



## Reports of Cases

Case T-588/08

**Dole Food Company, Inc. and Dole Germany OHG**  
**v**  
**European Commission**

(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 — Duty to state reasons — Rights of the defence — Guidelines on the method of setting fines — Gravity of the infringement)

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

1. *Judicial proceedings — Producing evidence — Time limit — Evidence lodged out of time — Conditions*

(Art. 256 TFEU; Rules of Procedure of the General Court, Art. 48(1))

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

(Art. 81(1) EC)

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

(Art. 81(1) EC)

4. *Agreements, decisions and concerted practices — Concerted practice — Adverse effect on competition — Criteria for assessment — Anti-competitive object — Sufficient — No anti-competitive effects on the market — Irrelevant — Distinction between infringements by subject matter and by effect — Intention of the parties to an agreement to restrict competition — Unnecessary criterion — Taking into account of such an intention by the Commission or the Courts of the European Union — Lawfulness*

(Art. 81(1) EC)

5. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement and its duration on the Commission — Probative value of voluntary statements by the main participants in a cartel in order to benefit from the Leniency Notice*

(Council Regulation No 1/2003, Art. 2; Commission Notice 2002/C 45/03)

6. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply competition rules — No obligation to discuss all the points of fact and law raised during the administrative procedure — Indication of the factors which led the Commission to assess the gravity and the duration of the infringement — Sufficient indication — Subsequent communication of more precise information — No effect*

(Arts 39 EC, 81 EC, 82 EC and 253 EC)

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

(Art. 81(1) EC)

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

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

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

(Art. 81(1) EC)

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

(Art. 81(1) EC)

11. *Judicial proceedings — Application initiating proceedings — Formal requirements — Brief summary of the pleas in law on which the application is based — Analogous requirements with regard to grounds in support of a plea — Grounds not set out in the application — General reference to documents annexed to the application — Inadmissibility*

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

12. *Competition — Fines — Amount — Determination — Criteria — Discretion of the Commission — Previous decision-making practice — Indicative character*

(Council Regulation No 1/2003, Art. 23(2))

*13. Competition — Fines — Amount — Determination — Criteria — Financial situation of the undertaking concerned — Whether to be taken into consideration — No obligation*

*(Council Regulation No 1/2003, Art. 23(2))*

1. See the text of the decision.

(see paras 40-42)

2. See the text of the decision.

(see paras 55-57, 60-62, 427, 541)

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

Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. In particular, the fact that a concerted practice has no direct effect on price levels does not preclude a finding that it limited competition between the undertakings concerned. Therefore, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

(see paras 64, 65, 546)

4. See the text of the decision.

(see paras 68-70, 412, 413, 543, 544)

5. The fact of seeking to benefit from the application of the 2002 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.

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.

(see paras 91, 100)

6. See the text of the decision.

(see paras 125, 126, 133, 264, 647)

7. In competition matters, it is necessary 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. Although the first type of conduct does not raise any difficulty in terms of the exercise of free and undistorted competition, the same cannot be said of the second type, which runs counter to the requirement that each economic operator must determine independently the policy which it intends to adopt on the common market, since that requirement of independence strictly precludes any direct or indirect contact between such operators with the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

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

By means of the pre-pricing communications, the undertakings concerned disclose the course of action which they contemplated adopting or at least enabled each of the participants to estimate competitors' future behaviour and to anticipate their intended course of action with regard to their quotation prices to be set. Those communications therefore decrease 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.

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. Pre-pricing communications, which concern the fixing of prices, give rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.

(see paras 291, 292, 402, 403, 414, 584, 585, 653, 654)

8. See the text of the decision.

(see paras 335, 588, 589)

9. 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. The competition rules prohibit contacts between economic operators where the object or effect of such contacts is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.

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

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

(see paras 339-341, 405, 545)

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

What matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which 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.

The existence of a single pre-pricing communication between competitors during the period concerned would not be sufficient to establish collusive conduct. However, conversely, the Commission cannot be required to prove the existence of a weekly pre-pricing communication throughout the infringement period. 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 to characterise conduct as collusive.

(see paras 368, 369, 373, 400)

11. See the text of the decision.

(see paras 461-464)

12. See the text of the decision.

(see paras 660, 662)

13. See the text of the decision.

(see para. 673)