming week before quotation prices were set.



- 257 The Commission grouped those exchanges of two types of information under the generic term of pre-pricing communications, whilst making it clear that those communications related, on some occasions, to price trends and indications of quotation prices for the forthcoming week (recital 266 to the contested decision). A pre-pricing communication therefore corresponds to an exchange relating to one or other of the types of information in issue and, *a fortiori*, to both types of information.
- 258 In their criticism of the statement of reasons for the contested decision, the applicants confine themselves to pleading, first, that the decision fails to specify the number of communications relating to price trends and indications of quotation prices for the forthcoming week, which amounts, on the one hand, to an admission that the contested decision is sufficiently explicit and clear on the nature of the information in question, and, on the other hand, to isolating artificially that type of information and to disregarding the contacts relating to price-setting factors.
- 259 Apart from the fact that the frequency of the pre-pricing communications is expressly examined in recitals 76 to 92 to the contested decision, it should be noted that the Commission describes the frequency of the cases in which the parties directly disclosed pricing intentions. Dole itself submits that that ‘occurred during about half of the Wednesday afternoon discussions with Chiquita’ (recital 153 to the contested decision) and, as regards the communications between Dole and Weichert, Dole admits that, in their communications, ‘they would also discuss the likelihood of a general market increase or decrease in banana prices or whether prices would generally remain at status quo’ (recitals 184 and 187 to the contested decision) while Weichert states that the discussions concerned ‘rarely also the possible evolution of official prices prior to the communication of official prices’ (recital 189 to the contested decision).
- 260 Second, the applicants complain that the Commission did not specify precisely what kinds of ‘factors relevant for [the] setting of quotation prices’ it was unlawful to discuss. They draw attention to the difference between the list of factors drawn up by Weichert, which is set out in the contested decision, and the list set out in the statement in defence and the fact that that list includes, *inter alia*, ‘imports of bananas into the EEA’, although the Commission dropped any objection linked to coordination on volumes.
- 261 As the Commission rightly submits, it was not its task to set out in a general manner, in the contested decision, an exhaustive list of factors which had to be regarded *prime facie* as unlawful in the relevant sector. By contrast, it was its task to assign a legal classification with sufficient precision and clarity to the conduct of the undertakings concerned in the light of the conditions for applying Article 81 EC, and it did so, with respect to the nature of the information exchanged, by reproducing the description of the bilateral communications given by the undertakings themselves.
- 262 The Commission drew attention *inter alia* to Dole’s statement that ‘market condition assessments included weather conditions, ripeners’ yellow stocks, estimated green port stocks and other factors influencing supply vs. demand’ (recital 152 to the contested decision concerning the communications with Chiquita). Dole also stated that its exchanges with Weichert related to market conditions (current and expected developments), and specified that ‘[e]xpected market demand was assessed by discussing the market situation (such as whether there were anticipated left-over import stocks at the ports or whether ripeners’ stocks of yellow bananas were not being ordered by supermarkets due to declining consumer demand)’ (recital 183 to the contested decision). The issue of market development might also be raised in Dole’s discussions with Chiquita and Weichert on the organisation of a promotion (recitals 154 and 186 to the contested decision).
- 263 The Commission also referred to the statement of Dole which stated that, ‘[b]ased on their discussions of market conditions, [the employees concerned] would also discuss the likelihood of a general market increase or decrease in banana prices or whether prices would generally remain at status quo’ and that, ‘[i]n conjunction with this, they might also discuss their opinions about how the Aldi price might change ...’ (recital 184 to the contested decision). That statement reveals the link between the

discussions on price-setting factors and those on price developments, which enables the Commission to observe that the participants in all communications were aware that their communications could lead to such discussions or disclosures and nevertheless were willing to take part in them (recital 269 to the contested decision).

- 264 It should be borne in mind, as was stated at paragraph 125 above, that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the interest which the addressees of the measure may have in obtaining explanations. In the present case, it cannot be reasonably claimed that the Commission failed to identify clearly and unequivocally the various types of information exchanged that it regarded as unlawful, and in particular price-setting factors, even though the latter expression merely reflects Dole's own statements, which are entirely unambiguous, on the existence of discussions concerning factors 'influencing supply vs. demand' (recital 152 to the contested decision).
- 265 Moreover, it must be observed that, in the contested decision, the Commission clearly dealt with the question of the taking into account of import volumes in the pre-pricing communications.
- 266 It is apparent from recitals 136, 149 and 185 to the contested decision that data relating to expected import volumes to Northern Europe were already exchanged before the pre-pricing communications took place. The volume of the individual imports of the undertakings was therefore not discussed in those communications unless it appeared that there would be a significant variation or irregularity in expected imports, on account, inter alia, of a ship's being immobilised. That finding of the Commission is not challenged by the applicants.
- 267 It follows from all the foregoing considerations that the complaint alleging that the Commission failed to identify clearly and unequivocally the various types of information exchanged which were regarded as unlawful must be rejected.

#### The nature of the information exchanged

- 268 The applicants maintain that the information exchanged fell within the public domain or was capable of being obtained from other sources such as trade publications, which even contained more detailed information on expected pricing direction in the relevant sector.
- 269 In support of their claims, the applicants refer to on-line periodicals which allegedly provided timely and comprehensive details on the banana market. The applicants state themselves that the magazine *Sopisco News* indicated every Saturday (that is two days before the conclusion of Dole's pricing negotiations the following Monday) the range of actual market prices by importer for the current week.
- 270 As the Commission correctly states, that publication therefore appeared at least two days after quotation prices were set and announced, not the day before. By that point in time, the quotation prices had been announced and widely disseminated on the market (recital 104 to the contested decision), which contradicts the applicants' claim of a 'timely' communication.
- 271 With respect to the information letter of the Centre de coopération internationale en recherche agronomique pour le développement (International Cooperation Centre on Agrarian Research for Development) (CIRAD), that letter reported, according to the applicants, market gossip on the current weekly pricing trend in Germany and also in other European Union countries every Thursday.
- 272 It is not possible to ascertain from that information on timing whether the information contained in that publication was known to the undertakings before their meeting, which was held right at the start of Thursday morning, the object of which was to set their quotation prices.

- 273 At the hearing, and in contradiction with their pleadings, the applicants even submitted that the publication of CIRAD's letter occurred on Wednesday without, however, adducing any evidence whatsoever in support of their claim.
- 274 In any event, an examination of the issues of that publication provided by the applicants, none of which corresponds to the infringement period relied upon in the contested decision, reveals data, in the form essentially of graphs, on production volumes and actual prices as well as very general comments on the relevant geographic markets and the trends in the light of the data acquired.
- 275 It is not alleged by the applicants that mention is made in those issues of importers' quotation prices for the forthcoming week or even of indicative quotation price trends for the forthcoming week. The CIRAD periodical does not contain any individual figures concerning banana importers.
- 276 Moreover, the applicants did not call in question their statements, recounted by the Commission by way of description of the content of the communications, concerning discussions with Chiquita on 'ripeners' yellow stocks, estimated green port stocks' (recital 152 to the contested decision) and with Weichert on whether there were 'anticipated left-over import stocks at the ports' or 'whether ripeners' stocks of yellow bananas were not being ordered by supermarkets due to declining consumer demand' (recital 183 to the contested decision). The applicants have failed to establish that such exchanges related to information available on the market.
- 277 The same applies with respect to the discussions relating to promotional activity, incidents affecting the transport of goods to Northern European ports or to Dole's and Chiquita's respective retail sales, namely yellow sales.
- 278 In response to Dole's and Weichert's observations, it is true that the Commission itself accepted that information discussed by the parties 'could be obtained from other sources' (recitals 160 and 189 to the contested decision); such information may relate to weather conditions, which were referred to by Dole and Weichert in the description of the bilateral communications.
- 279 The fact remains that Dole's or Weichert's point of view on certain information which was significant for the conditions of supply and demand, which could be obtained other than by means of discussions with the undertakings concerned, and its impact on the development of the market, does not by definition constitute publicly available information.
- 280 In any event, the Commission's finding in recitals 160 and 189 to the contested decision is not, in itself, incompatible with its conclusion that the practice in issue had an anti-competitive object, that conclusion being based on an overall assessment of the practice.

#### The participants in the exchanges

- 281 The applicants submit that the discussions in issue were not limited to the three suppliers to which the contested decision was addressed and that the importers exchanged the same or similar information with their customers, a fact that the Commission does not contest, but from which it does not draw the appropriate conclusions, namely proof that those exchanges had no anti-competitive objective.
- 282 With respect to the other importers, the applicants submit that Fyffes itself admitted that it had taken part in absolutely identical communications with the other importers, and all the importers informed the Commission that they had exactly the same communications with Leon Van Parys (Pacific).

283 In support of that submission, the applicants refer to paragraphs 128 and 129 of the statement of objections, which are worded as follows:

‘(128)

... Dole states that it had bilateral communications, which took place before banana quotation prices were set, with each of Fyffes, Weichert, Pacific, Del Monte and Chiquita. Del Monte states that its employee (sales manager for bananas) on Mondays-Wednesdays had telephone conversations with employees of other banana importers *inter alia* with each of Chiquita, Dole, Weichert/Fyffes and Pacific. Weichert states that it had bilateral communications with *inter alia* each of Chiquita, Dole, Del Monte, Fyffes and Pacific. Fyffes states that it had communications with banana importers and among such importers indicates Chiquita Netherlands, Dole, Pacific, Del Monte/Weichert and Del Monte Holland.

(129)

Pacific does not admit having had such communications with the other parties prior to the setting of the quotation price. However, each of Chiquita, Dole, Del Monte, Weichert and Fyffes separately state they had such type of bilateral communications with Pacific. Available phone records show that Pacific had phone calls with some of the other parties on Mondays – Wednesdays ...’

284 It must be stated that it can only be inferred from the abovementioned paragraphs of the statement of objections that Fyffes admitted the existence of communications with other importers, including Pacific, and that Chiquita, Dole, Del Monte and Weichert stated that they had also had bilateral communications with Pacific, without giving any further details.

285 It should be noted that, after sending the statement of objections to Fyffes and Leon Van Parys (Pacific), the Commission ultimately found in the contested decision that those two undertakings had not participated in an infringement, following the replies submitted by them and the Commission’s assessment of the evidence in its possession.

286 Moreover, it follows from recitals 21 and 24 to the contested decision that, in addition to Chiquita, Weichert, Dole, Del Monte (in relation to its own activities as a supplier of bananas), Fyffes and Leon Van Parys, a large number of other companies selling bananas were active in Northern Europe. It is neither alleged nor *a fortiori* proved that those companies were involved in the exchanges of information complained of in the contested decision.

287 Lastly, the Court observes that the applicants have failed to prove that the exchanges of information in question also involved customers.

288 The applicants produce two letters from customers of Dole’s, from Van Wylick OHG and from Metro Group Buying GmbH, in which those two companies do not make any mention of their participation in discussions with banana suppliers on factors relevant for the setting of quotation prices for the forthcoming week or on price trends and indications of quotation prices for the forthcoming week before quotation prices were set, or even that they were aware of the existence of bilateral communications between importers and *a fortiori* of the exact scope of those communications. Those two customers of Dole’s state in essence that Dole announced its quotation price to them on Thursday morning by telephone. The applicants state themselves that what is relevant about those letters is that they demonstrate that the decisive factor for customers was the ‘Aldi price’, and not quotation prices and that it is thus ‘immaterial whether customers knew all the details of the pre-pricing communications identified by the Commission’.

289 Moreover, the applicants are wrong in asserting, by referring to recital 325 to the contested decision, that the Commission does not dispute that the topics covered in these bilateral discussions were also discussed with customers.



- 290 In recital 325 to the contested decision, the Commission draws attention to Dole's and Del Monte's arguments relating to the notion of 'Radio Banana', according to which information in the banana trade was quickly disseminated and 'everybody' knew that competitors were talking to 'everybody'. In response to that assertion, the Commission refers expressly to other recitals in which it stated, first, that the evidence adduced or arguments presented by the undertakings concerned do not demonstrate that public institutions, customers or third parties knew about pre-pricing communications and the contents thereof and, second, that, in any event, those arguments do not alter its finding that the discussion between the undertakings concerned are anti-competitive.
- 291 In that regard, the Commission is right to rely on the necessary distinction 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 (recital 305 to the contested decision).
- 292 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 (*Suiker Unie and Others v Commission*, paragraph 56 above, paragraphs 173 and 174, and Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349, paragraph 89).
- 293 The individual assessment by a banana importer of a climatic event affecting a region of production, information which is public and available, should not be confused with the joint evaluation by two competitors of that event, in combination, as the case may be, with other information on the state of the market, and of its impact on the development of the sector, very shortly before their quotation prices are set.
- 294 It should be recalled that Dole explained that, in its communications with Chiquita, 'market condition assessments included weather conditions, ripeners' yellow stocks, estimated green port stocks and other factors influencing supply vs. demand'.
- 295 The Commission was therefore right to state, in recitals 160 and 189 to the contested decision, that, 'even if information about various topics discussed could be obtained from other sources, ... , the competitors' views about them, exchanged in bilateral discussions, could not'.

Whether the essential characteristics of the relevant market were taken into account

- 296 The applicants complain principally that the Commission ignored the market conditions and therefore failed to provide a statement of reasons on that point or, in other words, that the Commission failed to explain clearly and unequivocally how it took account of the market conditions in finding that the exchange of information constituted an infringement of Article 81 EC. In a general manner, the applicants also complain that the Commission carried out an incorrect evaluation of the market.

– The regulatory framework

- 297 The applicants state that the sector was subject to a specific regulatory regime which caused supply to be fixed as a result of a tariff-quota system.



- 298 In the first place, with respect to the complaint alleging infringement of the obligation to provide a statement of reasons in that regard, it is apparent from recitals 36 to 40, 129 to 137, 278 and 279 to the contested decision that the Commission took into account and examined, sufficiently and unequivocally, the regulatory framework governing the banana sector at the material time when assessing whether Dole's conduct was consistent with Article 81(1) EC, namely Regulation No 404/93.
- 299 It follows that it cannot be alleged that the Commission infringed Article 253 EC so far as concerns the regulatory framework governing the exchanges of information concerned.
- 300 In the second place, as regards the relevance of the Commission's analysis, it should be noted that, during the relevant period, banana imports into the Community were covered by the licence regime. The Commission observed, in recital 37 to the contested decision, that, when submitting licence applications, operators had to lodge a security and that the vast majority of the licensed quantities went to traditional operators, as opposed to 'newcomers' or 'non-traditional operators' (from 1 July 2001 onwards), which reveals the existence of certain barriers to entry on the relevant market.
- 301 Import quotas of bananas were set annually and allocated on a quarterly basis with certain limited flexibility between the quarters of a calendar year. The Commission specifies that, in view of the quota regime, the total amount of bananas imported into the Community as a whole in any given quarter during the relevant period was therefore determined, subject to some limited flexibility between quarters, given that there were strong incentives for anyone holding a licence to ensure that it would be used in the relevant quarter (recital 134 to the contested decision).
- 302 As the applicants state, the fact that supplies of bananas from Latin America and African, Caribbean and Pacific countries (ACP) were set in fact by Regulation No 404/93 throughout the period of the alleged infringement constitutes a factor that is clearly important in the determination of prices.
- 303 The importance of that legislation with regard to the level of supply and the fact that it contributes to a certain degree of transparency on the market permits the conclusion that the formation of prices on the banana market did not answer completely to the free operation of supply and demand.
- 304 That finding is not, however, incompatible with the Commission's conclusion that the practice in issue had an anti-competitive object.
- 305 First, the Commission took due account of an essential feature of the banana industry, namely its organisation in weekly cycles.
- 306 The Commission stated, correctly, that the common organisation of the markets did not determine in advance the number of bananas imported and marketed in the European Union and even less in the relevant geographic area in any given week.
- 307 In a market organised in weekly cycles, the Commission was therefore entitled to find that banana shipments to Northern European ports were determined, for any given week, as a result of the production and shipping decisions taken by producers and importers (recitals 131 to 135 to the contested decision), which therefore had some latitude as regards the volume available on the market.
- 308 Second, the Commission also took account of a specific situation in relation to the quantity of bananas available during a given week in Northern Europe; that situation is described in recital 136 to the contested decision in the following terms:

'Various documents in [the] Commission's possession show that prior to setting their weekly quotation prices, on Monday-Wednesday the parties exchanged information, concerning banana arrivals to Northern European ports. These exchanges relayed parties' own volume data for bananas, usually arriving in the upcoming week. The parties admit that such exchanges took place. Additionally or

alternatively, importers relied on banana arrivals information available from various public and private sources through market intelligence. Thus, when the parties had their prepricing communications, normally, they were already aware of competitors' banana volumes that would be arriving later at Northern European ports for the upcoming week ...'

- 309 The Commission also stated that, while the undertakings concerned did not contest the Commission's finding in the statement of objections that exchanges of volume information took place regularly every week at the beginning of the week (Monday to Wednesday morning) (footnote 179 to the contested decision), the Commission considered, in the light of the arguments presented by the parties in response to the statement of objections, that the evidence in the Commission's possession did not lead to the conclusion that exchanges of volume information had an anti-competitive object or that they formed part of the infringement (recital 272 to the contested decision).
- 310 The Commission noted, however, that the participants in pre-pricing communications communicated in the light of decreased uncertainty concerning their competitors' supply situation and that, in combination with the transparency of the market generated by its regulatory framework, that reflected a lessened degree of uncertainty in the banana industry in Northern Europe, making it all the more important that the remaining uncertainty as to competitors' future pricing decisions should be protected (recital 272 to the contested decision).
- 311 Although the applicants allege that the Commission incorrectly assessed the context of the practice in issue, they do not put forward any specific arguments contradicting the Commission's findings on banana undertakings' latitude as regards the volume available on the market in a given week and those undertakings' awareness of forthcoming banana arrivals, prior to the pre-pricing communications.
- 312 Accordingly, it must be stated that the Commission was right to take account, in its assessment of Dole's conduct, of a lessened degree of uncertainty in the banana industry in Northern Europe and the corresponding need to protect the remaining uncertainty as to competitors' future pricing decisions (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95 and T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraphs 1088 and 1856).
- The specific nature of the relevant product
- 313 In addition to arguing that the contested decision does not contain a statement of reasons in that regard, the applicants rely on the fact that, since bananas are perishable goods which need to be marketed quickly, it was useful and even essential for importers, in particular, to identify precisely market trends and what competitors were thinking of those trends, which explains why there were so many communications between a large number of banana importers. According to the applicants, the French Competition Council has indeed recognised this, giving consideration to the special features of the fruit and vegetable markets in the overall assessment of the effects of an information exchange.
- 314 In the first place, with respect to the complaint alleging infringement of the obligation to provide a statement of reasons, it is apparent from recitals 278, 279, 290, 300, 303, and 341 to 343 to the contested decision that the Commission examined, sufficiently and unequivocally, the arguments of the addressees of that decision, including those of Dole, relating to the specific nature of the relevant product, namely its highly perishable nature.
- 315 It follows that it cannot be alleged that the Commission infringed Article 253 EC so far as concerns the specific nature of the relevant product.

316 In the second place, as regards the merits of the Commission's assessment, it should be noted that the argument of the applicants referred to above seeks to establish that the communications between importers pursued, in the light of the specific nature of the relevant product, a legitimate purpose, namely enhanced market efficiency.

317 As the Commission rightly states in recital 303 to the contested decision, by explaining that the purpose of communications was efficient clearance of the market for a highly perishable product such as bananas, or finding a market clearing price, the undertakings to which the contested decision is addressed acknowledge, by virtue of this, that their communications did influence their pricing decisions. That finding confirms the anti-competitive object of the practice in issue.

318 In recital 303 to the contested decision, the Commission added that:

'... once an anti-competitive object of communications is established, the parties cannot justify them by arguing that they had in mind "efficiency increasing" aims. For an anti-competitive concerted practice to be exempted from the application of Article 81 [EC], the conditions set out in Article 81(3) [EC] ... must be met ... Moreover, it would not be sufficient to have no "anti-competitive spirit" in such communications with competitors where pricing intentions and price setting factors were disclosed or discussed.'

319 Moreover, the Commission found that the conditions for applying Article 81(3) EC were not satisfied (recitals 339 to 343 to the contested decision).

320 The statements of the applicants – who contest the existence of an infringement of Article 81(1) EC – on the usefulness for importers of knowing competitors' points of view on market trends, in the light of a very tight marketing timetable dictated by the need to offload entire cargoes of perishable fruit in a few days, merely corroborate the Commission's findings and conclusions.

321 Moreover, considerations of a general nature emanating from a national competition authority which has been seised of a request for an opinion relating to the economic organisation of the fruit and vegetable sector in the Member State concerned are entirely lacking in any relevance for the purposes of resolving the present case.

322 Lastly, it must be borne in mind that, according to the case-law, it is immaterial whether the undertakings acted in concert for reasons that were partially legitimate. Thus, the Court of Justice has held that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (*Beef Industry Development Society and Barry Brothers*, paragraph 68 above, paragraph 21).

323 Accordingly, it must be held that the applicants have failed to put forward any arguments such as to call in question the Commission's assessment regarding the specific nature of the relevant product.

– The variable nature of demand

324 Referring to recitals 35 and 130 to the contested decision, the applicants maintain that demand fluctuated considerably on the relevant market and that it was impossible for importers to reliably predict demand, which had the consequence that prices changed every week.

325 In the first place, with respect to the complaint alleging infringement of the obligation to provide a statement of reasons, as the applicants state themselves in their pleadings, the Commission expressly raised the issue of demand on the relevant market by stating that '[b]ananas are seen in the trade as a 52-week product, the demand of which is slightly higher in the first half of the year and lower in the second part of the year, notably during the summer period' (recital 35 to the contested decision), thus precluding any failure to comply with its obligation to provide a statement of reasons in that regard.

- 326 In the second place, as regards the merits of the Commission's assessment, the Court would point out that the Commission's finding, referred to in paragraph 325 above, cannot be deemed equivalent – as the applicants would have it – to a finding that it is impossible for importers to reliably predict demand. Moreover, that alleged impossibility, which is mentioned in recital 130 to the contested decision, is based merely on statements made by Del Monte which are recalled in that recital.
- 327 Moreover, first, the Court notes that the Commission highlighted (recital 131 to the contested decision), without being contradicted by the applicants, the decision-making capacity of importers in the weekly determination of arrival volumes of bananas in Northern European ports and their allocation between the various Member States comprising Northern Europe, Eastern Europe and EFTA, a situation that reveals market adaptability and flexibility on the supply side.
- 328 Second, the applicants' statements on the variability of demand and the alleged consequence of that, namely weekly variability of prices, are consistent with the Commission's conclusion that there was a concerted practice having as its object a restriction of competition, and even strengthen that conclusion.
- 329 With respect to the content of the bilateral communications, the Commission correctly pointed out that the undertakings in question discussed demand and supply conditions or, in other words, price-setting factors, with, in particular, a joint evaluation of the level of demand. It should be borne in mind, in that regard, that Dole specified that, in the context of its discussions with Weichert, '[e]xpected market demand was assessed by discussing the market situation (such as whether there were anticipated left-over import stocks at the ports or whether ripeners' stocks of yellow bananas were not being ordered by supermarkets due to declining consumer demand)' (recital 183 to the contested decision).
- 330 In the economic study of 10 April 2007 submitted by Dole during the administrative procedure, it is stated that demand for bananas varied from week to week in response to a wide range of predictable and unpredictable factors and that, given that uncertainty, DFFE had to discover an ideal price enabling it to reach an equilibrium between its supply with this fluctuating demand, taking the risks and costs of banana ageing into account. It is further specified therein that the 'factor affecting the final volumes taken by a customer is price, so that demand, unlike supply, is price elastic'.
- 331 Those demand-related arguments of Dole, in the context of a market that was also characterised by an information exchange system between importers on volumes of weekly banana arrivals in the ports, are such as to justify the Commission's conclusions on the fact that price was a key instrument of competition in the relevant sector (recital 261 to the contested decision) and the overriding need to protect, in the context of the banana market, the remaining uncertainty as to competitors' future pricing decisions (recital 272 to the contested decision).

– The structure of the market

- 332 The applicants emphasise that the limited information exchange took place in a market that is neither highly concentrated nor oligopolistic. After stating the contrary at paragraph 406 of the statement of objections, the Commission now considers, without providing the slightest explanation, that that factor is not relevant (recital 280 to the contested decision), thus rejecting the overwhelming evidence adduced in support of the competitive nature of the relevant market. Furthermore, the alleged infringement covers less than half the market, namely 45 to 50% by value or 40 to 45% by volume (recital 31 to the contested decision), according to the exaggerated figures used by the Commission, which has not made clear how it calculated that market share, which in reality is less than 25% in Germany, the largest market in Northern Europe. That size of market share naturally undermines the suggestion that the information exchange in issue might be used to support an industry-wide price increase.



- 333 In the first place, with respect to the complaint alleging infringement of the obligation to provide a statement of reasons, it must be stated that the issue of the structure of the market and its competitive nature was examined by the Commission, sufficiently and unequivocally, in recitals 25 to 31, 280, 281 and 324 to the contested decision.
- 334 That finding cannot be called in question by the fact that, in paragraph 406 of the statement of objections, the Commission initially took the view that the market was oligopolistic, whereas this view is not reproduced in the contested decision.
- 335 It should be borne in mind that, according to the case-law, the decision is not necessarily required to be an exact replica of the statement of objections (Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 68). The Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections. In that regard, it must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 92; see also, to that effect, *Suiker Unie and Others v Commission*, paragraph 56 above, paragraphs 437 and 438).
- 336 The Commission therefore redrafted, as it was entitled to do following the replies of the undertakings to the statement of objections, its arguments in the contested decision; those arguments are mainly set out in recitals 280 and 281, in which the Commission maintains that:
- the market structure is not relevant for the purposes of establishing an infringement in this case, the General Court having observed in Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission* [2001] ECR II-2035, paragraph 113, that, in the event of a price cartel the relevance of the structure of the market surrounding the infringement is not the same as in cases of market sharing;
  - in any event, the parties had a substantial share of the market and were the suppliers of the three leading brands of bananas;
  - the parties cannot justify their involvement in cartel arrangements by claiming that there is competition in the market and that there is no requirement that, in order to constitute an infringement by object, arrangements should exclude any competition between the parties.
- 337 It follows from the foregoing considerations that it cannot be alleged that the Commission infringed Article 253 EC so far as concerns the issue of the structure of the market in question.
- 338 In the second place, as regards the relevance of the Commission's assessment, the applicants correctly observe that the view that the structure of the market is not a relevant factor for the purposes of establishing an infringement in the present case is based on a misinterpretation of *Tate & Lyle and Others v Commission*, paragraph 336 above, inasmuch as the passages of that judgment cited in recital 280 to the contested decision do not relate to the establishment of the infringement, but instead to the amount of the fine imposed.
- 339 It should be borne in mind that, according to the case-law, each economic operator must determine independently the policy which he intends to adopt on the common market and that, while it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or



disclose to them its decisions or intentions concerning its own conduct on the market 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 (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraphs 32 and 33).

340 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 (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 58).

341 The Court of Justice has also made clear that an information exchange system may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market (*Thyssen Stahl v Commission*, paragraph 62 above, paragraph 86).

342 It must be pointed out that, in the contested decision, the Commission states that, in addition to Chiquita, Weichert and Dole, Del Monte (in relation to its own activities as a supplier of bananas), Fyffes and Leon Van Parys had significant banana sales in Northern Europe and that, in addition to those undertakings, a large number of other companies selling bananas were active in the Northern European region. Most of these were small companies that concentrated on a limited geographical area (particularly Germany) (recitals 21 and 24 to the contested decision).

343 The Commission states, however, that the parties had a substantial share of the market and were the suppliers of the three leading brands of bananas.

344 The Commission explains, in that regard, how it determined the combined presence of the addressees of the statement of objections in the supply of bananas in recitals 25 to 31 to the contested decision.

345 Thus, the Commission estimated the parties' combined shares of banana sales by value, on the basis of the information supplied by those addressees and the banana importers Fyffes and LVP, which led it to conclude that the combined share of sales by value of Chiquita, Dole and Weichert in 2002 accounted for approximately 45-50% of banana sales in Northern Europe (recitals 26 and 27 to the contested decision).

346 The applicants submit that the figures put forward by the Commission are significantly exaggerated and are inconsistent with an independent consumer survey, which showed the combined share of Chiquita, Dole and the undertaking formed by Del Monte and Weichert, measured by volume, to be less than 25% on the largest market, namely Germany.

347 That argument was already set out by Dole during the administrative procedure and was rejected, correctly, by the Commission, in recital 29 to the contested decision, in the following manner:

'... First, it is important to understand that the Commission's market share estimate for Germany in the Statement of Objections was based on the turnover figures and estimates of sales by other banana suppliers provided by the addressees of this decision plus LVP and Fyffes. The Commission's estimate in the Statement of Objections was value based not volume based. Even if the estimate of the independent market research company were correct, a large part of the difference between this estimate and the Commission's estimate could likely be explained by the difference in price between branded bananas and non-branded bananas. Second, the market research company measures bananas consumed in Germany while the Commission's estimate measures bananas sold in Germany. Not all bananas supplied by importers in Germany are necessarily consumed there ...'

- 348 It is also apparent from the excerpts of the survey in question set out at page 42 of Dole's reply to the statement of objections that the data in that survey concern 2004, whereas the infringement period ended at the end of 2002, and concern solely Germany, where the Commission specifically noted the presence of numerous small operators. For the same reasons, a table showing the market shares of Dole, Chiquita, Del Monte and other suppliers on the German market from 2003 to 2005 is likewise not relevant.
- 349 It must be stated that, in these proceedings, the applicants merely reproduce the same argument, based on the same documents, without providing any evidence such as to contradict the Commission's response on that argument's lack of relevance. The applicants have not produced any specific evidence capable of establishing their claim that the Northern European market was highly competitive.
- 350 In the contested decision, the Commission also assessed the share of sales by volume of the undertakings concerned in Northern Europe, on the basis of the data provided by them, in the light of the apparent consumption of bananas in volume resulting from official statistics published by Eurostat (Statistical Office of the European Union) and reached the conclusion that in 2002 sales of fresh bananas by Chiquita, Dole and Weichert, measured by volume, accounted for approximately 40-45% of apparent consumption of fresh bananas in Northern Europe, that estimate being slightly lower than the share by value of those sales (recital 31 to the contested decision).
- 351 The applicants claim that it is unclear how the Commission calculated the market shares, since it appears to aggregate the sale of yellow and green bananas in the numerator, but uses only green bananas (i.e., Eurostat import figures, which can only be of green bananas) in the denominator (meaning that combined total market shares must exceed 100%).
- 352 That line of argument must be rejected inasmuch as it is based on an incorrect premiss, namely the distinction between yellow bananas and green bananas. It should be borne in mind that the relevant product is the fresh banana, since the applicants have failed to adduce evidence to justify their claim of the existence of two separate products belonging to two different markets. The contested decision concerns all bananas, whether green or yellow, and the Commission has clearly established a relationship between sales of fresh bananas in 2002 by Chiquita, Dole and Weichert and apparent consumption of that product.
- 353 It follows from the foregoing considerations that the Commission was right to consider and take into account the fact that Dole, Chiquita and Weichert had a substantial share of the market, which, although it cannot be described as oligopolistic, cannot be characterised by supply of a fragmented nature.
- 354 It follows that the complaints alleging infringement of the obligation to provide a statement of reasons and incorrect evaluation as regards the taking into account of the essential features of the relevant market must be rejected.

#### The timing and frequency of the communications

- 355 The applicants submit that, according to the case-law, the periodicity of an exchange of information is a relevant factor in assessing whether such an exchange constitutes a restriction of competition by object and that, in the present case, the Commission did not properly assess that factor or disclose in a clear and unequivocal fashion the reasoning which it followed.

- 356 In the first place, as regards the statement of reasons in the contested decision in relation to the timing and frequency of the communications, it is apparent from recitals 70 to 75 to the contested decision that the pre-pricing communications generally took place between Dole and Chiquita late on Wednesday afternoons and, sometimes, early on Thursday mornings and between Dole and Weichert on Wednesday afternoons only, that is shortly before those undertakings set their quotation prices.
- 357 As regards the communications between Dole and Chiquita, Chiquita stated that they took place almost weekly (with the exception of vacations and other weeks of absence). The available phone records of Chiquita's employee, Mr B., show at least 55 outgoing phone calls made to Mr H. (but not incoming calls) on Wednesdays and at least 53 outgoing calls on Thursday mornings between 2000 and 2002, of which 23 calls (in 19 weeks) took place before 8:45 a.m., of which 18 calls (in 17 weeks) took place even before 8:30 a.m. (that is, before the time when Dole's pricing meeting would start) (recitals 76 to 78 to the contested decision), this being consistent with Chiquita's submissions that it and Dole had Thursday morning pre-pricing communications.
- 358 Dole stated that from 2000 until about autumn 2001 contacts between its employee Mr H. with Mr B. (Chiquita employee) took place about 20 times per year (15 times on Wednesdays and 5 times on Thursdays). In addition, Dole stated that from about autumn 2001 until about 2002-2003 contacts between its employee Mr G. with his counterparts at Chiquita took place up to possibly 10 times per year. According to Dole, it is possible that from about autumn 2001 until December 2002 a few such calls between Mr H. and Mr B. may have occurred, but that 'Mr. H. ... has no recollection of such calls during such period' (recital 79 to the contested decision).
- 359 In its reply to the statement of objections, Dole estimated, on the basis of the available phone records, that there were 55 contacts on Wednesday afternoons and 58 contacts on Thursday mornings, irrespective of the duration of the calls in the case of the Thursday morning calls (recital 77 and footnote 92 to the contested decision).
- 360 It is also stated in recital 153 to the contested decision that Dole itself estimated that an exchange relating to indicative quotation price trends occurred during approximately half of the communications with Chiquita.
- 361 As regards the communications between Dole and Weichert, in respect of which no phone records are available, Dole first stated, in its reply to requests for information, that it communicated with Weichert 'almost weekly' that is, approximately 40 weeks per year, before submitting, in the reply to the statement of objections, that 'the market conditions exchange occurred approximately every other week, due to travel and other commitments', a reason that had already been put forward in the reply to requests for information to explain the number of alleged communications (recitals 87 and 88 to the contested decision).
- 362 In its reply to a request for information of 15 December 2006, Weichert stated that communications with Dole did not take place every Wednesday but on average once or twice a month. When asked by the Commission on 5 February 2007 to specify a number of weeks per year, Weichert submitted that its employees had communications with Dole approximately 20 to 25 weeks per year (recital 87 to the contested decision).
- 363 Weichert then went on to state, in the reply to the statement of objections, that the contacts with Dole took place 'on average no more than once or twice a month', without explicitly backtracking on the initial estimate. This led the Commission to estimate that the frequency of those contacts was approximately 20 to 25 weeks per year, which is consistent with Dole's statements (recitals 90 and 91 to the contested decision).

- 364 On the basis of the evidence thus gathered, the Commission concluded that the communications were sufficiently consistent to form a 'pattern' of communications (recitals 86 and 91 to the contested decision).
- 365 It follows from the foregoing considerations that it cannot be alleged that the Commission infringed the obligation to provide a statement of reasons, set out in Article 253 EC.
- 366 In the second place, as regards the validity of the Commission's assessment, the applicants plead, first, that the contested decision is imprecise as regards the content of the communications at issue and more specifically as regards the concept of 'price-setting factors', and then goes on to criticise the relevance of the Commission's analysis concerning the counting of the exchanges.
- 367 They submit, first of all, that there is nothing in the contested decision that allows Dole to know whether a single discussion of any of the subjects broached amounts to a restriction of competition by object under Article 81 EC.
- 368 It must be borne in mind that, 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, it is apparent from the case-law that 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 (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 60).
- 369 The Court of Justice has specified that what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded 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 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 (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 61).
- 370 In the present case, it is apparent from the contested decision (see, in particular, recitals 262, 263, 265 and 269) that the Commission assessed a specific practice, namely Dole's bilateral communications with Chiquita and Weichert before it set its quotation prices, in the light of that practice's specific content, extent and legal and economic context. In that context, the Commission analysed the periodicity of the exchanges and concluded that all the communications formed part of a single 'pattern' or a uniform pattern of communications. On the basis of that overall assessment, the Commission took the view that all Dole's pre-pricing communications with its two competitors constituted a concerted practice having an anti-competitive object.
- 371 In response to the arguments that the pre-pricing communications were sporadic or irregular, the Commission added that the fact that such communications may not have taken place systematically or regularly is not decisive when evaluating the existence of an infringement, and took the view that each separate instance of such communications had an anti-competitive object (recital 270 to the contested decision).



- 372 It should be noted that, in the rejoinder, the Commission claims, several times and referring to *T-Mobile Netherlands and Others*, paragraph 56 above, that, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion, there may be an infringement and that its assessment in the contested decision is therefore in line with the standard laid down by the case-law.
- 373 In so far as the Commission might have meant thereby that, on the assumption that its findings relating to the frequency of the communications and its conclusion that there was a consistent 'pattern' of communications are not upheld, the existence of a single pre-pricing communication between Dole and its competitors for each year from 2000 to 2002 would be sufficient to establish collusive conduct, that claim would have to be rejected in the light of the specific object of the coordination complained of and of the nature of the market which was organised in weekly cycles. However, conversely, the Commission cannot be required to prove the existence of a weekly pre-pricing communication throughout the infringement period, since proof that a number of exchanges did take place, from which it is possible to establish that there was a system for disseminating information, is sufficient. It should be noted, in this respect, that importers' quotation prices did not change each week, as is apparent from the internal reports on Chiquita's prices.
- 374 The applicants state, next, that the Commission never clearly indicated which topics of the communications constitute a restriction of competition by object, although that question is liable to have an impact on the determination of the number of communications at issue. The applicants claim that it is not clear whether the calculation of the alleged improper communications includes, by error, communications that are limited to discussion of information on volumes, to 'general industry gossip (employees leaving/joining, announced joint-ventures/acquisitions etc.)' and observe that, if matters relating to weather conditions in Europe were excluded, the number of the communications at issue would necessarily be lower.
- 375 It should be recalled, first of all, that the Commission distinguished two types of information exchanged, namely (i) price-setting factors, that is, factors relevant for the setting of quotation prices for the forthcoming week and (ii) price trends and indications of quotation prices for the forthcoming week before quotation prices were set, the Commission grouping those exchanges of information under the generic term of pre-pricing communications.
- 376 The determination of the content of those communications is based on Dole's own statements, those of its competitors and on documentary evidence, and it is clearly apparent from the contested decision (recitals 136, 149 and 185) that, with regard to the topics referred to by the applicants, only exchanges relating to import volumes do not form part of those communications.
- 377 As was explained in paragraph 264 above, the expression 'price-setting factors' merely reflects Dole's own statements, which are entirely unambiguous, on the existence of discussions concerning factors 'influencing supply vs. demand'. With respect to weather conditions, Dole stated, in its letter accompanying its reply to a request for information, that 'key information in determining Dole's quotation price' included, inter alia, industry volumes coming into the European Union and ripener volumes, as well as weather conditions.
- 378 In the economic study of 10 April 2007 submitted by Dole during the administrative procedure, it is stated that demand for bananas varied from week to week in response to a wide range of predictable and unpredictable factors, the 'weather' being expressly cited as one of those factors.
- 379 Moreover, the applicants admit, in their pleadings, to the existence of bilateral communications, between banana importers, relating to 'general market gossip' or 'possible' market 'trends', which took place before quotation prices were set. The applicants state in the application that, during the period of the alleged infringement, DFFE held an internal meeting every Thursday morning during which 'all the information DFFE had collected', assembled in a special file, was evaluated in an attempt to assess



market conditions. DFFE then established, on the basis of all that information, a weekly quotation price. The information exchanged with competitors therefore formed part of a special file that enabled Dole to determine its pricing policy.

- 380 As regards the communications with Weichert, and in reply to a request for information, Dole states that '[t]he purpose of the contacts was to exchange information to allow each importer to better assess market conditions' and that, '[u]sing the general information/market opinions obtained from the contact, Dole would estimate the likely demand in the market place, the likely supply available to meet the demand, and whether Dole's initial price idea would match the real market conditions' (recital 195 to the contested decision).
- 381 In its reply to the statement of objections (p. 215), Dole states that it 'does not contest that it indeed took into account the information received from its competitors, in conjunction with many other factors, in setting its own quotation prices'. This statement by Dole concerns both its communications with Chiquita and with Weichert (recital 229 to the contested decision).
- 382 All the abovementioned explicit statements rule out the possibility of a bilateral discussion that might be limited to mere gossip on the industry in general, even if the employees of the undertakings concerned might have raised, on certain occasions, in addition to factors relevant to the setting of quotation prices, price trends or price indications, an innocuous subject concerning the personnel of the undertakings which were active on the market.
- 383 It should be noted, next, that the frequency of the pre-pricing communications was established by the Commission on the basis of phone records from the fixed line of a Chiquita employee, revealing only outgoing calls to Dole, but also on the basis of the statements of the undertakings concerned.
- 384 As regards the conditions in which Chiquita, Dole and Weichert were called upon to make an assessment of the number of bilateral communications, it is not disputed that, apart from Chiquita's statements contained in its application for immunity and the documents attached thereto, the undertakings in question replied to requests for information and to the statement of objections sent by the Commission.
- 385 In the statement of objections, the Commission expressly distinguished the communications relating to volumes from those relating to 'market conditions, price trends and/or indications of quotation prices', since the first type of communications took place before the second type. The replies by the undertakings to which the statement of objections was addressed were therefore given on an unambiguous basis.
- 386 The situation is particularly explicit as regards Dole and its contacts with Chiquita, since Dole submitted, in its reply to the statement of objections, its own calculation of the number of pre-pricing communications on the basis of the phone records of a Chiquita employee and since the Commission, after disregarding very short telephone conversations, ultimately determined the number of contacts recognised by Dole at 55 on Wednesday afternoons and 53 on Thursday mornings out of a total of 58 contacts admitted to by Dole (recitals 77 and 78 to the contested decision).
- 387 As regards the contacts between Dole and Weichert, the Commission found that communications took place approximately 20 to 25 weeks per year, which corresponded to Weichert's estimate in its reply to the request for information of 5 February 2007 and was consistent with Dole's estimate, provided in the reply to the statement of objections, according to which 'the market conditions exchange occurred approximately every other week' (recital 91 to the contested decision).

- 388 The Court observes (i) that, in its reply to the request for information of 15 December 2006, Weichert itself draws a clear distinction between the communications on volumes and those on general market conditions and the development of official prices, and (ii) that only those latter discussions were specifically referred to by the Commission in its request of 5 February 2007 seeking clarification from Weichert on the frequency of those discussions in terms of the number of weeks per year.
- 389 Second, the applicants claim that the figures on which the Commission relies do not make it possible to show the regular nature of the communications, which occurred on a random basis, and to form the basis for the subsequent conclusion of unlawful coordination of quotation prices.
- 390 The applicants observe, first of all, that the Commission's reference to 'about 20' communications per year with Chiquita suggests more regularity than was the case, since an examination of the exact number of communications, broken down on an annual basis, reveals that Dole and Chiquita had only 7 bilateral communications on Wednesday afternoons in 2000.
- 391 In the light of Dole's reply to the statement of objections, it is apparent that that presentation of the figures is deliberately partial, since it disregards communications which took place on Thursday morning. In that reply and on the basis of the available telephone records, Dole states that there were 7 communications on Wednesday afternoons and 10 on Thursdays in 2000, 24 communications on Wednesday afternoons and 37 on Thursdays in 2001, and 24 communications on Wednesday afternoons and 11 on Thursdays in 2002, that is to say 55 contacts on Wednesdays and 58 contacts on Thursday mornings (revised downwards to 53 by the Commission after excluding very short telephone conversations).
- 392 Dole does not contest that the telephone records show that, of those 53 calls, 22 took place before 8.45 a.m., of which 18 calls took place even before 8.30 a.m., it being observed that Dole and Chiquita's internal pricing meetings normally started at 8.30 a.m. and 8.45 a.m. or even at 9.00 a.m., respectively (recitals 78 and 85 to the contested decision).
- 393 Dole also recognises that there were 20 weeks in which it communicated with Chiquita on both Wednesdays and on Thursday mornings, an estimate revised downwards to 17 by the Commission after excluding short conversations (recital 84 to the contested decision).
- 394 Moreover, the abovementioned figures originate from an analysis of the available phone records of Chiquita in the Commission's file which show only outgoing calls and not calls from Dole to Chiquita. Dole stated, in its replies to the requests for information of 30 March 2006 and 27 February 2007, that, on certain occasions, its employees phoned their counterparts at Chiquita.
- 395 Thus, Dole stated that 'Mr [H.] may have very rarely contacted Mr B. on Wednesday afternoon if Dole had not heard from him on Wednesday afternoon, and in particular, if there was some unusual circumstance in market developments' and that 'Mr [G.] would only initiate contact if Chiquita had not called' (recital 61 to the contested decision).
- 396 The wording of those replies reveals that Chiquita initiated contact most of the time, but also that there was a certain continuity in the telephone contact between employees of the undertakings concerned, Dole's employees taking the initiative in the collusive contacts in the place of their counterparts at Chiquita if they had not heard from the latter.
- 397 Dole's calls to Chiquita must, therefore, be taken into account in order to assess the frequency of the bilateral communications, it being noted that Dole did not provide, as it was requested to do by the Commission, the fixed line telephone records of its employees involved in the bilateral communications (footnote 64 to the contested decision).

- 398 The applicants observe, next, that 156 weekly meetings relating to the setting of quotation prices took place during the period of the alleged infringement and that it is therefore difficult to understand how the exchanges of information as counted by the Commission in the contested decision (55 communications between Dole and Chiquita and between 60 and 75 communications between Dole and the undertaking formed by Del Monte and Weichert) could have had the importance ascribed to them by the Commission when in almost two thirds of cases the weekly quotation prices were set without the slightest communication of that type.
- 399 That line of argument is based, once again, on a truncated presentation of the communications with Chiquita, for the same reasons as those stated in paragraphs 391 to 397 above.
- 400 Moreover, Dole's purely arithmetical approach, which is based solely on drawing a link between the total number of weekly meetings relating to the setting of quotation prices and the total number of bilateral communications, is not such as to contradict the Commission's conclusion that the communications in question were sufficiently consistent to constitute an established mechanism for circulating information.
- 401 The significant number of communications recognised by Dole, Chiquita and Weichert, the similar content of those communications, the fact that they regularly involved the same persons with a virtually identical *modus operandi* in terms of timing and means of communication, the fact that they continued for at least three years and that none of the undertakings claims that there was any interruption in the exchanges, Dole's statements on its contact with the Chiquita employee when Dole 'had not heard from him on Wednesday afternoon', Dole's and Chiquita's statements on the relevance of the information exchanged for the setting of quotation prices and Chiquita's internal email, of 8 August 2002 (recitals 172 et seq. to the contested decision), which reveals the unusual nature of a pricing decision taken by Dole without prior consultation of Chiquita, permit the conclusion that the Commission was right to find that there had been a 'pattern' or system of communications to which the undertakings concerned were able to resort according to their needs.
- 402 That mechanism made it possible to create a climate of mutual certainty as to their future pricing policies (*Tate & Lyle and Others v Commission*, paragraph 336 above, paragraph 60), a climate that was further reinforced by the subsequent exchanges of quotation prices, once those prices had been set on Thursday morning.
- 403 Although certain information exchanged could be obtained from other sources, the exchange system established enabled the undertakings concerned to become aware of that information more simply, rapidly and directly (*Tate & Lyle and Others v Commission*, paragraph 336 above, paragraph 60) and to undertake an updated joint assessment of that information.
- 404 The Court considers that the data exchanged were in themselves of sufficient strategic interest because they were highly topical and because of the short intervals between them over a long period.
- 405 That sharing, on a regular and frequent basis, of information relating to future quotation prices had the effect of artificially increasing transparency on a market where, as was explained in paragraph 310 above, competition was already reduced as a result of the specific regulatory context and earlier exchanges of information on volumes of banana arrivals in Northern Europe (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 281).
- 406 Third, the applicants maintain that, if the purpose of the communications had been to coordinate the weekly quotation prices of the three importers, the same communication would have had to take place between the same importers during the same week.

407 That argument would appear to be irrelevant in the light of the fact that the Commission alleges that Dole participated in a concerted practice by means of bilateral communications with Chiquita, on the one hand, and Weichert, on the other, that all those communications related to price-setting factors, that is, factors relevant to the setting of quotation prices for the forthcoming week, and/or price trends and indications of quotation prices for the forthcoming week, and that all those communications revealed a system for circulating information to which the undertakings resorted according to their needs.

408 Accordingly, the applicants' arguments that the Commission erred in its assessment of the frequency of the communications must be rejected.

#### The purpose of the bilateral communications

409 The applicants claim that the Commission committed an error of assessment by concluding, on the basis of Chiquita's 'subjective intent', that the purpose of the bilateral communications was to coordinate quotation prices. The only document dating from the period of the alleged infringement to which the applicants allege the Commission refers in the contested decision, namely an internal Chiquita email, lacks any probative value. Referring to recital 302 to the contested decision, the applicants submit that the Commission's decision to reject the explanations provided by the addressees of the statement of objections who contested Chiquita's opinion as to the purpose of the information exchanges and by the customers (recital 302 to the Decision), but to accept the explanations provided by the applicant for leniency, Chiquita, does not contain a sufficient statement of reasons.

410 That line of argument, put forward in support of the claim that the Commission committed an error and which seeks to criticise the merits of the contested decision and therefore the substantive legality of that act, must be rejected.

411 In the first place, the Court would point out that the Commission did not rely on any anti-competitive intent on the part of Chiquita in order to find that those undertakings had infringed Article 81 EC.

412 The Commission was correct in taking the view that, since the anti-competitive object of the practice in issue was established, it was under no obligation to establish the subjective intent of the participants in the exchanges of information at issue (recital 235 to the contested decision).

413 It should be borne in mind, in this respect, that the parties' intention is not a necessary factor in determining whether a concerted practice is restrictive, but that there is nothing prohibiting the Commission or the Courts of the European Union from taking that aspect into account (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 27).

414 In the second place, the Commission considered that all the pre-pricing communications formed part of a single 'pattern' and had the same anti-competitive objective, namely coordination in the setting of quotation prices. By means of the pre-pricing communications, Dole, Chiquita and Weichert disclosed 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 therefore decreased uncertainty concerning competitors' future decisions on quotation prices, the undertakings thus coordinating the setting of those prices and the message to the market instead of deciding on their pricing policies independently (recitals 263 to 272 to the contested decision).

415 The Commission concludes that, by their very nature, horizontal practices relating to prices have as their object the restriction of competition within the meaning of Article 81(1) EC (recitals 261 and 263 to the contested decision).



- 416 In reaching that conclusion, the Commission evaluated the practice in issue by taking account of the content and frequency of the bilateral communications and of the legal and economic context in which those discussions took place. It relied on Chiquita's statements, but also on Dole's and Weichert's statements, as well as on documentary evidence such as phone records and emails.
- 417 First, as regards the statements of the undertakings concerned, it is common ground that the description set out in the contested decision of the content of the bilateral pre-pricing communications is based essentially on those statements.
- 418 It should be noted that Chiquita stated that 'the ultimate topic in [Mr B.'s] calls with Mr [H.] was to evaluate whether there were chances to increase the prices in the upcoming week, i.e. whether it would be also the intention of the respective other company to increase the prices', that '[i]t was important to find out whether there was still room for price increase' and that 'this exchange of the pricing intention ... served to remove the uncertainty as regards the price setting' (recitals 151 and 164 to the contested decision).
- 419 Chiquita also stated that its employee and Dole's employee were aware of the fact that the pricing intentions communicated were part of the market intelligence on the basis of which pricing decisions were made (recital 167 to the contested decision).
- 420 Those statements on the purpose of the pre-pricing communications are corroborated by the statements of Dole, which itself admitted that those communications had influenced its pricing decisions.
- 421 It should be pointed out that Dole stated:
- in its reply to a request for information, that it was Dole's understanding that Chiquita's indicative Wednesday price would be confirmed on Thursday (recital 170 to the contested decision);
  - in its letter accompanying its reply to a request for information, that 'key information in determining Dole's quotation price' included, inter alia, industry volumes coming into the European Union and ripener volumes, as well as weather conditions;
  - as regards the communications with Weichert, and in response to a request for information, that '[t]he purpose of the contacts was to exchange information to allow each importer to better assess market conditions' and that, '[u]sing the general information/market opinions obtained from the contact, Dole would estimate the likely demand in the market place, the likely supply available to meet the demand, and whether Dole's initial price idea would match the real market conditions' (recital 195 to the contested decision);
  - in its reply to the statement of objections (p. 130), that 'Mr. [H., a Dole employee] has explained that he and Mr. [B., a Chiquita employee] might sometimes say that they expected prices to go up by 1 Euro or 50 cents' (recital 170 to the contested decision, footnote 217);
  - in its reply to the statement of objections (p. 215), that it 'does not contest that it indeed took into account the information received from its competitors, in conjunction with many other factors, in setting its own quotation prices'. This statement by Dole concerns both its communications with Chiquita and with Weichert (recital 229 to the contested decision);
  - at the administrative hearing, that its 'purpose was to use the bilateral exchanges, in conjunction with other market intelligence, to more quickly discover market-clearing prices (i.e. match fixed weekly supply of bananas with varying demand) that would enable Dole to efficiently dispose of its bananas with the least amount of haggling'.



422 Moreover, as was observed in paragraph 379 above, the applicants admit, in their pleadings, to the existence of bilateral communications, between banana importers, relating to ‘possible’ market ‘trends’, which took place before quotation prices were set. The applicants state that, during the period of the alleged infringement, DFFE held an internal meeting every Thursday morning during which ‘all the information DFFE had collected’, assembled in a special file, was evaluated in an attempt to assess market conditions. DFFE then established, on the basis of all that information, a weekly quotation price. The information exchanged with competitors therefore formed part of a special file that enabled Dole to determine its pricing policy.

423 Second, the Commission refers to documentary evidence and, in particular, to an internal Chiquita email, dated 8 August 2002, sent to Mr P. (Chiquita’s Chief Executive Officer) by Mr K., who conveys his thoughts following a EUR 2 increase by Dole of its quotation price (recitals 111 and 172 et seq. to the contested decision).

424 The Chiquita employee states as follows:

‘Why did we move by 1.5 only, while Dole moved 2.0?

Yesterday we felt the market was heating somewhat, but more in the neighbourhood of 1.00 euro.

This morning, Dole did not take my call, and w/o consulting announced 2.00 (through [J.], so avoiding possible questions). What could be their motivation?

- 1) ... the Edeka promotion: Edeka is doing a one week 3rd label promotion “below the Aldi price” (normally their mix is 60 Dole, 30 CB, 20 DM plus some 3rds). They forced all their suppliers to help. Edeka had agreed with Dole to purchase 80K boxes at Aldi price. By moving the market and Aldi price up they [Dole] first get a better price for the 80K ... . As we will participate with 50K CS, we might take some benefit out of this.
- 2) Dole knows we [Chiquita] have a lot of Dole plus deals and is using this more and more to push our real price up, while staying much lower.

Later, Dole called me, repeated their move and said “and the Aldi price will certainly move 2 also”.

Through Weichert ... we know that they found Dole’s move somewhat exaggerated.

All indicates to me that Dole is overdoing it, for their motives. We should not be perceived as all but too happy to follow, so we decided for 1.50, closing the gap to 2 with Dole and 4.50/5.00 with the 3rd.’

425 The applicants submit that that message shows only that Chiquita did not follow Dole’s movement and therefore that it was acting independently. They maintain that there is nothing in this email to support the Commission’s assertion that the reference to ‘this morning’ meant that it was unusual for Dole to make a quotation price announcement without consulting with Chiquita.

426 As the Commission correctly states (recitals 173 and 174 to the contested decision), that message does not simply show that Mr K. could not reach Dole on that morning, but that Dole announced its quotation price ‘without consulting’ Chiquita and that Chiquita was surprised, as it expected Dole to consult it before taking its decision on the setting of the quotation price. Moreover, the document indicates that, after initially communicating with a more junior employee of Chiquita to avoid questions, Dole recontacted Chiquita to inform it of that price development and to encourage Chiquita to follow their lead by advising it that the ‘Aldi price’ would ‘certainly’ move by EUR 2 too. The fact that Dole called Chiquita and provided it with explanations contradicts the claim that the undertakings’ conduct was autonomous.

- 427 Third, it should be observed that the Commission relies on settled case-law according to which, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 51, and Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567, paragraphs 132 and 133). In recital 302 to the contested decision, the Commission states that that requirement of proof to the contrary is not satisfied in the present case. It is apparent from Chiquita's and Dole's statements, set out in paragraphs 418, 419 and 421 above, that those undertakings admitted that they took into account the information obtained from competitors in setting their quotation prices, as the Commission observes in recital 229 to the contested decision.
- 428 More generally, the Commission states, in recital 302 to the contested decision, that the undertakings to which the statement of objections is addressed did not adduce evidence which could rebut the findings on which the Commission bases its conclusions concerning the anti-competitive object of pre-pricing communications. The Commission observes, in that regard, that it cannot 'accept as sufficient probative evidence letters by members of the general public or customers, in particular when there is no indication that they were aware of the nature of pre-pricing communications' between the undertakings concerned.
- 429 The information provided by the applicants in these proceedings does not invalidate the Commission's conclusions mentioned in paragraph 427 above.
- 430 It follows from the foregoing considerations that the complaint that the Commission committed an error of assessment in concluding that the bilateral communications had an anti-competitive purpose relating to the coordination of quotation prices must be rejected.

The relevance of quotation prices in the banana industry

- 431 The applicants claim that the Commission failed to explain clearly and unequivocally how the exchange of the various types of information at issue might be relevant for setting actual prices of green bananas.
- 432 They claim that sporadic and random discussions on matters far removed from actual prices cannot be considered to be sufficiently harmful for competition to amount to an infringement by object. They assert, in that regard, that there is no link between quotation prices and the setting of transaction prices in the banana sector, unlike the price set by the retailer Aldi, which is the largest buyer of bananas in Northern Europe, and whose announcement, on Thursday afternoon, would mark the starting position for commercial negotiations. In the applicants' submission, all the market participants admit that the price set by Aldi for yellow bananas is the benchmark and the decisive factor for the negotiation of actual prices. The applicants state that the Commission recognises itself that quotation prices are not closely correlated to actual prices (recital 352 to the contested decision).
- 433 Dole claims that the Commission totally misrepresented its position and that it is clear that, like its economists, all the other importers and its customers, it has consistently argued that quotation prices were not relevant to the negotiation of actual prices.
- 434 With respect to the statement of reasons for the contested decision, it should be recalled that the Commission described to the requisite legal standard, in recitals 146 to 197 to the contested decision, the content of the bilateral pre-pricing communications, which all related to quotation prices.
- 435 It is apparent, moreover, from recitals 102 to 128 to the contested decision that the Commission examined, with sufficient precision and clarity, the issue of the setting and relevance of the quotation price in the banana sector.

- 436 It is common ground that Chiquita, Dole and Weichert set their quotation prices for their brands each week, in practice on Thursday mornings, and announced them to their customers. The importers stated that the quotation prices were rapidly transmitted throughout the trade and afterwards reported in the trade press (recitals 34, 104 and 106 to the contested decision).
- 437 The Commission explains that transaction prices were either negotiated on a weekly basis or determined on the basis of a pre-established pricing formula with a reference to a fixed price or with clauses linking the price to the quotation price of the seller or a competitor or to another indicator such as the 'Aldi price'. In particular, Chiquita had contracts which were based on the 'Dole plus' formula where the transaction price was actually dependent on the weekly quotation price set by Dole or on Chiquita's own quotation prices. For the customers concerned, there was a direct link between the prices they paid and the quotation prices (recitals 104 and 105 to the contested decision).
- 438 The Commission further states the following in recital 104 to the contested decision:
- '... On Thursday mornings banana suppliers which sell to Aldi usually submitted their offers to Aldi. Usually by around 2 p.m. the "Aldi price" was set. The Aldi price is the price paid by Aldi to its banana suppliers. Aldi explains that every Thursday between 11.00 and 11.30 they receive offers from their suppliers. Aldi explains that its decision on its weekly offer to its suppliers was based on the offers received, the prices of the previous week and the price in the similar week of the previous year. About 30 minutes after the offers from the suppliers, Aldi sends a counter offer which is normally the same for all suppliers. Aldi states that it is unaware of the existence of a so-called "Aldi price", and is consequently unable to assess the importance of the price for transactions of others. From the second half of 2002, the "Aldi price" began to be used more as an indicator for banana pricing formulae in certain other transactions, including for branded bananas.'
- 439 The Commission refers to documentary evidence (recitals 107, 110 to 113 to the contested decision) as well as to Dole's statements (recitals 114, 116, 117 and 122 to the contested decision) and Del Monte's statements (recital 120 to the contested decision) in order to demonstrate the relevance of quotation prices in the relevant sector.
- 440 The Commission concludes that quotation prices served at least as market signals, trends or indications as to the intended development of banana prices, and that they were relevant for the banana trade and prices obtained. Moreover, in some transactions actual prices were directly linked to quotation prices. The Commission considers that they were sufficient means to achieve the anti-competitive object (recitals 115 and 128 to the contested decision).
- 441 Accordingly, the applicants' claims that the Commission infringed its obligation to provide a statement of reasons must be rejected.
- 442 In the first place, as regards the merits of the Commission's assessment, the Court would point out that, during the administrative procedure, Dole itself made statements which reflect the relevance of quotation prices in the relevant market. The applicants complain, however, that the Commission misrepresented their position on the role of quotation prices because it took their statements out of context.
- 443 As regards the statements of Dole on which the Commission relies, first, it should be noted that Dole clearly admitted that its quotation prices were sent to all its customers (recital 106 to the contested decision, p. 4 of the economic study of 10 April 2007 submitted by Dole), and confirms this in the application.

444 Dole stated that '[i]n a very modest way, [quotation prices] help importers and customers assess the current state of the market and how it may evolve' and that 'the quotation price simply served as a market indicator, which had the purpose of advancing negotiations toward the actual price' (recitals 116 and 117 to the contested decision).

445 Dole submitted several explicit statements showing that customers considered that quotation prices were relevant for the commercial negotiations. Dole stated that:

- information on importers' quotation prices could be obtained from a variety of sources and, in particular, from 'customers who sought to bargain for the best offer by publicly comparing competing quotation prices' (recital 114 to the contested decision, p. 222 of the reply to the statement of objections);
- '[o]n Thursday, when Dole communicated its quotation prices to customers, they might complain that Dole's prices were too high', that a 'Dole employee, [Mr H.], might then check by contacting the particular competitor (to whom Dole's price had been unfavourably compared by the customer)' and that '[t]his was a way for Dole to ensure that big customers were not fooling them';
- 'The business is characterised by demanding customers who wield considerable buyer power, many of them dominant retailers who do not hesitate to switch between suppliers' (page 38 of the reply to the statement of objections);
- 'Customers (ripeners, wholesalers, retailers, and others) eagerly broadcast offers from the different importers' (p. 39 of the reply to the statement of objections);
- Dole's supermarket customers openly considered 'offers from competing suppliers as a means of obtaining the most attractive deal' (p. 97 of the reply to the statement of objections).

446 It is therefore apparent that customers expected that higher quotation prices would result in higher transaction prices and, as they held a strong position on the market, they used quotation prices as negotiating instruments for the setting of actual prices, thus demonstrating the interest that importers had in taking concerted action on those quotation prices. Those precise, repeated and consistent statements by Dole, which were provided in writing deliberately and after mature reflection, have considerable probative value (see, to that effect, Case T-348/08 *Aragonesas Industrias y Energía v Commission* [2011] ECR II-7583, paragraph 104) in relation to the role of quotation prices as the importers' initial price request and the relevance of those prices in commercial negotiations.

447 During the administrative procedure, Dole submitted economic studies, including one dated 10 April 2007, in which it is stated that the two essential features of the market are that bananas are a perishable product and that the formation of prices implies intensive informal discussions between market participants.

448 That study advances an economic explanation for the price formation process and mentions, first of all, the exchanges of information between the market participants, other than the discussions between banana companies.

449 That study states as follows:

'[Those exchanges] were seeking to resolve uncertainty about the market clearing price in the days prior to the arrival of the weekly shipments of bananas to Northern Europe ... The willingness of the ripeners to accept particular terms from Aldi depended to some extent on the initial quotation price they received from importers ... , and these in turn depended on the importer's views about the ease of selling the particular volume they were landing that week. ... [B]etter information about the likely market clearing price among participants conduces to efficient transactions. ... [T]he negotiations



between suppliers and customers would be less protracted ... with a lower risk that bananas would spoil ... If all parties have less divergent views about the market clearing price they would more easily find a price at which they were willing to trade ... Sellers, on the other hand, might mistakenly sell too many bananas at too low a price, unaware that another buyer ... might have been willing to pay more.'

450 As regards the exchanges between banana companies, the economic study of 10 April 2007 states that those exchanges '[were] one additional means by which different sources of information in the market were aggregated into a common view about the market clearing price' and that '[t]he exchange meant that the quotation prices of the banana companies each reflected pooled information about supply and demand that week, and not just the private information of one supplier'.

451 It is further stated, on page 3 of the economic study of 10 April 2007, that 'weekly demand for DFFE's bananas is uncertain' and that 'DFFE must "discover" the price that will equilibrate its supply with this fluctuating demand at the most desirable price, taking the risks and costs of banana ageing into account'. In addition, it is stated on page 5 of that analysis that 'DFFE's final quotation price revealed to its customers DFFE's views on the tightness of the market and, hence, on the market value of its bananas'.

452 Those various excerpts from the economic study of 10 April 2007 demonstrate the relevance of quotation prices in the banana industry, it being observed that the distinction raised within the whole consisting of the information exchanges between the market participants is purely theoretical since it is apparent both from the study itself and Dole's statements (p. 215 of the reply to the statement of objections and recital 229 to the contested decision) that the information collected from the banana companies and other market participants was aggregated and served as a basis for the setting of Dole's prices.

453 It should be further noted that Dole admitted that some of its transactions were directly based on its quotation prices.

454 According to Dole, its Belgian subsidiary, VBH, sent its weekly price to certain customers (Metro, Delhaize, Carrefour) for bananas delivered yellow, a price that was based on the green quotation price sent by DFFE, plus the add-ons specified in VBH's contract with its customer.

455 Dole thus stated that '[t]his yellow price includes ripening, delivery [and] distribution, bagging, and other product specifications that each customer may request', that '[t]hus, the price varies with the weekly green price and any add-ons' and that 'the retailer contracts ... provide for a price formula (i.e., yellow price = (green price communicated by DFFE (+) add-ons due to product specifications and logistics costs (-) rebates))'. It should moreover be noted that only the add-ons and rebates were negotiated once per year as part of a contract valid for one year.

456 As was stated in paragraph 202 above, the applicants claim that that method of pricing began only after the infringement period and that the Commission failed to check whether that information on those VBH contracts, which were mentioned in the reply to the Commission's request for information of 10 February 2006 which covered the period 'from 2000 to date', concerned that limited period from 2000 to 2002, which was ultimately relied upon in the contested decision.

457 It should be recalled (see paragraph 203 above) that examination of the relevant annexes to the defence has not brought to light anything to justify the applicants' claims as to the application *ratione temporis* of the method of setting the prices in question. Moreover, the applicants do not adduce any specific and objective evidence capable of proving the veracity of their claims, and do not even provide any information on how VBH determined its prices for the period 2000 to 2002. It was clear that, in the Commission's request for information of 10 February 2006, the period referred to started on 1 January 2000. Since Dole's reply does not provide any information of a restrictive nature regarding the date of implementation of the method of setting the prices in question in the contracts between VBH and its



customers, Metro, Delhaize and Carrefour, Dole's reply necessarily covered the entirety of the period referred to, including the period from 2000 to 2002. Accordingly, the applicants' argument that the method of setting the prices in question was not applicable *ratione temporis* must be rejected.

458 The applicants further state that DFFE also sold green Dole brand bananas to a few very small customers at a price equal to the quotation price, namely to two customers in 2002, accounting for EUR 1 072 840, or 1% of its total turnover. However, no documentation is provided in support of those figures.

459 Second, Dole submits that the Commission's citations of its initial statements are taken out of context, 'as explained in Annex C 7 to the reply'.

460 The Commission contends that Annex C 7 to the reply is inadmissible on the basis of the case-law relating to the interpretation of Article 44(1)(c) of the Rules of Procedure.

461 It will be recalled that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) of the Rules of Procedure of the General Court, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if appropriate without other information (Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, paragraph 166, confirmed on appeal in Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369).

462 According to consistent case-law it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (Case C-52/90 *Commission v Denmark* [1992] ECR I-2187, paragraph 17; orders in Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraph 21, and in Case T-154/98 *Asia Motor France and Others v Commission* [1999] ECR II-1703, paragraph 49). The annexes may be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by applicants in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments (see, to that effect, Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 99).

463 Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke v Commission* [1997] ECR II-2081, paragraph 34, and Case T-231/99 *Joynson v Commission* [2002] ECR II-2085, paragraph 154). The annexes cannot therefore serve as a basis for developing a plea set out in summary form in the application by putting forward complaints or arguments which are not contained in that application (Case T-340/03 *France Télécom v Commission*, paragraph 461 above, paragraph 167, confirmed on appeal by Case C-202/07 P *France Télécom v Commission*, paragraph 461 above).

464 That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court also applies to the pleas in law and complaints referred to in the pleadings (Case T-102/92 *Viho v Commission* [1995] ECR II-17, paragraph 68, and Case T-340/03 *France Télécom v Commission*, paragraph 461 above, paragraph 166, confirmed on appeal by Case C-202/07 P *France Télécom v Commission*, paragraph 461 above).

465 In the present case, in support of the complaint that the statements made by Dole during the administrative procedure were taken out of context, the applicants refer, in the reply, to a passage of the reply to the statement of objections, which is worded as follows:

‘[I]t is simply absurd to believe that the exchanges of quotation prices would enable banana importers to project, in any way, final prices charged to customers. Aldi buys bananas from ripeners who are supplied by the various banana importers. The ripeners provide Aldi with price offers per kilogram, Aldi then compares the price quotes offered, taking into account its own assessment of the consumer response in its different retail stores and makes the decision on which ripeners to buy from. These offered prices are confidential and unconnected with the quotation prices of banana importers.’

466 The applicants also cite a passage from the economic study of 20 November 2007, in which it is stated as follows:

‘Unlike the Aldi price ... the initial quotation prices of the banana companies played no direct role in determining the actual prices that customers paid for bananas.’

467 It must be stated that the applicants did not provide any explanation as to the significance of those two citations, even though the first citation mentions exchanges on quotation prices – which were in fact established by the Commission in the contested decision – but subsequent to the pre-pricing communications, and the second citation refers to an absence of a ‘direct’ role of the initial quotation prices. Moreover, the applicants did not carry out any comparison between those citations and the statements by Dole to which the Commission draws attention in order to support its conclusion that quotation prices were relevant.

468 It is apparent, in those circumstances, that the applicants merely submit two citations, taken from the reply to the statement of objections and an economic study, without giving any further details, and make general reference to Annex C 7 to the reply in support of their complaint that the Commission took Dole’s initial statements out of context. Such a laconic formulation of the complaint does not enable the Court to give a ruling, if appropriate, without other information in support, and to allow the annexes to provide the detail of an argument which is not presented in a sufficiently clear and precise manner in the application would be contrary to their purely evidential and instrumental function (Case T-340/03 *France Télécom v Commission*, paragraph 461 above, paragraph 204).

469 That conclusion is all the more compelling in the present case given that the applicants improperly described as an annex supplementary written observations submitted by them, which amount merely to an extension of the pleadings; this is incompatible with the quality that defines an annex, that is its purely evidential and instrumental function.

470 It is therefore necessary to reject as inadmissible Annex C 7 to the reply and the complaint that the applicants seek to make on the basis that the Commission took into consideration, outside of their context, statements made by Dole during the administrative procedure on the role of the quotation price.

471 In the second place, as regards the documentary evidence contained in the case-file, it should be noted that the Commission refers to various documents and, principally, to emails in order to support its conclusion that quotation prices were relevant for the banana market.

472 First, it refers to an email from Mr B. to Mr P. (both managers of Chiquita) of 30 April 2001 (recital 107 to the contested decision) worded thus:

‘It has been proven that as soon as [Dole/Del Monte/Tuca] reach a quote of DEM 36.00 their customers (retailers) resist as at that quote level the consumer price has to go over DEM 3.00/kg. No doubt this “phenomena” will stay with us for a while. This would mean our ceiling quote will be DEM 40.00 (green quote).’

473 As the Commission rightly states, that document shows that actual prices were dependent on quotation prices and that customers followed their development. It shows that customers reacted when quotation prices reached certain levels, but also that they perceived that quotation prices had a link to actual prices. Thus the document clearly states that if the quotes from Dole/Del Monte/Tuca reached ‘DEM 36.00’, ‘the consumer price ha[d] to go over DEM 3.00/kg’. That document also reveals the existence of a certain interdependence between the quotation prices of the Chiquita, Dole and Del Monte banana brands and limits in differentials which could be sustained.

474 It should be noted that, in its reply to the statement of objections, Weichert observed that the email in question provided indirect evidence of the fact that retailers were price sensitive (recital 108 to the contested decision).

475 Second, the Commission mentions an email from Chiquita’s chief executive officer for Europe (recital 113 to the contested decision), dated 21 June 2000, sent to various colleagues in which he comments on a decrease in the Chiquita quotation price following the decrease of DEM 2 in Dole’s quotation price. The email states that, ‘with a price differential that would have gone to DEM 9 with Dole, [he] had no other alternative. This is obviously a blow as there [is] little/no chance to raise prices in the summer, under normal production and market conditions’. In the same email, Mr P. further states that ‘this [is] why I am urging you, again, to look at every opportunity to increase volume. Increases in volumes will not compensate 100% of a reduction in price, but we need every extra [box] we can, as long as it does not impact us negatively in the long run.’

476 That email clearly contradicts the applicants’ assertion that there is no link between quotation prices, or at least their evolution, and price developments on the market. As the Commission rightly states, that email demonstrates how Chiquita was concerned about a downward revision of quotation prices, which was described as a ‘blow’, since there was ‘little [or] no chance to raise prices in the summer’, and about seeking a solution to cushion the negative consequences of that situation on price levels, in this case by acting on volumes. That email demonstrates, once again, the importance of the question of differentials between importers’ quotation prices and of the acceptable or sustainable limits in those differences.

477 Third, the Commission refers to an internal Chiquita email, dated 8 August 2002 (recitals 111 and 172 et seq. to the contested decision), whose content was set out in paragraph 424 above.

478 The email of 8 August 2002 demonstrates the relevance of Dole’s quotation price for the market, including for the actual prices obtained by Dole itself. It confirms that Chiquita had ‘Dole plus deals’, that is contractual arrangements with actual prices directly linked to Dole’s weekly quotation prices, and clearly shows the relevance of Dole’s quotation price for the actual prices of Chiquita. Moreover, in this instance, Dole’s quotation price influenced the quotation price of Chiquita. This email indicates that, the day before, Chiquita was considering an upwards move ‘in the neighbourhood of 1.00 euro’, but that, that morning, Chiquita had decided to increase its quotation price by EUR 1.5. Indeed, in its corporate statement, Chiquita submits that, in the light of Dole’s increase of its quotation price by EUR 2, it changed its quotation price by increasing it by EUR 1.5 ‘instead of changing its price only 1 € upwards as contemplated the day before’ (recital 111 to the contested decision).

479 Fourth, the Commission refers to correspondence between Atlanta (ripeners-distributor) and Chiquita and internal Chiquita emails, dated 2 and 6 January 2003 (recitals 110 and 176 to the contested decision).

480 On Thursday 2 January 2003, an Atlanta employee sent an email to two Chiquita executives, Mr P. and Mr K. That email refers to a decision taken by Chiquita to increase its quotation price – which had already been sent to customers – by EUR 0.5, following an increase in Dole's quotation price which occurred on the same morning as that message was sent. In that email, the Atlanta employee directed to Chiquita's executive representatives a 'very critical remark' about such a pricing decision. Mr K. replied to this, on 6 January 2003, as follows: 'My mistake, I was taken by surprise by the move of Dole. We thought it would stop the upward movement if we were to stay put, and jeopardize price evolution in the next weeks.' On 2 January 2003, in relation to the same matter, a Chiquita employee wrote to Mr K. that he had problems due to this upward revision after the price had been already announced to customers. On 6 January, Mr K. replied to this as follows:

'[Mr P.] did not want Dole and Del Monte to feel we were letting them down by staying. I understand.'

481 The applicants claim, on the one hand, that the fact that the Chiquita executive was 'taken by surprise' by Dole's move can only indicate that Dole acted without any input from Chiquita and, on the other hand, that those documents cannot be used by the Commission to support its case, since they date from after the period of the alleged infringement.

482 It is certainly common ground that the documents date from January 2003 and are immediately subsequent to the infringement period. However, the fact remains that, although those documents are not in themselves capable of establishing that the alleged anti-competitive conduct occurred, they constitute a serious indication in support of the evidence gathered by the Commission on the purpose of the pre-pricing communications.

483 The Court would observe, in that regard, that the mere mention of Chiquita's surprise does not necessarily permit the conclusion that Dole's conduct was autonomous. Instead, it may reflect a difference in understanding by Chiquita of Dole's position during a previous bilateral discussion and of Dole's move.

484 Moreover, even if a participant in collusive conduct may seek to exploit it for its own ends, or even cheat, that does not however diminish its liability in respect of its participation in that conduct. According to settled case-law, an undertaking which, despite a cartel with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230; Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627, paragraph 189; see, also, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ international Belgium and Others v Commission* [1983] ECR 3369, paragraph 25).

485 As regards the relevance of quotation prices in the banana sector, the messages referred to above show that customers clearly thought that a change in the quotation price had relevance for the prices that they could expect to pay or receive. Those messages also reveal, as the Commission correctly observes, the strong interest of the undertakings concerned in coordinating the setting of quotation prices and Chiquita's genuine concern to support increases in the quotation prices of its main competitors, if need be by taking the very unusual step of revising upwards a price that had already been announced, despite the difficulties that that would create with customers. In this respect, it was motivated by the prospect of not compromising an upward price development for the forthcoming weeks (recitals 177 to 179 to the contested decision).



- 486 It must be stated, moreover, that the applicants did not submit any observations in their pleadings on the probative value of all the abovementioned emails in relation to the issue of the relevance of quotation prices for the relevant market, apart from in relation to the fact that the emails of January 2003 postdated the infringement period.
- 487 At the hearing, the applicants merely stated that the communications at issue were internal to Chiquita and that those communications could not therefore reflect Dole's position on the role of quotation prices on the banana market.
- 488 That claim alone is not sufficient to undermine the probative value of emails from an operator marketing goods in competition with Dole's on the banana market, referring to concrete and precise situations relating to Dole's quotation prices and revealing the relevance of those prices for importers and their customers and highlighting, in particular, an interdependence between the quotation prices of the Chiquita, Dole and Del Monte banana brands.
- 489 Fifth, the Commission relies on a letter sent by the Deutscher Fruchthandelsverband eV (DFHV, a German trade association) to a Member of the Commission dated 21 January 2005 in which this association states *inter alia* that '[t]hese "official" prices reflect only the starting position of the different operators for their weekly price negotiations' and that 'they are up to 50% higher than the truly agreed prices' (recitals 112 and 119 to the contested decision).
- 490 Although that document postdates the end of the infringement period and cannot suffice to prove the infringement alleged, it reveals that, three years later, when no modification of the organisation of the banana market has been claimed or demonstrated, quotation prices were generally considered to be a starting point for weekly price negotiations.
- 491 Lastly, it should be noted that the applicants appended to their pleadings a copy of the banana pricing meeting package, relating to a meeting which was held every Thursday morning during which all the information that Dole had collected, which was assembled in that package, was evaluated in an attempt 'to assess market conditions' and set a weekly quotation price.
- 492 According to the applicants, that package included a graph entitled 'Banana Green Prices EU North' which analysed, on the basis of the 10 previous weeks, the quotation prices of Dole and those of its main competitors, thereby clearly showing that competitors' quotation prices were relevant information for the setting of Dole's prices and, more generally, the relevance of quotation prices in the banana sector.
- 493 In the third place, as regards the role played by the 'Aldi price' in the banana sector, it should be observed that the Commission states that that price was less relevant during the infringement period of 2000 to 2002 than subsequently, which the applicants contest, claiming that the 'Aldi quote' was the only relevant benchmark for all transactions in the banana sector, including during the period 2000 to 2002.
- 494 First, as regards the distribution method of Dole's bananas, the applicants highlight the quantitative importance of transactions effected under 'Aldi plus agreements', long-term supply agreements with a fixed price formula, based on the purchase price set by Aldi for yellow bananas converted into an equivalent green banana price.
- 495 Dole claims that, in 2000, it sold around 50% of its green bananas under 'Aldi plus agreements', a figure which rose to almost 80% in 2005. The applicants also mention in their pleadings a figure of 66% of sales of Dole brand bananas in 2002, whilst stating that the economic report set out in Annex 3 to Dole's reply to the Commission's statement of objections found that sales effected under 'Aldi plus agreements' accounted for precisely 49% of Dole's total sales; that difference could be



explained by the fact that that report calculated the percentage on the basis of figures concerning the European Union – which was composed of 15 Member States at that time – as opposed to Northern Europe only.

496 In addition to a certain degree of inconsistency in the presentation of the figures on which the applicants' arguments are based, it should be observed that an examination of the economic report set out in Annex 3 to the reply to the statement of objections reveals that no figures are provided for 2000 and the following data for subsequent years: 58% in 2001, 49% in 2002, 60% in 2003, 68% in 2004 and 79% in 2005, thereby reflecting a continuing growing importance of 'Aldi plus agreements' from 2003 onwards.

497 Moreover, on 2 October 2008, Dole sent the Commission a letter in which it states that the figures communicated in its reply to the statement of objections were too high and provides a table containing the following data as regards the percentages of Dole's turnover corresponding only to sales of green bananas under 'Aldi plus agreements': 50% in 2000, 48% in 2001, 38% in 2002, 51% in 2003, and 61% in 2004.

498 Dole stated in that letter that the 2000 figure is an 'estimate', given that the economists' report did not include any data for that year. It should moreover be noted that the 2001 figure is 48%, falls to 38% in 2002, before increasing from 2003, which does not reflect a constant increase. As the Commission rightly states, an analysis of the data relating to Dole's transactions confirms the finding that the 'Aldi price' was less correlated with Dole's actual prices from 2000 to 2002 than subsequently.

499 Second, in support of the claim that quotation prices were not relevant for the negotiations on transaction prices, unlike the 'Aldi price', the applicants explain that, when Aldi announced the price that it intended to pay for yellow bananas to its suppliers (that is say to ripener-distributors), the latter reported this back to the banana importers.

500 Apart from the fact that that assertion is not substantiated in any way, it must be stated that the applicants indicated that, during the relevant period, that is to say from 2000 to 2002, Dole published only a single quotation price, which was announced before Aldi announced its own price, and that that practice changed 'between 2002 and 2008', when Dole followed up its Thursday morning initial quotation price with the adoption of a 'final quotation price', which it communicated to its customers after the 'Aldi price' was announced on Thursday afternoon.

501 In the contested decision, the Commission recalled that Dole had explained, in reply to a request for information of 15 December 2006, that 'DFFE ... decided that as of December 2002, Dole's quotation prices would be henceforth re-adjusted ... in relation to the "Aldi price"' (footnote 163 to the contested decision) and that various adjustments to Dole's and Weichert's quotation prices took place between October and December 2002 (recital 123 to the contested decision).

502 It is therefore apparent that Dole initially set a single quotation price, which was communicated to its customers before the 'Aldi price' was announced and, subsequently, split that single quotation price into two, in order to create a final quotation price which came out after the 'Aldi price' was announced and took account of it.

503 The foregoing considerations not only corroborate the evidence of the growing importance of the 'Aldi price', but also and above all reveal that Dole did not do away with quotation prices when modifying its price-setting process and, on the contrary, maintained them, including the Thursday morning quotation price, which came out before the 'Aldi quote'. Moreover, that finding merely reinforces the relevance of the single quotation price of Thursday morning, which came out earlier than the 'Aldi quote', before it was split up by Dole. It should also be noted that Dole continued to set quotation prices even though it revised them after the 'Aldi price' had been announced.

- 504 In their pleadings, the applicants did not provide any credible explanation as to why quotation prices were maintained, even though, in their submission, they had no relevance in the banana sector.
- 505 In the reply, the applicants state that ‘no importers (including Dole) use quotation prices today’, that ‘Dole believes that the use of quotation prices was simply a vestige practice from the open banana market auctions that took place in Hamburg several decades earlier’ and that ‘Dole’s continued issuance of quotation prices was simply a formal, historical practice’.
- 506 It is extremely doubtful that the determination of the pricing policy of an economic operator might be based solely on the observance of a defunct historical tradition rather than on an objective criterion of strict utility, especially in the context of a market characterised, according to the applicants’ own statements, by a very tight marketing timetable, in view of the perishable nature of the relevant product, and the pursuit of maximum commercial efficacy.
- 507 The applicants’ statements by which they seek to reduce the setting of quotation prices and their announcement to customers each Thursday morning over a three-year period to a mere ‘formal, historical practice’ are not consistent with Dole’s own description of its pricing policy and, in particular, to the investment deployed in setting those prices weekly.
- 508 In the economic study of 20 November 2007, submitted by Dole, it is stated that ‘the [initial] quotation prices, which reflected extensive information gathering efforts, ... provided better and more accurate information about market conditions’. In the application, it is mentioned that the package relating to the Thursday morning internal meetings on setting quotation prices ‘contained a broad range of banana market information, including the volume of green bananas being shipped that week, customer-specific and Member State-specific information on volumes, historic and aggregated volume information, Dole’s pricing to specific customers and on a broader geographical scale, and Dole’s chart “Banana Green Prices EU North”’. That chart corresponded to a graph analysing, on the basis of the 10 previous weeks, Dole’s quotation prices and those of its main competitors.
- 509 At the hearing, the applicants underlined the need to distinguish two periods, that of the infringement period from 2000 to 2002, when a single quotation price was set which bore no real relation to the market, and the period after 2002, when a final quotation price was set after the ‘Aldi price’ had been announced. That final quotation price still served as a negotiation basis, but was closer to the reality of the market guided by the ‘Aldi price’, or in any case closer to that reality than the previous quotation price which was never revised.
- 510 By those statements, the applicants express the mere evolution over time of a constant instrument of their pricing policy, until 2008, which Dole deemed necessary to modify only in December 2002, in order to adapt it to the growing importance of the ‘Aldi price’ and to ensure that it was more effective. The fact that the quotation price revised on Thursday afternoon after the ‘Aldi quote’ had been announced was supposed to reflect the reality of the market more faithfully does not mean that the quotation price set on Thursday morning from 2000 to 2002 had no relevance whatsoever, it being recalled that Dole maintained that quotation price by describing it as an initial quotation price.
- 511 It should be further noted that the applicants maintain that quotation prices were published in the trade press. It is apparent from an examination of the *Sopisco News* magazine, which appeared each Saturday, before the conclusion of the commercial negotiations, that that magazine mentions quotation prices by importer and a range of actual prices by importer for the current week, the maximum actual price corresponding to the quotation price indicated.
- 512 The applicants do not contest the Commission’s finding that the undertakings concerned exchanged their quotation prices, once those prices had been set, on Thursday morning, before the ‘Aldi price’ was announced. The Commission states that the exchange of quotation prices formed an element of

the parties' cartel arrangements and, in particular, enabled the parties to verify directly between them the quotation prices which other participants had set and reinforced the bonds of cooperation among them arising from the pre-pricing communications (recital 198 to the contested decision).

513 The two findings cited above clearly contradict the applicants' claim that quotation prices were not relevant.

514 Third, the applicants claim that other importers confirmed Dole's statements.

515 They refer to the following statements by Fyffes, which were made at the administrative hearing of 4 and 6 February 2008, indicating that:

- quotation prices 'are irrelevant for actual price negotiations' and that 'price fixing through the "coordination" of official [quotation] prices is impossible';
- quotation prices 'are not a benchmark, a starting point or otherwise of relevance';
- actual prices of other importers are 'never set by reference to Fyffes' official [quotation] price' and that the 'most important factor affecting weekly negotiations is the "Aldi price" which becomes known at lunchtime each Thursday'.

516 It should be noted that it is neither alleged nor *a fortiori* proved that Fyffes did not communicate its quotation price to its customers on Thursday morning and that the statements of that undertaking must be assessed in the light of their context, namely that of an undertaking which was an addressee of the statement of objections and which contested the anti-competitive conduct alleged.

517 With respect to Chiquita, the applicants claim that it acknowledged, in its leniency application, that the 'Aldi price' was the benchmark for pricing of green and yellow bananas throughout Europe.

518 However, it should be pointed out that the applicants refer to statements by Chiquita relating to the supply by Atlanta of bananas to Aldi and to Atlanta's activity of marketing third-tier bananas.

519 Apart from the specific context of the statements in question, an examination of the leniency application shows, in any event, that the applicant's claim is based on an incomplete reading of that application, since Chiquita states therein that the 'Aldi price' 'became' the benchmark for trade in bananas in many EU countries, wording which expresses the idea of the growing importance of that price found by the Commission in recital 104 to the contested decision and raised by Chiquita in corporate statement No 13, which is mentioned in that recital.

520 As regards Weichert and Del Monte, the Commission observes, without being contradicted by Dole, that, during the relevant period, quotation prices for Dole and Del Monte bananas (the latter were marketed by Weichert) were virtually identical. In order to substantiate that finding, the Commission states, in footnote 138 to the contested decision, as follows:

'Weichert explains, in response to a request for information, that "[w]hile Del Monte did not formally instruct Weichert to have the same official price as Dole, it effectively expected Weichert to have an official price at least as high as that of Dole" (see file p. 38533, Weichert response to the request for information of 15 December 2006). Dole states, in response to a request for information [of 15 December 2006], for the period including 2000-2002 that "... Del Monte positioned its branded bananas as comparable to the Dole-branded bananas, and it was generally assumed in the industry that Del Monte would look to the Dole quotation price as a way to promote that similarity with customers" ...'

- 521 It is therefore apparent that Dole's quotation price was regarded as a commercial instrument that enabled Del Monte to obtain the same pricing positioning as Dole's for its bananas.
- 522 Del Monte claimed, in its reply to the statement of objections, that quotation prices had no impact on actual prices, but also stated that the exchange of information on quotation prices was a way for importers 'to summarise the relevant information about demand, arrival volumes, and any stocks in a comprehensible "message" to the market' (recital 122 to the contested decision) and that 'importers could at worst have coordinated a "common" signal to send to the market (in the form of coordinated official prices)' (recital 120 to the contested decision).
- 523 Documentary evidence reveals that Del Monte attached significant importance to Weichert's quotation prices.
- 524 Weichert communicated to the Commission weekly reports concerning the banana market situation during the infringement period that had been sent to Del Monte, at the latter's request; those reports mention official prices, but also estimates of actual prices for the week concerned in the form, inter alia, of a price range for Del Monte-branded bananas (marketed by Weichert) and competitors' products (recital 392 to the contested decision).
- 525 The Commission refers to a fax of 28 January 2000, by which Mr J.-P. B., a Del Monte employee, requested Mr W. to provide him with an explanation about the difference between the 'final price' and the 'expected price' in the following terms: 'To make matters worse, I talked on two distinct occasions with the person in charge in your company of the commercialisation of the bananas, to discuss about market conditions and prices ... I was told that Interfrucht [Weichert] will keep its prices "very close" to the official price!!! ...' That message clearly shows that Del Monte expected Weichert to obtain a final price which would be very close to quotation or official prices (recitals 112, 126 and 389 to the contested decision).
- 526 Those documents, which are contemporaneous with the infringement period, demonstrate the relevance of quotation prices in the banana sector on which Weichert, along with Dole and Chiquita, was one of the operators. It must be pointed out that the infringement relates to a single product, the fresh banana, which has three levels of quality with corresponding price differences, and which falls within a single market characterised by a price-fixing process consisting of an announcement each Thursday morning of Dole's, Chiquita's and Weichert's quotation prices to their customers, the first message to the market on importers' price expectations. Even though those quotation prices concerned only first- and second-category bananas sold by those undertakings, there was a link between those prices and those of thirds brands or those of unbranded bananas in so far as, each week, there was necessarily pricing positioning of the various qualities of bananas by reference to one another. The existence of a certain interdependence between the quotation prices of Chiquita, Dole and Del Monte banana brands is illustrated by Chiquita's internal emails of 30 April 2001 (recital 107 to the contested decision) and 8 August 2002 (recitals 111, 172 et seq. to the contested decision).
- 527 Fourth, the applicants rely upon statements by customers confirming their position which state:
- '[T]he Dole quotation prices for bananas ... were hardly relevant for the negotiations of the actual and final price we were invoiced for [Van Wylick, OHG] ...
- The Dole quotation prices represent Dole's first price demand vis-à-vis us as its purchaser that, however, practically never becomes accepted. As a purchaser of Dole bananas we take the price for bananas of thirds as a benchmark and negotiate with Dole the respective price of the week for Dole bananas accordingly [Metro Group Buying GmbH].'
- 528 An examination of that testimony, originating from Dole's customers, reveals that the applicants cite it in an incomplete and biased manner.



- 529 By the expression ‘Dole quotation prices’, Van Wylick is referring to and mentions expressly ‘those from Thursday morning’ and ‘those that have possibly been adjusted after the price had been fixed for the discount segment’, which is a reference to the situation at the end of 2002 when initial and final quotation prices appeared, a period from which the Commission admits that the ‘Aldi price’ began to be increasingly used as an indicator for banana pricing formulae (recital 104 to the contested decision). In any event, Van Wylick’s testimony does not state that those prices were entirely lacking in any relevance, as the applicants assert.
- 530 That evidence of Van Wylick must also be read in conjunction with Metro’s testimony which confirms that Dole’s quotation prices constituted the initial price demand by that undertaking to its customers and that communication of those quotation prices marked the beginning of commercial negotiations. Metro specifies that it referred to the price of third-tier bananas when negotiating with Dole (which is the standard approach of a customer entering into negotiations with a seller whose starting point is to try to achieve the announced price) and that ‘the outcome of the negotiations is regularly between the Dole quotation price and the price of thirds’. Moreover, Metro states that it ‘practically’ never accepted Dole’s quotation prices, which means, conversely, that it might sometimes have done so.
- 531 Contrary to the applicants’ assertions, those two testimonies do not confirm their claim that quotation prices were not relevant in the banana sector, but even demonstrate the contrary in the case of Metro’s testimony. Whilst the applicants claim that the letters of those two customers demonstrate that the decisive factor for the commercial negotiations was the ‘Aldi price’, the documents in question do not even make any mention of such a price and of any role of that price in the commercial negotiations.
- 532 At the hearing, the applicants submitted that the quotation price being referred to in Metro’s testimony was that categorised as final, set after the ‘Aldi quote’ was announced, which could serve as a starting point for the negotiations. In support of that submission, the applicants rely on the fact that Metro’s testimony goes back to 2008.
- 533 Apart from the fact that there is no automatic link between the year in which Metro’s testimony was written and the nature of the quotation price being referred to in that testimony, it must be stated that, as the title of Annex 10 to the application reveals, Metro’s letter is undated. In any event, the general nature of the wording of that letter does not permit the interpretation that the applicants give to that letter for the first time at the hearing.
- 534 The applicants also refer to the testimony of one of Dole’s customers contained in an email sent on 13 June 2007 to the Commissioner for Competition, and to the testimony of a former Atlanta employee contained in a letter sent to Dole on 19 November 2007, thus suggesting the existence of two different witnesses.
- 535 However, it is clear that the statements concerned emanate from the same person, Mr W., who confirms in his letter of 19 November 2007 having sent an email to the Commissioner for Competition on 13 June 2007.
- 536 It is true that the witness described as ‘ludicrous’ any suggestion that banana suppliers could have participated in a price-fixing cartel, but for reasons relating to the regulatory framework of the market and to the licensing system, which ensured that that market was very transparent. Mr W. also stated that the banana market was dominated by several very powerful buyers, and that ‘the benchmark price for the entire European banana market was, ultimately, unilaterally set by Aldi’.
- 537 That peremptory and general statement is not alone capable of undermining the probative value of the various items of evidence gathered by the Commission demonstrating the relevance of quotation prices. It must also be recalled that the Commission did in fact take account of the specific regulatory framework of the relevant market in its global analysis of the concerted practice.



- 538 On the other hand, it should be noted that, in his email of 13 June 2007 to the Commission, Mr W. states that, '[i]f the price did not appear to be in line with the market for a customer, he would inform his supplier about competing offers' and that '[t]his is a procedure which repeats itself every Thursday and which is more or less standard in the industry'. That statement on a specific and precise fact confirms Dole's statements, made during the administrative procedure, revealing that customers used quotation prices as negotiating instruments for the setting of actual prices (see paragraph 446 above).
- 539 Fifth, the applicants refer to an economic analysis of the transactions carried out by Dole (reports of 20 November 2007 and 19 December 2008) and to an internal document revealing that prices paid by customers were much more closely linked to the 'Aldi price' than to Dole's quotation prices and that the impugned conduct had no impact on actual prices. The applicants allege that the same is true in respect of Chiquita in the light of a table produced by Fyffes during the administrative procedure and of Chiquita's statements on the fact that quotation prices are 'far away from reality' or 'have no correlation' to actual prices. They allege that the Commission ultimately admitted this, as evidenced by its statement in recital 352 to the contested decision that 'the Commission does not claim that actual prices and quotation prices are closely correlated'.
- 540 That line of argument must be rejected, inasmuch as it is based on a misconception of the standard of proof of a concerted practice within the meaning of Article 81(1) EC.
- 541 As is clear from the very terms of Article 81(1) EC, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. However, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market (*Commission v Anic Partecipazioni*, paragraph 55 above, paragraph 118; *Hüls v Commission*, paragraph 57 above, paragraph 161; and *T-Mobile Netherlands and Others*, paragraph 56 above, paragraph 51).
- 542 In the present case, it is not in dispute that the undertakings which participated in the unlawful concerted action remained active in the banana trade and that Dole admitted that it took into account the information obtained from competitors in setting its quotation prices.
- 543 Moreover, although the very concept of a concerted practice presupposes conduct on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (*Commission v Anic Partecipazioni*, paragraph 55 above, paragraphs 122 to 124; *Hüls v Commission*, paragraph 57 above, paragraphs 163 to 165; and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 123 to 125).
- 544 As was recalled earlier in paragraph 68 above, an anti-competitive object and anti-competitive effects constitute conditions that are not cumulative but alternative for the purposes of applying the prohibition laid down in Article 81(1) EC. In deciding whether a concerted practice is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market.
- 545 It must be borne in mind that, 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. In addition, 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 (*T-Mobile Netherlands and Others*, paragraph 56 above, paragraphs 31, 35 and 38).

- 546 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 (see, to that effect, Case T-21/99 *Dansk Rørindustri v Commission* [2002] ECR II-1681, paragraph 140).
- 547 It must be noted in that regard that prices actually charged on a market are liable to be influenced by external factors outside the control of the members of the cartel, such as the evolution of the economy in general, changes in demand in that particular sector or the negotiating power of customers.
- 548 In the present case, it is apparent from paragraphs 443 to 537 above that the Commission has established to the requisite legal standard the relevance of quotation prices in the banana sector, a factor which, in combination with the other circumstances of the case taken into account by the Commission, makes it possible to establish the existence of a concerted practice having an anti-competitive object.
- 549 It is therefore irrelevant whether the quotation price was the most decisive factor in terms of Dole's and Chiquita's actual price or to what extent the quotation prices and actual prices of those undertakings were connected, bearing in mind that quotation prices are announced prices in respect of which it has not been claimed that they could be obtained in weekly negotiations or even that they could serve as a basis for calculating the final prices charged.
- 550 The mere fact that actual prices and quotation prices are not 'closely' correlated, as stated in recital 352 to the contested decision, is not sufficient to call in question the probative value of the evidence adduced by the Commission which enabled it to conclude that quotation prices served at least as market signals, trends or indications as to the intended development of banana prices and that they were relevant for the banana trade and the prices obtained.
- 551 The finding that there was a differential between quotation prices, which were the subject of the unlawful concerted action, and transaction prices certainly does not mean that quotation prices were not liable to have an influence on the level of transaction prices. The function of quotation prices is to lift market prices higher even if, ultimately, market prices are lower than announced prices. It should be borne in mind, in that regard, that the General Court has taken account of the fact that the recommended rates of an undertaking were higher than the market price in order to find that the pricing system of that undertaking had the object of increasing market rates (Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraph 163).
- 552 Moreover, it is common ground that, in certain transactions, the price was directly linked to quotation prices by means of pre-established pricing formulae.
- 553 The Commission was therefore entitled to conclude that the bilateral communications between the undertakings concerned were unlawful, and had the object of leading to conditions of competition that do not correspond to the normal conditions of the market, since they made it possible for each of the participants to reduce uncertainty over the conceivable conduct of competitors (see, to that effect, *Cimenteries CBR and Others v Commission*, paragraph 312 above, paragraph 1908).
- 554 In any event, it must also be pointed out that the analysis and the document which are mentioned in paragraph 539 above concern only the prices charged by Dole or Chiquita, whereas the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating the cartel's effect on the market; account must only be taken of the effects of the infringement taken as a whole (*Commission v Anic Partecipazioni*, paragraph 55 above, paragraphs 150 and 152).

- 555 With respect, first of all, to Chiquita's transactions, the table produced by Fyffes during the administrative procedure would appear to be lacking in any genuine probative value, since the data collected refer to a period commencing only in the second quarter of 2002, and it is also not possible to determine with certainty whether those data in fact concern the whole of the relevant geographic market.
- 556 Moreover, Chiquita's statements on quotation prices being 'far away from reality' are contained in an email dated 26 June 2004 and therefore after the infringement period. It may, however, be observed that, in that email, a Chiquita employee replies to a query by a colleague who is surprised at the level of the quotation price of Del Monte brand bananas, which is higher than Dole's. The author of the email states that, since Del Monte had taken direct charge of distributing its bananas, it had a strategy of positioning itself as closely as possible to Chiquita and that given that the new person running Del Monte was a former Chiquita employee, he knew Chiquita's tricks regarding pricing and therefore the differential between quotation prices and actual prices.
- 557 As regards the brief and vague statement that quotation prices 'have no correlation' to actual prices, it is in no way substantiated by objective documentary evidence relating to the infringement period of 2000 to 2002 and the relevant geographic market. In any event, that statement cannot be read in isolation, independently of Chiquita's explicit statements on the purpose of the pre-pricing communications and of the documentary evidence gathered by the Commission and, in particular, of the emails from Chiquita, demonstrating the relevance of quotation prices in the banana sector.
- 558 Next, it must be stated that the economic analysis and the document mentioned in paragraph 539 above, relating to Dole's pricing practice, do not permit the conclusion that there is no correlation between actual prices and quotation prices, but that there is a lower level of correlation between those two prices than there is between actual prices and the 'Aldi price'. Moreover, to the extent that it can be accepted that the graphs set out in Annex A 18 to the application refer to data relating only to transactions in Germany, they show that the correlation between the 'Aldi price' and Dole's actual price was significantly higher in 2006-2007 than between 2000 and 2002, thereby corroborating the idea of the growing importance of the 'Aldi price'.
- 559 The applicants concentrate on the correlation between the 'Aldi price', the price of a retailer which acquired yellow bananas from ripeners, and Dole's actual price, whereas the relevance of that correlation should not be overstated, given the chronology of marketing of bananas, in the context of the process of weekly negotiation, since it is common ground that Chiquita, Dole and Weichert announced their quotation prices to all their customers, ripeners and retailers, early on Thursday morning, before the 'Aldi quote' became public; this shows that, from a chronological point of view, the announcement of quotation prices marked the starting point of the commercial negotiations. Dole's statements, submitted during the administrative procedure, on the conduct of customers in relation the offers made by importers bear out the truth of that observation (see paragraph 445 above)
- 560 It is therefore apparent that the importers first set and announced their quotation prices signalling the intended development of banana prices, then ripeners formed an idea about the market development and submitted their offers to Aldi, and only then was the 'Aldi price' set.
- 561 The applicants claim that it is not possible to take the view that quotation prices might be relevant because they might have somehow influenced the 'Aldi price' and state, in that regard, that Aldi purchases third-tier bananas (and not bananas marketed under the Chiquita, Dole and Del Monte brands) so that quotation prices, which do not concern third-tier bananas, have no relevance for Aldi.

562 That argument plainly contradicts Dole's assertion that the 'Aldi price' itself was relevant for all transactions (without differentiation by brand, including its own sales of branded bananas). It should be added that quotation prices are part of a process of setting the prices of a product, the banana, which has three levels of quality, thus implying a pricing positioning of the three types of bananas by reference to one another and a form of interdependence between prices.

563 Moreover, the applicants state that Aldi's suppliers did not take account of quotation prices and refer to the letter from their customer, Van Wylick, and to a statement by Chiquita on the conditions under which Atlanta made its offers to Aldi.

564 In its letter (see paragraph 527 above), Van Wylick states that Dole's banana quotation prices were hardly relevant for the negotiations of the actual and final price '[it was] invoiced for', that latter reference showing that the author of the letter is referring to its business relationship with Dole and not with Aldi.

565 Chiquita's statement reads as follows:

'As already mentioned above, quote prices were announced to Atlanta on Thursday only for Chiquita, Dole and Del Monte for their prime brands. Accordingly, Atlanta did not base its offer to Aldi upon a "third label quote price". As explained above, the offers were based upon the information collected by Mr. [C.] and Mr. [N.] in their pre-pricing calls with third label suppliers on Wednesday (Mr. [N.] or Thursday (Mr. [C.])). In such calls, third label suppliers always tried to convince Atlanta of their price expectations. Such price expectations were not identical, but often showed differences in the range of 0.50€ to 1€ per box.'

566 That statement on Atlanta's conduct indicates that, when it was setting its price offer to Aldi, Atlanta took account of information collected from third-label banana suppliers, but that it was aware, at that point, of the importers' price expectations by means of the earlier announcement of quotation prices, as the beginning of the statement reveals.

567 Atlanta's pricing decisions for a type of banana, like the pricing decisions of all the other operators – including Aldi – active on the market, were necessarily taken in the context of a market covering three levels of quality accompanied by correlative price differences.

568 It should be noted that the economic analysis of the transactions carried out by Dole (reports of 20 November 2007 and 19 December 2008) reveal a high average level of correlation between the 'Aldi price' and quotation prices during the period 2000 to 2005, that analysis indicating that the development of the 'Aldi price' was in fact closely correlated to the development of the quotation price.

569 In that regard, the Commission drew attention, in recital 122 to the contested decision, to the following statements by Dole:

'... the initial quotation prices, which some of the companies are voicing to the market on Thursday mornings after their pricing meetings, is a price trend – their expectation that the market might go up by 1 Euro, by 50 cents (always per box, per 18kg box) and ... that the ripeners who are crucial for the supply of yellow bananas are giving quotes to Aldi (the largest buyer of bananas) in the morning of Thursday and the ripeners form their idea about how the market price might develop during the morning hours, some time between 9 and 11 o'clock, then they send the faxes with their offers to Aldi and Aldi comes back some time after 1 o'clock; so what is happening very often is that the ripeners do expect the price of a box of bananas to go up by 1 Euro and Aldi is coming back and saying "Well, yes the market is getting better, we see our retail consumer offtake developing positively



but we don't accept 1 Euro up, we accept 36 cents up" ... So ... the importers really have a feeling for the market only, they see a market trend emerging, and they think that the price might go up by 1 Euro (that's what they are voicing to the market) but then the crucial thing is what Aldi thinks ...'

- 570 That assessment by Dole, which has always contested that it committed an infringement of Article 81 EC, does not call in question the relevance of the description of the process characterising what happened on Thursdays and the establishment of a link between quotation prices and the 'Aldi quote'.
- 571 Dole also stated, by means of economic studies submitted during the administrative procedure, that 'the [initial] quotation prices, which were based on extensive information-gathering efforts ... provided better and more accurate information about market conditions than would likely have been the case absent such exchanges' and that 'these initial quotation prices were known to ripeners when ripeners made their offers to Aldi, so that better initial quotation prices would likely conduce to Aldi price that more accurately reflected changes in the balance of supply and demand for the following week' (p. 5 of the economic study of 20 November 2007). It is further stated that 'the willingness of the ripeners to accept particular terms from Aldi depended to some extent on the initial quotation price they received from importers (although these prices were not binding)', that '[those quotation prices] in turn depended on the importer's views about the ease of selling the particular volume they were landing that week' and that 'the exchange meant that the quotation prices of the banana companies each reflected pooled information about supply and demand that week, and not just the private information of one supplier' (p. 7 and 9 of the economic study of 10 April 2007).
- 572 Those statements, which are particularly explicit in relation to the link between quotation prices and the 'Aldi quote', are consistent with the content of an internal Chiquita email, dated 8 August 2002, in which a Chiquita employee conveys his thoughts following a EUR 2 increase by Dole of its quotation price (recitals 111, 172 et seq. to the contested decision) in the following terms: 'By moving the market and Aldi price up they [Dole] ... get a better price ...'
- 573 Responding to a request for information from the Commission, Aldi stated that its decision on its weekly offer to its suppliers was based on the offers received, the prices of the previous week and the price in the 'similar' week of the previous year. Aldi added that 'the prices in offers it received from ripeners reveal at least a tendency for the price development, which [did] not always have to be reflected in the formulation of the counteroffer, however' (recital 116 to the contested decision and footnote 150).
- 574 It follows from the foregoing considerations that the Commission was right to find that quotation prices were relevant in the banana sector, by observing (i) that they served at least as market signals, trends or indications as to the intended development of banana prices and that they were relevant for the banana trade and the prices obtained and (ii) that, in some transactions, actual prices were directly linked to quotation prices.
- 575 It is also appropriate to point out, as the Commission rightly does, that the alleged importance of the Aldi purchasing price does not exclude the relevance of quotation prices as established in the contested decision.
- 576 It follows from the foregoing considerations that the complaint alleging that quotation prices were not relevant for the negotiation of actual prices in the banana sector must be rejected.



The responsibility of the Dole employees involved in the bilateral communications

- 577 The applicants maintain that, on the assumption that there was a close correlation between quotation prices and actual prices, the information exchanges at issue did not even involve disclosure of the actual quotation prices adopted in the Thursday meeting and observe, in that regard, that the Dole employee involved in the bilateral communications in issue, Mr H., was not responsible for setting actual quotation prices, that decision being made by DFFE's general manager.
- 578 It should be recalled that the Commission alleges that Dole participated, on a bilateral basis, in communications with Chiquita and Weichert about price-setting factors, that is, factors relevant for the setting of quotation prices for the forthcoming week, and on price trends and indications of quotation prices for the forthcoming week before quotation prices were set on Thursday morning.
- 579 The Commission also found, without being contradicted by the applicants, that Dole exchanged bilaterally with the abovementioned undertakings quotation prices, once they had been set, and that that exchange made it possible to monitor the follow-up to the pre-pricing communications and to reinforce cooperation between the undertakings.
- 580 The pre-pricing communications involved Messrs H. and G., respectively Area Manager and Sales Executive at Dole, both of whom participated in the internal pricing meetings (recital 63 to the contested decision). The applicants do not challenge those findings of the Commission.
- 581 It should be borne in mind, moreover, that, according to the case-law, the attribution to an undertaking of an infringement of Article 81 EC does not require there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned by that infringement; action by a person who is authorised to act on behalf of the undertaking suffices (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 97, and Case T-15/99 *Brugg Rohrsysteme v Commission* [2002] ECR II-1613, paragraph 58). The applicants do not contest that their employees involved in the pre-pricing communications were so authorised.
- 582 Accordingly, the applicants' argument that the employees involved in the pre-pricing communications did not have final responsibility for setting quotation prices is irrelevant and must be rejected.
- 583 It follows from all the foregoing considerations that the Commission has established to the requisite legal standard that Dole, Chiquita and Weichert 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 (recitals 148, 182 and 196 to the contested decision).
- 584 By means of the pre-pricing communications, Dole, Chiquita and Weichert coordinated the setting of their quotation prices instead of deciding on them independently. During those bilateral discussions, the undertakings disclosed the course of action which they contemplated adopting or at least enabled the participants to estimate competitors' future behaviour with regard to their quotation prices to be set and to anticipate their intended course of action. They therefore decreased uncertainty concerning competitors' future decisions on quotation prices, with the result that competition between undertakings was restricted (recitals 263 to 272 to the contested decision).
- 585 The Commission was therefore right to conclude that the pre-pricing communications, which took place between Dole and Chiquita and between Dole and Weichert, concerned the fixing of prices and that they gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.

B – *Infringement of the rights of the defence and the obligation to state reasons*

586 In the first place, the applicants maintain that, of the three activities amounting, according to the statement of objections, to a set of interrelated bilateral collusive arrangements and an infringement by object of Article 81 EC, the Commission ultimately disregarded two, including the practice, relating to the exchange of information about volumes, which was considered by Chiquita to be the most serious. They also observe that the Commission did not punish Fyffes and Van Parys, which were none the less involved in the same alleged collusive bilateral communications.

587 In so doing, the Commission, according to the applicants, completely changed its theory relating to the infringement in the contested decision, without affording them an opportunity in advance of being heard on that change, thus infringing Article 27(1) of Regulation No 1/2003 and their rights of defence.

588 It should be borne in mind that, according to the case-law, the decision is not necessarily required to be an exact replica of the statement of objections (*van Landewyck and Others v Commission*, paragraph 335 above, paragraph 68). The Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections. In that regard, it must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains (*ACF Chemiefarma v Commission*, paragraph 335 above, paragraph 92; see also, to that effect, *Suiker Unie and Others v Commission*, paragraph 56 above, paragraphs 437 and 438). Thus it is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts that there will be an infringement of the rights of the defence (*ACF Chemiefarma v Commission*, paragraph 335 above, paragraph 94; see also, to that effect, Joined Cases T-39/92 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49, paragraphs 49 to 52).

589 That is not the case where, as in the present case, the alleged differences between the statement of objections and the final decision do not concern any conduct other than that in respect of which the undertakings concerned had already submitted observations and are therefore unrelated to any new complaint (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 103).

590 It is common ground that, in paragraph 60 of the statement of objections, three collusive practices are alleged, namely:

- exchanges of information concerning arrival volumes of bananas into Northern Europe (exchange of volume information);
- bilateral communications on banana market conditions, price trends or indications of quotation prices before those prices were set;
- exchange of banana quotation price information (exchange of quotation prices).

591 In paragraph 429 of the statement of objections, the Commission unequivocally found that ‘each complex of bilateral arrangements’ and the network of arrangements constituted an infringement having an object of restricting competition in the Community and the EEA within the meaning of Article 81 EC and Article 53 of the EEA Agreement.

- 592 That conclusion followed a separate examination of each type of conduct complained of, in particular, in paragraphs 404, 412 to 416 of the statement of objections, in which the Commission referred to ‘a complex of bilateral communications on banana market conditions, price trends ... or indications of quotation prices before quotation prices were set, by which parties influenced price setting, ultimately amounting to price fixing’ and stated that ‘such collusive arrangements had an anti-competitive object’.
- 593 As the Commission states, the applicants clearly understood the case made against them in the statement of objections, as is clear from the reply of 21 November 2007 to that statement, in which Dole specifically defends itself against the allegation that bilateral communications on banana market conditions constituted an infringement by object.
- 594 The applicants essentially refer, in their pleadings, to paragraph 395 of the statement of objections which concerns the concept of a complex, single and continuous infringement, the Commission having taken the view, initially, that the three anti-competitive practices at issue led to a broader single and continuous infringement.
- 595 In the contested decision, after analysing the replies to the statement of objections and the statements made by the undertakings concerned at their respective hearings, the Commission ultimately withdrew, first, its objections relating to exchanges of information on volumes and those relating to the exchanges of quotation prices, maintaining only the objection in respect of the concerted practice relating to what it called the pre-pricing communications and, second, the objections addressed to Fyffes and Van Parys.
- 596 Accordingly, the applicants cannot validly plead infringement of the rights of the defence, as recognised by Article 27(1) of Regulation No 1/2003, irrespective of Chiquita’s perception of the gravity of the objections referred to in the statement of objections, as claimed by the applicants.
- 597 In the second place, in the complaint alleging infringement of the rights of the defence, the applicants first claim that the Commission infringed its obligation to state reasons inasmuch as the contested decision fails to specify in a clear and unequivocal fashion what communications about factors relevant to the setting of quotation prices may or may not take place between banana importers under Article 81 EC.
- 598 That claim has already been examined and rejected for the reasons stated in paragraphs 261, 262 and 264 above.
- 599 Moreover, the applicants claim that the contested decision also fails to specify what features of the communications involving Fyffes and Van Parys explain why those communications were not found to have an anti-competitive object.
- 600 In so far as Dole claims that the contested decision is unlawful by reason of insufficient reasoning or a lack of clarity relating to the treatment of Fyffes and Van Parys, which were not addressees of the contested decision and thus were not penalised, it should be recalled that Dole may not argue from such a circumstance in order itself to escape a penalty imposed for breach of Article 81 EC when the circumstances of the two other undertakings are not even the subject of proceedings before the Union judicature (see Case T-304/02 *Hoek Loos v Commission* [2006] ECR II-1887, paragraph 62 and the case-law cited).
- 601 It follows from the foregoing considerations that the complaint alleging infringement of the obligation to state reasons laid down in Article 253 EC must be rejected.

### III – *The claims for annulment or reduction of the fine*

602 The applicants put forward a single plea alleging that the fine is unjustified and disproportionate, in the context of which they complained that the Commission determined the basic amount of the fine by taking account of the sale of products unrelated to the infringement, taking the view that the impugned conduct had the object of fixing prices and refusing to take account of Dole's precarious financial situation.

#### A – *Preliminary observations*

603 It is common ground that, when setting the amount of the fine imposed on Dole, the Commission applied the Guidelines (recital 446 to the contested decision), which have established a two-step calculation method.

604 The Guidelines provide, by way of a first calculation step, for the determination by the Commission of a basic amount for each undertaking or association of undertakings concerned and include, in that regard, the following provisions:

'12. The basic amount will be set by reference to the value of sales and applying the following methodology.

...

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

...

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.



24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred [to] in point 22.'

605 According to footnote 2 of the Guidelines, the expression 'horizontal price-fixing agreements', which appears in point 23 of the Guidelines, includes concerted practices within the meaning of Article 81 EC.

606 The Guidelines provide, by way of a second calculation step, that the Commission may adjust the basic amount upwards or downwards, on the basis of an overall assessment which takes account of all the relevant circumstances (points 11 and 27).

607 In respect of those circumstances, point 35 of the Guidelines mentions an undertaking's ability to pay in the following terms:

'In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

*B – The allegedly disproportionate nature of the basic amount of the fine in that it is based on the value of sales of products unrelated to the infringement, and the infringement of the obligation to state reasons*

608 The applicants maintain that the Commission misapplied the Guidelines when it calculated the basic amount of the fine, because it relied on the value of sales of products unrelated to the alleged infringement, namely sales of green bananas other than Dole-branded bananas; sales of Dole-branded green bananas sold under contractual arrangements not based on quotation prices; and sales of yellow bananas. They also claim that the contested decision is inadequately reasoned on the inclusion of transactions relating to those bananas in the basis for calculating the amount of the fine.

609 It should be noted that the applicants reiterate the criticisms that they made when disputing the existence of the infringement.

610 In the first place, this is the case in respect of the distinction drawn by the applicants between green and yellow bananas, which it submits are two different products which fall within two separate markets, underlying the argument that the Commission fails to explain in the contested decision how the alleged coordination of quotation prices for green bananas sold by DFFE during the current week can have affected the pricing of yellow bananas sold by Saba, Kempowski, VBH and Dole France, pricing which was set independently and without any reference to a green quote.

- 611 First, as regards the claim of an infringement of the obligation to state reasons, it must be pointed out, as was stated at paragraph 127 above, that the Commission, in recitals 4, 5, 32, 34, 104, 141 to 143, 182, 196 and 287 to the contested decision, explained with sufficient precision and clarity its position as regards the single nature of the relevant product, namely fresh bananas, the specific nature of that product, namely fruit which is imported green and sold for public consumption once it has become yellow, after it has been ripened, the manner in which ripening is organised and, subsequently, in which bananas are marketed, the process of commercial negotiation with quotation prices and the link between the quotation prices of green and yellow bananas.
- 612 In the contested decision, the value of sales of fresh bananas by Dole in 2002 is estimated at EUR 198 331 150, a figure which includes transactions by DFFE, the subsidiaries VBH, Saba, Kempowski and Dole France in Belgium and Luxembourg; this figure was revised downwards to EUR 190 581 150 after subtracting the amount of bananas purchased from the other addressees of the contested decision (recitals 451 to 453 to the contested decision).
- 613 Accordingly, it cannot be alleged that the Commission infringed Article 253 EC so far as concerns the inclusion in the value of sales of transactions relating to green and yellow bananas.
- 614 Second, as regards the merits of the Commission's assessment, it should be borne in mind that the applicants' argument based on the distinction between green bananas and yellow bananas was already put forward in support of the complaint that Dole's and Chiquita's respective operating methods were incompatible with the unlawful coordination alleged against those undertakings.
- 615 That complaint was rejected as unfounded (see paragraph 248 above). The Commission was right to consider that green and yellow bananas are the same product, that the quotation price (whether green or yellow) concerned the same product, fresh bananas, and that yellow quotation prices were linked to green quotation prices. The specific features of the banana, namely fruit which is imported green and sold for public consumption once it has become yellow, after it has been ripened, and the manner in which it is marketed cannot affect the single nature of the relevant product and provide a valid basis for the claim of the existence of two different products falling within two separate markets.
- 616 It follows that the applicants have failed to demonstrate any misapplication of the Guidelines by the Commission on account of the inclusion in the value of sales of transactions relating to yellow bananas.
- 617 It should be further observed that, going beyond the product in itself, the applicants rely on the fact that yellow bananas were sold by Saba, Kempowski, VBH and Dole France, which were not addressees of the statement of objections and of the contested decision, or involved in the anti-competitive conduct complained of, since they set their prices independently of DFFE and without reference to its quotation price.
- 618 That argument cannot be accepted.
- 619 It is common ground that, in Article 1 of the contested decision, the Commission found that the infringement was committed by Dole, the ultimate parent company of the Dole group, which is involved in the sale and marketing of bananas in Europe via numerous subsidiaries.
- 620 Although Dole claimed that there had not been any anti-competitive conduct, it did not, however, dispute in these proceedings its liability as parent company of the Dole group, it being recalled that the contested decision relates clearly to an anti-competitive practice relating to fresh bananas, whether green or yellow.

- 621 The claim that Dole's subsidiaries were autonomous is merely part of the line of argument relating to the necessary distinction between green and yellow bananas raised in support of the complaint alleging that Dole's and Chiquita's operating methods were incompatible with the collusion alleged and the claim that the value of sales relied on by the Commission in determining the amount of the fine should be reduced.
- 622 Accordingly, the Commission cannot be criticised for having taken into account, when determining the value of 'the undertaking's' sales of goods or services, in accordance with point 13 of the Guidelines, to which the infringement directly or indirectly relates, the amount of the sales of yellow bananas by the companies of the group of which Dole is the ultimate parent company.
- 623 The applicants' statements on the alleged autonomy of Saba, Kempowski, VBH and Dole France are therefore irrelevant and, in any event, unjustified, as was explained in paragraphs 209 and 210 above.
- 624 Third, the applicants claim, more specifically, that the amount of the transactions relating to yellow bananas which Saba purchased from Chiquita and subsequently sold cannot properly be used to calculate Dole's fine either. The applicants maintain that the Commission considered that those transactions should be regarded as revenues for Dole and not Chiquita, in order to avoid double counting those bananas (recital 452 to the contested decision), although that objective could be achieved by including those bananas in Chiquita's revenues. That approach would have been the more appropriate, since the price of those specific bananas was determined solely by Chiquita and another shareholder of Saba.
- 625 In recital 452 to the contested decision, the Commission deducts, in order to avoid double counting, from the sales figures of the undertakings to which the contested decision was addressed the value of fresh bananas sold to other addressees, which were subsequently sold in Northern Europe.
- 626 It is not disputed that Saba is a subsidiary of Dole and that it resold yellow bananas purchased green from Chiquita for an amount of EUR 18 168 309 according to recital 452, so that the deduction effected by the Commission was justified.
- 627 It must be observed that, according to the applicants' own pleadings, Dole also benefited from that desire of the Commission to avoid double counting, since the Commission deducted an amount of EUR 7 750 000 corresponding to sales of Dole bananas by the ripener-distributor Atlanta, which was linked to Chiquita.
- 628 The claim that the price of the bananas in question was set by Chiquita and another shareholder of Saba is in no way substantiated and even contradicts the previous assertion by the applicants that Saba determined its pricing policy autonomously. Accordingly, the applicants' argument by which it seeks to exclude from the value of sales transactions relating to bananas purchased by Saba from Chiquita and resold in Northern Europe must be rejected.
- 629 The applicants also refer to double counting in relation to sales by DFFE of green bananas to Cobana, which were taken into account in the amount of the transactions declared by DFFE in 2002, and which were subsequently purchased by Kempowski for an estimated amount of EUR 2.6 million and resold as yellow bananas for an estimated amount of EUR 2.9 million.
- 630 Apart from the fact that the amounts indicated are based on a mere estimate, it must be stated that that claim of the applicants is in no way substantiated and that the situation described does not fall within the situation described in recital 452 to the contested decision, since Cobana was not one of the undertakings to which the contested decision was addressed.
- 631 In the second place, the applicants reiterate their line of argument that quotation prices were not relevant in the banana sector.

- 632 The applicants claim (i) that Dole's quotation prices concerned only green Dole-branded bananas and not green third-tier bananas sold by DFFE, the latter therefore having no connection with the infringement and (ii) that green Dole-branded bananas sold under contractual arrangements not based on the quotation prices are not goods to which that infringement relates, in this case green bananas sold under 'annual Aldi plus agreements' and during weekly negotiations in which Dole's quotation prices did not serve as the starting point of the commercial negotiations.
- 633 First, as regards the complaint alleging infringement of the obligation to state reasons, it should be noted that, having stated that the relevant product was the fresh banana, the Commission specified three levels of banana brands, called 'tiers', which exist on the banana market, and the corresponding pricing difference (recitals 4 and 32 to the contested decision).
- 634 According to the Commission, and as was mentioned in paragraph 14 above, the prices paid by retailers and distributors for bananas (known as 'actual prices' or transaction prices) could be the result either of negotiations taking place on a weekly basis, in fact between Thursday afternoon and Friday (or later in the current week or the beginning of the following week) or of the implementation of supply contracts with pre-established pricing formulae mentioning a fixed price or linking the price to a quotation price of the seller or a competitor or another quotation price, such as 'the Aldi price' (recital 34 to the contested decision).
- 635 The Commission examined in recitals 102 to 128 to the contested decision, with sufficient precision and clarity, the issue of the setting and relevance of the quotation price in the banana sector, and set out the chronology of the pricing process in the light of the announcement of the 'Aldi price' (recital 104 to the contested decision).
- 636 Moreover, the Commission added, in recital 287 to the contested decision, that 'while quotation prices were set for different brands of the parties, there was a relationship between prices for those brands and for other "thirds" brands and for unbranded bananas' and that 'in fact both Dole and Weichert argue that even the price paid by Aldi (for non-branded bananas) was important in determining actual prices for branded bananas'.
- 637 Accordingly, it cannot be alleged that the Commission infringed Article 253 EC so far as concerns the inclusion in the value of sales of transactions relating to green bananas other than Dole-branded green bananas and to sales of Dole-branded green bananas effected under 'Aldi plus agreements' or during the weekly negotiations.
- 638 Second, with respect to the merits of this complaint, it should be recalled that the Commission was right to find that quotation prices were relevant in the banana sector, by observing (i) that they served at least as market signals, trends or indications as to the intended development of banana prices and that they were relevant for the banana trade and the prices obtained and (ii) that, in some transactions, actual prices were directly linked to quotation prices.
- 639 It must be pointed out, as was observed in paragraph 526 above, that the infringement relates to a single product, the fresh banana, which has three levels of quality with corresponding price differences, and which falls within a single market characterised by a price-fixing process consisting of an announcement each Thursday morning of Dole's, Chiquita's and Weichert's quotation prices to their customers, the first message to the market on importers' price expectations. Even though those quotation prices concerned only first and second category bananas sold by those undertakings, there was a link between those prices and those of thirds brands or those of unbranded bananas in so far as, each week, there was necessarily pricing positioning of the various qualities of bananas by reference to one another. The existence of a certain interdependence between the quotation prices of Chiquita, Dole and Del Monte banana brands, the Del Monte brand being distributed by Weichert, is illustrated by Chiquita's internal emails of 30 April 2001 (recital 107 to the contested decision) and 8 August 2002 (recitals 111, 172 et seq. to the contested decision).



- 640 As the Commission rightly observes, the applicants state themselves that the ‘Aldi price’, relating to the purchase of third-tier bananas, was relevant for the setting of the transaction prices of all bananas, including Dole-, Chiquita- and Del Monte-branded bananas.
- 641 As regards transactions effected under ‘Aldi plus agreements’, with an actual price set by reference to the ‘Aldi price’, the indirect influence of quotation prices on the ‘Aldi price’ has been demonstrated in paragraphs 559 to 573 above.
- 642 It is apparent from the foregoing considerations that the applicants have failed to demonstrate any misapplication of the Guidelines by the Commission on account of the inclusion in the value of sales of transactions relating to green bananas other than Dole-branded green bananas and to sales of Dole-branded green bananas effected under ‘Aldi plus agreements’ or during the weekly negotiations, it being recalled that point 13 of the Guidelines refers to the fact that the Commission takes account, for the purposes of determining the basic amount of the fine, of the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates.
- 643 Lastly, it should be pointed out that the applicants’ assertion that an error was committed during the administrative procedure as regards the calculation of the total net sales of DFFE’s green bananas in 2002 (excluding inter-company sales to Saba and VBH), which, it alleges, came in fact to EUR 98 997 693 and not to EUR 99 451 555, is not substantiated in any way and that no claim for the reduction of the basic amount of the fine set by the Commission is specifically based on that assertion.
- 644 It follows that the complaint alleging that the basic amount of the fine is disproportionate inasmuch as it is based on the value of sales of products unconnected with the infringement must be rejected.

*C – The allegedly disproportionate nature of the basic amount of the fine in that it is based on the incorrect finding that the conduct ‘concerned the fixing of prices’ and infringement of the obligation to state reasons*

- 645 The applicants claim that the finding in recital 456 to the contested decision that the impugned conduct ‘concerned the fixing of prices’ is inconsistent with the Commission’s earlier assertion that ‘the parties did not agree or concert on actual prices’ (recital 237 to the contested decision) and the fact that the present case involves a mere information exchange, which is not part of a broader price-fixing agreement. That error by the Commission led it to take, under point 19 of the Guidelines, a large proportion of sales (15%) in order to fix the basic amount of the fine and to increase that amount, under point 25 of the Guidelines, by an additional ‘entry fee’ of 15%, by referring only to the ‘specific circumstances of the case’, which constitutes manifestly insufficient reasoning and is in any event incorrect, in so far as that reference means that the present case concerns ‘price-fixing’.
- 646 The applicants also claim that the application, under point 19 of the Guidelines, of a percentage as high as 15% is manifestly disproportionate by comparison with the percentage applied, namely 18%, in two decisions taken in application of Article 81 EC dated 27 and 28 November 2007 concerning actual price-fixing agreements covering the EEA and concluded by undertakings holding a larger part of the total market (85% in the first case and 80% in the second).
- 647 In the first place, as regards the complaint alleging that the contested decision was inadequately reasoned, in addition to the case-law mentioned in paragraphs 125 and 126 above, it should be borne in mind that, in the context of the setting of fines for infringement of competition law, the Commission fulfils its obligation to state reasons when, in its decision, it indicates the factors which enabled it to measure the gravity and the duration of the infringement committed, and it is not required to include a more detailed account or figures relating to the method used to calculate the fine

(see, to that effect, Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 38 to 47, and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraph 1532).

- 648 In the present case, it must be observed that the Commission, in accordance with points 20 and 22 of the Guidelines, examined and took into account when setting the proportion of the value of sales by reference to the degree of gravity of the infringement, various factors relating to the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether the infringement had been implemented, as is apparent from recitals 454 to 459 to the contested decision. In order to determine the additional amount provided for in point 25 of the Guidelines, the Commission referred, by an express reference to section 8.3.1.1 of the contested decision, to its assessment of those factors, as can be seen in recital 464 to the contested decision.
- 649 It will be recalled that point 25 of the Guidelines provides that, for the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, including, in particular, those referred to in point 22 of the Guidelines.
- 650 Accordingly, it cannot be alleged that the Commission infringed in any way its obligation to state reasons by setting the amount of 15% under point 25 of the Guidelines.
- 651 In the second place, as regards the merits of the complaint alleging the disproportionate nature of the basic amount of the fine and more specifically of the percentages of the value of sales applied under points 19 and 25 of the Guidelines, first, it must be stated that the line of argument set out by the applicants to that end is in part identical to that which they put forward when challenging the existence of the infringement, and which was rejected earlier in this judgment.
- 652 That line of argument is based on an incomplete and biased reading of the contested decision, in which it is clearly stated that the infringement alleged does not relate to the coordination of actual prices, but to the coordination of quotation prices (see, in particular, recital 237 to the contested decision), which were prices announced to customers by Dole, Chiquita and Weichert.
- 653 As was explained in paragraphs 59 to 62 above, it is not necessary for an information exchange to underpin or form part of a broader cartel in order to be caught by the competition rules. It can be analysed autonomously, as a concerted practice having an anti-competitive object if it directly or even ‘indirectly’ fixes purchase or selling prices or any other trading conditions, as Article 81(1)(a) EC provides.
- 654 In the present case, the Commission was entitled to conclude that the pre-pricing communications, which took place between Dole and Chiquita and between Dole and Weichert, concerned the fixing of prices and that they gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC (see paragraph 585 above).
- 655 It must be noted that point 23 of the Guidelines, according to which ‘[h]orizontal price-fixing, market-sharing and output-limitation agreements’ are by their very nature among the most harmful restrictions of competition, refers to footnote 2, which specifies that the concept of agreements includes ‘concerted practices’ within the meaning of Article 81 EC.
- 656 Similarly, point 25 of the Guidelines provides that the basic amount will include a sum of between 15% and 25% of the value of sales in order to deter undertakings from entering into ‘horizontal price-fixing, market-sharing and output-limitation agreements’, an expression which is identical to that of point 23 which refers to footnote 2. A systematic and consistent interpretation of the Guidelines permits the conclusion that the clarification provided by footnote 2 relates just as much to the same concept of ‘agreements’ used in point 25 of the Guidelines.

- 657 Second, it must be stated that, by setting an amount of 15% of the value of Dole's sales, the Commission applied a proportion 50% lower than that which may be generally applied in horizontal agreements or concerted practices fixing prices, which are, by their very nature, among the most harmful restrictions of competition and will be 'heavily fined', according to points 21 and 23 of the Guidelines. Point 23 of the Guidelines indicates clearly that the proportion to be applied in respect of horizontal agreements or concerted practices fixing prices will generally be at the 'higher end of the scale', the rate of 15% set by the Commission being in the lower part of the 'higher end of the scale'.
- 658 With respect to the additional amount provided for in point 25 of the Guidelines, it must be stated that the Commission applied the minimum amount of 15% mentioned therein.
- 659 The nature of the infringement, the implementation of the practice in issue and the fact that that practice concerned 8 Member States, that is a significant part of the European Union, which was composed of 15 Member States at the material time, including the Federal Republic of Germany, which constitutes, according to the applicants' own statements, the largest banana market in Northern Europe, are factors that were taken into consideration by the Commission and which justify the intermediate amount of 15% of the value of Dole's sales applied under points 21 and 25 of the Guidelines.
- 660 Third, it must be borne in mind that the Court of Justice has repeatedly held that 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 (Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 205). It follows that the applicants cannot invoke the Commission's decision-making policy as an argument before the Courts of the European Union (Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others v Commission* [2009] ECR I-8681, paragraph 123).
- 661 Moreover, it must be stated that the Commission applied a share of sales, in respect of the degree of gravity of the infringement, which was lower than that used in the two decisions to which the applicants refer and which did not relate to the same products, thus illustrating differential treatment of the cases in question.
- 662 Even if it is accepted that the amount of 15% relied on in the contested decision reveals an increase in the share of sales taken into account by the Commission in respect of the assessment of the gravity of the infringement, it will be recalled that the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689, paragraph 127). The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level, at any time, to ensure the implementation of European competition policy (*Musique Diffusion française and Others v Commission*, paragraph 581 above, paragraph 109).
- 663 It follows from the foregoing considerations that it has not been demonstrated that Dole was treated in a disproportionate or discriminatory manner.

*D – The allegedly disproportionate amount of the fine in that the Commission wrongly ignored Dole's argument that it ought to have taken account of Dole's precarious financial situation*

- 664 The applicants assert that the Commission made an error of assessment in refusing to take account of Dole's precarious financial situation on the sole ground that to do so would amount to conferring on it 'an unjustified competitive advantage' (recital 491 to the contested decision). The Commission's

assessment deprives point 35 of the Guidelines of its *effet utile* and is based on a key contradiction, in the light of the fact that the Commission inexplicably abandoned any action against Fyffes and Van Parys.

665 The applicants further submit that the Commission's assessment is insufficient and that, in the defence, the Commission put forward a new reason to explain its rejection, in breach of Article 253 EC. At the hearing, the applicants made clear that they were also alleging, in their pleadings, that the contested decision was inadequately reasoned.

666 In the first place, with respect to the statement of reasons for the contested decision, it should be noted that, after citing point 35 of the Guidelines in its entirety (recital 489 to the contested decision) and recalling the exchanges with Dole for the purposes of determining its financial situation (recital 490 to the contested decision), the Commission came to the following conclusion in recital 491 to the contested decision:

'After having examined Dole's financial situation on the basis of the information submitted, the Commission concludes that it is not appropriate to adjust the amount of the fine in Dole's case. Although the financial information provided by Dole shows that Dole is undergoing serious financial constraints, to take into account the adverse financial situation of an undertaking would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.'

667 It is therefore apparent that the Commission applied the method laid down in the Guidelines and refused to grant a reduction in the amount of the fine on the basis of exceptional circumstances deriving from an inability to pay in the light of an examination which culminated in the mere finding of 'serious financial constraints', or of an 'adverse financial situation'.

668 Those reasons must be read in conjunction with the wording of point 35 of the Guidelines, referred to in recital 489 to the contested decision, which sets out the conditions for granting a reduction in the amount of the fine on the basis of exceptional circumstances.

669 It is clearly apparent from point 35 of the Guidelines that, in order to benefit from such a reduction, the undertaking concerned must establish that the imposition of the fine 'would irretrievably jeopardise [its] economic viability' and 'cause its assets to lose all their value', and that no reduction in the amount of a fine will be granted 'on the mere finding of an adverse or loss-making financial situation', that last reference corresponding to the reasoning used by the Commission in the case of Dole.

670 The applicants claim that, in its defence, the Commission puts forward a new reason to explain its refusal to take account of its financial situation, stating that it rejected that argument following 'a detailed analysis of Dole's situation on the basis of the information submitted', and that that new reasoning is inadmissible.

671 It is sufficient to note that that explanation is already contained in recital 491 to the contested decision, the Commission merely recalling, in its defence, that it analysed Dole's financial situation on the basis of the information submitted and concluded that the conditions for a reduction in the amount of the fine had not been satisfied.

672 It follows that it cannot be alleged that the Commission infringed Article 253 EC either by inadequate reasoning or by contradicting itself in the statement of reasons for the contested decision.

673 In the second place, as regards the merits of the Commission's assessment, it should be borne in mind that, according to settled case-law, the Commission is not required, when determining the amount of the fine, to take account of an undertaking's financial losses, since recognition of such an obligation would be tantamount to giving an unjustified competitive advantage to undertakings least well



adapted to the market conditions (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181, paragraph 370 and the case-law cited).

- 674 The wording of point 35 of the Guidelines reflects the fact that the Commission has taken account of that case-law in the determination of the method of calculating fines.
- 675 It must be stated that the applicants neither claim nor, *a fortiori*, prove that the imposition of a fine was such as to irretrievably jeopardise their economic viability and cause their assets to lose all their value.
- 676 It is therefore apparent that the Commission applied the method laid down in the Guidelines and that its refusal to grant a reduction in the amount of the fine in the light of the mere finding of a 'negative financial situation' is consistent with the case-law referred to in paragraph 673 above.
- 677 With respect to the claim by the applicants of a 'key contradiction' in the Commission's conduct, because of the treatment afforded to Fyffes and Van Parys, who benefited from a competitive advantage stemming from the 'inexplicable' abandoning of any action against them, it must be stated that the applicants' comparative analysis is wholly irrelevant.
- 678 It will be recalled that, where an undertaking has acted in breach of Article 81 EC, it cannot escape being penalised altogether on the ground that one or more other traders have not been fined, when those traders' circumstances are not even the subject of proceedings before the Court (*Ahlström Osakeyhtiö and Others v Commission*, paragraph 56 above, paragraph 197).
- 679 In any event, as was already stated, the Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections and must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains. In the present case, the Commission abandoned the complaints initially made against Fyffes and Van Parys, taking the view that the evidence concerning them was insufficient.
- 680 That situation is in no way comparable to Dole's, an addressee of the contested decision to which the Commission refused to grant a reduction in the amount of the fine in the light of its financial situation and does not therefore reveal any inconsistency or discrimination to Dole's detriment.
- 681 Accordingly, the claim that the Commission was wrong to reject Dole's request that its precarious financial situation be taken into account must be rejected.
- 682 It follows from all the foregoing considerations that the applicants' application for annulment or reduction of the fine must be dismissed.
- 683 It follows that the action must be dismissed in its entirety.

### **Costs**

- 684 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Dole Food Company, Inc. and Dole Germany OHG to pay the costs.**

Truchot

Martins Ribeiro

Kanninen

Delivered in open court in Luxembourg on 14 March 2013.

[Signatures]

## Table of contents

Facts giving rise to the dispute .....	1
Contested decision .....	2
Procedure and forms of order sought by the parties .....	6
Law	
I – Admissibility of the document submitted by the applicants at the hearing .....	7
II – The claims for annulment of the contested decision .....	8
A – The infringement of Articles 81 EC and 253 EC .....	8
1. Whether an exchange of information can be classified as a concerted practice having an anti-competitive object .....	8
2. The existence of a concerted practice having an anti-competitive object .....	12
a) Chiquita's lack of credibility .....	12
b) The incompatibility of Dole's and Chiquita's operating methods with the collusion alleged .....	16
The alleged infringement of Article 253 EC .....	17
Substance .....	19
c) The unlawful coordination of Dole's, Chiquita's and Weichert's quotation prices .....	31
Identification of the unlawful discussions .....	31
The nature of the information exchanged .....	35

The participants in the exchanges .....	36
Whether the essential characteristics of the relevant market were taken into account .	38
– The regulatory framework .....	38
– The specific nature of the relevant product .....	40
– The variable nature of demand .....	41
– The structure of the market .....	42
The timing and frequency of the communications .....	45
The purpose of the bilateral communications .....	52
The relevance of quotation prices in the banana industry .....	55
The responsibility of the Dole employees involved in the bilateral communications ..	74
B – Infringement of the rights of the defence and the obligation to state reasons .....	75
III – The claims for annulment or reduction of the fine .....	77
A – Preliminary observations .....	77
B – The allegedly disproportionate nature of the basic amount of the fine in that it is based on the value of sales of products unrelated to the infringement, and the infringement of the obligation to state reasons .....	78
C – The allegedly disproportionate nature of the basic amount of the fine in that it is based on the incorrect finding that the conduct ‘concerned the fixing of prices’ and infringement of the obligation to state reasons .....	82
D – The allegedly disproportionate amount of the fine in that the Commission wrongly ignored Dole’s argument that it ought to have taken account of Dole’s precarious financial situation .	84
Costs	