Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 March 2015*

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* Language of the case: English.

(Appeals — Competition — Agreements, decisions and concerted practices — European banana market — Coordination in the setting of quotation prices — Obligation to state reasons — Belated statement of reasons — Belated submission of evidence — Rights of defence — Principle of equality of arms — Principles governing the establishment of the facts — Distortion of the facts — Assessment of the evidence — Market structure — Requirement for the Commission to specify those aspects of the exchange of information which constitute a restriction of competition by object — Burden of proof — Calculation of the fine — Whether sales made by subsidiaries not involved in the infringement are to be taken into account — Sales of the same bananas counted twice)

In Case C-286/13 P,

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

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

Dole Fresh Fruit Europe, formerly Dole Germany OHG, established in Hamburg (Germany),

represented by J.-F. Bellis, lawyer,

appellants,

the other party to the proceedings being:

European Commission, represented by M. Kellerbauer and P. Van Nuffel, acting as Agents,

defendant at first instance,

THE COURT (Second Chamber),

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

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 8 October 2014,

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

gives the following

Judgment

1 By their appeal, Dole Food Company, Inc. ('Dole Food') and Dole Fresh Fruit Europe, formerly Dole Germany OHG ('DFFE') (together, 'the Dole companies') seek to have set aside, in whole or in part, the judgment of the General Court of the European Union in *Dole Food and Dole Germany* v *Commission* (T-588/08, EU:T:2013:130) ('the judgment under appeal'), by which that court dismissed their action for annulment of Commission Decision C(2008) 5955 final of 15 October 2008 relating to

a proceeding under Article 81 EC (Case COMP/39 188 — Bananas) ('the contested decision'). The Dole companies also seek the annulment of that decision, in so far as it concerns them, and the annulment or reduction of the fine imposed on them by that judgment.

Background to the dispute

2 For the purposes of these proceedings, the background to the dispute, as set out in paragraphs 1 to 32 of the judgment under appeal, may be summarised as follows.

3 Dole Food is a United States company which produces fresh fruit, fresh vegetables and pre-packed and frozen fruits. DFFE is a subsidiary of that company.

4 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').

5 On 3 May 2005, the European Commission granted Chiquita conditional immunity from fines, pursuant to point 8(a) of the Leniency Notice.

6 On 20 July 2007, the Commission sent a statement of objections to a number of undertakings which it had inspected, including Chiquita, the Dole companies, Fresh Del Monte Produce, Inc. ('Del Monte'), and Internationale Fruchtimport Gesellschaft Weichert & Co. KG ('Weichert').

7 On 15 October 2008, the Commission adopted the contested decision, by which it found that the undertakings to which it was addressed had participated in a concerted practice consisting in coordinating their quotation prices for bananas marketed in Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden, between 1 January 2000 and 31 December 2002 (recitals 1 to 3 to the contested decision).

8 At the material time, 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).

9 The banana business distinguishes three levels of banana brands: premium Chiquita brand bananas, second-tier bananas (Dole and Del Monte brands) and third-tier bananas, which include a number of other banana brands. This brand-division is reflected in banana pricing (recital 32 to the contested decision).

10 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).

11 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).

12 Chiquita, Dole Food 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 106 to the contested decision).

13 The prices paid by retailers and distributors for bananas ('actual prices') could be the result either of negotiations taking place on a weekly basis, in fact on Thursday afternoon or later, 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'. Each Thursday, between 11 a.m. and 11.30 a.m., the Aldi retail chain received offers from its suppliers and then sent a counter-offer; the 'Aldi price', the price paid to suppliers, was generally set at around 2 p.m. From the second half of 2002, the 'Aldi price' began to be increasingly used as an indicator for the calculation of banana prices for a number of other transactions, in particular those relating to branded bananas (recitals 34 and 104 to the contested decision).

14 According to the Commission, 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 usually took place on Wednesdays, before the undertakings concerned set their quotation prices, and all related to future quotation prices (recital 51 et seq. to the contested decision).

15 Dole Food communicated bilaterally with both Chiquita and Weichert. Chiquita was aware or at least foresaw that Dole Food had pre-pricing communications with Weichert (recital 57 to the contested decision).

16 Those bilateral pre-pricing communications were designed to reduce uncertainty as to the conduct of the undertakings concerned with respect to the quotation prices to be set by them on Thursday mornings (recital 54 to the contested decision).

17 After they had been set on Thursday morning, the undertakings concerned exchanged their quotation prices bilaterally. That subsequent exchange enabled them to monitor individual pricing decisions in the light of previous pre-pricing communications and reinforced cooperation between those undertakings (recitals 198 to 208, 227, 247 and 273 et seq. to the contested decision).

18 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 in accordance with formulae based on quotation prices (recital 115 to the contested decision).

19 The Commission considered that the undertakings concerned must necessarily have taken account of the information received from competitors when determining their conduct on the market, Chiquita and Dole Food even expressly admitting having done so (recitals 228 and 229 to the contested decision).

20 The Commission concluded that the pre-pricing communications between Dole Food and Chiquita and between Dole Food and Weichert were liable to influence operators' pricing behaviour, concerned the fixing of prices and gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC (recitals 54 and 271 to the contested decision).

21 According to the Commission, 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 European Community within the meaning of Article 81 EC. Chiquita and Dole Food were held responsible for the entire single and continuous infringement, while Weichert was held responsible only for the part of the infringement relating to the collusive agreements with Dole Food (recital 258 to the contested decision).

22 In view of the fact that the market for bananas in northern Europe is characterised by a substantial volume of trade between Member States and that the collusive agreements covered a significant part of the Community, the Commission considered that those agreements had an appreciable effect on trade between Member States (recital 333 et seq. to the contested decision).

23 For the purposes of calculating the amount of the fines, the Commission applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines') and the Leniency Notice.

24 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).

25 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 Food and Chiquita (recital 476 to the contested decision).

26 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 Food, Del Monte or Weichert.

27 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;

…

— [Dole Food], from 1 January 2000 until 31 December 2002;

— [DFFE], from 1 January 2000 to 31 December 2002;

— [Weichert], from 1 January 2000 to 31 December 2002;

— [Del Monte], from 1 January 2000 to 31 December 2002.

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

Article 2

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

— [Chiquita], Chiquita International Ltd, Chiquita International Services Group NV and Chiquita Banana Company BV, jointly and severally: EUR 0;

— [Dole Food] and [DFFE], jointly and severally, EUR 45 600 000;

— [Weichert] and [Del Monte], jointly and severally: EUR 14 700 000.

…’

The procedure before the General Court and the judgment under appeal

28 By application lodged at the Registry of the General Court on 24 December 2008, the Dole companies brought an action seeking the annulment of the contested decision and the annulment or reduction of the fine imposed on them by that decision.

29 At the hearing on 25 January 2012, the Dole companies submitted a written statement from the Commission’s file and requested that it be placed on the case-file. The Commission opposed that request.

30 By the judgment under appeal, the General Court dismissed the action. In particular, the General Court considered, at paragraphs 40 to 48 of the judgment under appeal, that the document submitted by the Dole companies was inadmissible.

Forms of order sought by the parties

31 The Dole companies claim that the Court should:

— set aside, in whole or in part, the judgment under appeal;

— set aside, in whole or in part, the contested decision, in so far as it relates to them;

— annul or reduce the fine imposed on them by the contested decision;

— in the alternative, refer the case back to the General Court, and

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the appeal;

— in the alternative, dismiss the action for annulment of the contested decision, and

— order the Dole companies to pay the costs of the appeal or, in the alternative, to pay the costs of the action for annulment.

The appeal

The first ground of appeal, alleging breach of the rights of the defence, on account of procedural errors

The first part of the first ground of appeal, relating to the consent given to the Commission to address for the first time before the General Court evidence in the administrative file

– Arguments of the Dole companies

33 By the first part of their first ground of appeal, the Dole companies submit that, instead of finding that the contested decision failed to give adequate reasons, the General Court allowed the Commission to address for the first time during the judicial proceedings a critical issue relating to the economic context of the conduct which it imputes to the undertakings in question. The Dole companies argued at first instance that the Commission failed to provide reasons for its theory that the purpose of the pre-pricing communications was to coordinate prices, even though the Chiquita and DFFE quotation prices concerned bananas which would not be sold in competition with each other during the same week.

34 At paragraph 134 of the judgment under appeal, the General Court justified that lack of reasoning and expressed the view that the clarifications made in the proceedings before it merely served to elucidate the statement of reasons already contained in the contested decision. The General Court thereby failed to have regard to the requirements imposed on the Commission under Article 253 EC and infringed Article 48(2) of its Rules of Procedure. In so doing, the General Court also infringed the Dole companies' rights of defence.

– Findings of the Court

35 At paragraph 127 of the judgment under appeal, the General Court observed that, in recitals 4, 5, 32, 34, 104, 141 to 143, 182, 196 and 287 to the contested decision, the Commission had explained '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'.

36 At paragraph 128 of that judgment, the General Court stated that 'the [Dole companies'] arguments by which they seek to establish, in essence, that [Dole Food'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'. That finding is not contested.

37 Accordingly, first, the General Court did not err in concluding, at paragraph 135 of judgment under appeal, that, in the contested decision, the Commission complied with its duty to state reasons under Article 253 EC, as it is sufficiently clear from that decision that the Commission did not consider the distinction made by the Dole companies between the alleged green and yellow markets to be relevant.

38 Second, as the Dole companies raised that distinction for the first time in the application initiating the proceedings, the General Court was entitled to take the view, at paragraphs 133 and 134 of the judgment under appeal, that it was open to it, without infringing Article 48(2) of its Rules of Procedure, to permit the Commission to defend its assessment in the contested decision by reference to information provided in the course of the proceedings.

39 It follows that the first part of the first ground of appeal is unfounded.

The second part of the first ground of appeal, concerning the admissibility of an item of evidence produced by the Dole companies in the course of the hearing before the General Court

– Arguments of the Dole companies

40 By the second part of their first ground of appeal, the Dole companies argue that, by rejecting evidence which they submitted in response to a claim made by the Commission for the first time in the rejoinder, the General Court failed to have regard to the applicants' rights of defence. The Commission attempted to substantiate the claim that 'there is no principal difference between the "green quotation price" and the "yellow quotation price"' of bananas by referring to an annex to the rejoinder from which it is apparent that the retailer Aldi announced each Thursday the price that it would pay to purchase yellow bananas. The Commission inferred from this that green and yellow quotation prices are interchangeable in the same week, as the purchase price for yellow bananas announced by Aldi played a key role in the actual prices of green bananas set by DFFE.

41 That inference is incorrect, but the Dole companies were given the opportunity to put forward their arguments only at the hearing before the General Court. The appellants point out that they explained at the hearing that the price announced by Aldi was for yellow bananas which that retailer purchased two weeks later, when the ripeners/distributors which had purchased green bananas from DFFE would be selling the bananas as yellow to retailers competing with Aldi.

42 To substantiate their argument, the Dole companies submitted at the hearing before the General Court a written statement from the Commission's file which confirmed those facts and contradicted the inference drawn by the Commission. The General Court none the less rejected that evidence as inadmissible, taking the view, at paragraph 46 of the judgment under appeal, that the Commission had not put forward a new argument in its rejoinder but had simply reproduced the language of the contested decision.

43 However, no explanation or reference was given by the General Court for that ground of the judgment under appeal.

– Findings of the Court

44 It should be noted, as observed by the General Court at paragraphs 40 to 42 of the judgment under appeal, that, in accordance with Article 48(1) of its Rules of Procedure, a party may offer further evidence in the reply or rejoinder, although that provision specifies that the party must, none the less, give reasons for the delay in offering it. That requirement means that the Court must have the power to review whether the reasons given for the delay in offering the evidence are well founded and, if the application is not founded to the requisite legal standard, the power to reject any such offer (judgment in *Gaki-Kakouri* v *Court of Justice*, C-243/04 P, EU:C:2005:238, paragraph 33).

45 In the present case, it is clear that the Aldi quotation price had already been discussed during the administrative procedure, that it had been addressed in the contested decision and that it had given rise, from the beginning of the written procedure at first instance, to discussions between the parties as to its scope and significance, as observed by the Advocate General at point 36 of her Opinion. Contrary to what is claimed by the appellants, this was therefore by no means a new aspect introduced into the proceedings by the Commission's rejoinder.

46 The Dole companies have not put forward any argument to the effect that they were unable to produce at the stage of their application, or indeed at the reply stage, the document which they seek to rely on, with the result that the General Court was entitled, without erring in law, to express the view, at paragraph 48 of the judgment under appeal, that that document had been submitted late, at the hearing stage, and, therefore, not to admit it.

47 It follows that the second part of the first ground of appeal is unfounded.

The third part of the first ground of appeal, concerning the General Court's rejection of Annex C.7 to the reply as inadmissible

– Arguments of the Dole companies

48 By the third part of the first ground of appeal, the Dole companies submit that, by rejecting Annex C.7 to their reply as inadmissible, the General Court erred in law and infringed their rights of defence. Seeking to contest a number of claims made by the Commission in the defence to the effect that the applicants had made statements which amounted to recognition of the fact that quotation prices were relevant to actual prices, they produced Annex C.7, from which it is apparent that those statements are irrelevant to the present case, as they have been taken out of context.

49 Contrary to what was stated by the General Court at paragraphs 461 to 470 of the judgment under appeal, the arguments set out in their reply would have enabled that court to rule on the issue. In particular, Annex C.7 did not constitute an extension of the reply, did not contain any additional plea or argument and simply provided evidentiary support for the arguments in the reply.

– Findings of the Court

50 It should be noted that it is necessary, for an action before the General Court 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 must appear in the application itself (judgment in *Mastercard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 40 and the case-law cited).

51 In the present case, it is sufficient to observe that an examination of the case-file at first instance discloses that the General Court was entitled to conclude that the pleadings submitted do not provide any explanation concerning the Dole companies' claims that the Commission took certain statements out of context, as the reply merely referred to Annex C.7 and it was not therefore possible for the General Court to adjudicate on the Dole companies' claims on the basis of their pleadings.

52 The third part of the first ground of appeal must therefore be rejected as unfounded.

The fourth part of the first ground of appeal, relating to an infringement of the principle of equality of arms

53 By the fourth part of their first ground of appeal, the Dole companies claim that, for the reasons set out in connection with the first three parts of that ground of appeal, the General Court failed to have regard to the principle of equality of arms by allowing the Commission to introduce new pleas and arguments, while at the same time preventing the Dole companies from replying to that evidence. That amounts to a separate breach of their rights of defence, as they were placed at a substantial disadvantage vis-à-vis the Commission.

54 Given that the first three parts of the first ground of appeal are unfounded, the alleged infringement of the principle of equality of arms is also unfounded.

The fifth part of the first ground of appeal, concerning the General Court's establishment of the facts

– Arguments of the Dole companies

55 By the fifth part of their first ground of appeal, the Dole companies contend that the General Court did not properly establish the facts, as it merely put oral questions to counsel for the Dole companies, without recording either the questions or the replies in the minutes and without having recourse to measures of inquiry, pursuant to Article 65 of its Rules of Procedure, in order to examine the key issues in relation to which it was, in any event, clearly confused during the hearing.

56 At paragraphs 203 and 630 of the judgment under appeal, the General Court expressed, for the first time, doubts as to the veracity of certain arguments put forward and information provided by the Dole companies, whereas those doubts could have been dispelled by a request for documents or witnesses by way of measures of inquiry.

57 Accordingly, by failing to have recourse to measures of inquiry for the purpose of establishing certain facts considered to be relevant, the General Court infringed the rules and principles relating to the taking of evidence, as well as its duty to investigate. It thereby also infringed the Dole companies' rights of defence.

– Findings of the Court

58 First, it is established case-law that the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the substantive inaccuracy of the findings of the General Court is apparent from the documents in the case (judgment in *Der Grüne Punkt — Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 163 and the case-law cited).

59 Next, the Dole companies' allegations, which are disputed by the Commission, do not of themselves establish that the replies given to the questions at the hearing and the subsequent examination of the case-file were not sufficient to enable the General Court to give an informed ruling on the nature of quotation prices. Accordingly, it cannot be inferred from those allegations that the General Court was under an obligation to have recourse to measures of inquiry.

60 Lastly, with regard to paragraphs 203 and 630 of the judgment under appeal, it is sufficient to observe that, in those paragraphs, the General Court simply applied the principles governing the burden of proof.

61 It follows that the fifth part of the first ground of appeal is unfounded.

62 In the light of all the foregoing, the first ground of appeal must be rejected as unfounded.

The second ground of appeal, alleging distortion of the facts relating to the economic context of the infringement

Arguments of the Dole companies

63 By their second ground of appeal, the Dole companies submit that the General Court distorted the facts relating to the nature of the quotation prices issued by DFFE, Weichert and Chiquita, respectively.

64 First, the Dole companies maintain that the General Court stated, at paragraphs 152, 182 and 184 of the judgment under appeal, that DFFE issued a yellow quotation price and, at paragraph 232 of the judgment, that all importers would issue a green quotation price, which would then serve as the basis for setting a yellow quotation price. However, the Dole companies stated at first instance that DFFE issued only a green quotation price and never issued or set a yellow quotation price.

65 Second, by its statement at paragraph 232 of the judgment under appeal, the General Court misrepresented the nature of the quotation price issued by Weichert, as that company issued only a green quotation price, which was announced after DFFE issued its green quotation price. There is no evidence to substantiate the General Court's conclusion.

66 Third, by that same statement, the General Court distorted the facts relating to the nature of the quotation price issued by Chiquita, as the evidence showed that the normal practice for Chiquita (and Chiquita alone) was to issue a yellow quotation price, from which it derived a green quotation price.

67 Moreover, there is no evidence to show that Chiquita's quotation price related to bananas to be sold two weeks later. That assumption on the part of the Commission is at odds with the market reality and the evidence in its own file. As a consequence, the quotation prices issued by DFFE and Chiquita during the same week related to different products.

68 The distortion of those facts led the General Court to the incorrect conclusion that there was a practice of converting between green and yellow quotation prices and that DFFE, Weichert and Chiquita reference prices all related to bananas in the same week of the ripening cycle. As the price coordination envisaged by the Commission was not possible, the General Court erred by accepting that claim at paragraph 248 of the judgment under appeal.

69 Moreover, that distortion of the facts led the General Court to conclude, incorrectly, at paragraph 232 of the judgment under appeal, that quotation prices were the same as actual prices and constituted a necessary precondition for the sale of all bananas. The use of the term 'green price' suggests that importers issued their actual prices to customers each Thursday. In fact, however, they issued only reference prices on Thursday and the actual green price was agreed upon subsequently by negotiation with the customer.

Findings of the Court

70 First, it is apparent from the judgment under appeal that, contrary to what is claimed by the Dole companies, the General Court gave due consideration to the nature of quotation prices, the difference between those prices and actual prices, the general functioning of the market and the specific features of Chiquta's, Dole Food's and Weichert's internal procedure and practice. Indeed, those various factors are referred to, inter alia and respectively, at paragraphs 143, 144 and 206, 127 and 137 to 142, 150 et seq., 158 et seq. and 252, 254 and 255 of that judgment.

71 Next, the General Court referred, at paragraphs 152 and 184 of the judgment under appeal, to a yellow Dole price, not, as claimed by the Dole companies, a yellow quotation price. Similarly, the term 'quotation prices' does not appear in paragraph 232 of the judgment under appeal.

72 Furthermore, even if, as observed by the Advocate General at point 66 of her Opinion, paragraph 182 of the judgment under appeal contains an editorial mistake in so far as it refers to a 'yellow quotation price', it cannot be inferred from this that the General Court was confused or that it in any sense distorted the evidence.

73 Lastly, the argument that the Chiquita and Dole Food bananas for which the quotation prices were issued on the same day were not sold during the same weeks and were not therefore in competition with each other must be rejected, in any event, as ineffective.

74 The claim that sales were not synchronised, even if it were proven, would not in any event affect the General Court's findings, based on evidence provided by the undertakings in question themselves, such as the evidence cited at paragraph 201 and 220 of the judgment under appeal, from which it is apparent that green and yellow quotation prices were convertible and that Chiquita's setting of the yellow quotation price was, of its own admission, influenced by the development of the quotation prices issued by Dole Food.

75 In the light of the foregoing, the second ground of appeal must be rejected.

The third ground of appeal, alleging inadequate assessment of the evidence

The first part of the third ground of appeal, relating to the claim that there are insufficient grounds for it to be possible to confirm the Commission's calculation of market shares

– Arguments of the Dole companies

76 By the first part of their third ground of appeal, the Dole companies claim that, by finding that the Commission examined the structure of the market correctly, the General Court failed to have regard to its duty to state reasons.

77 The Dole companies point out that, at paragraph 353 of the judgment under appeal, the General Court found that the Commission was right to consider that Dole Food, Chiquita and Weichert had a substantial share of the market and that the market could not be characterised by supply of a fragmented nature and to take that into account. That conclusion is based solely on market share figures supplied by the Commission showing that the total sales of Dole Food, Chiquita and Weichert accounted for approximately 45% to 50% of sales by value (paragraph 345 of the judgment under appeal) and 40% to 45% of apparent consumption by volume (paragraph 350 of that judgment).

78 At first instance, the Dole companies claimed that those market shares represent double the shares suggested by an independent survey. They are too high because, in their view, the Commission aggregated yellow and green banana sales in the numerator, while the figure used for the denominator appeared to be based on import figures, which related only to green bananas. That calculation results in market shares in excess of 100%, since, for example, yellow bananas sold by the Dole companies which they had purchased as green bananas from another importer were included in both their yellow sales and in the importer's green sales, while the denominator included only green banana sales.

79 The Commission was aware of the difficulties in estimating the market shares held by the companies at issue on the fresh banana market. None the less, the General Court reached its decision on the basis of the figures provided by the Commission, without seeking further information or conducting an

examination of the problems indicated to it. Accordingly, the judgment under appeal is vitiated by an error of law as the General Court rejected, at paragraph 352 of that judgment, the arguments put forward by the Dole companies based on the distinction to be made between green and yellow bananas and upheld the Commission's argument that only fresh bananas were to be taken into account in calculating market shares.

– Findings of the Court

80 As the Advocate General observed at points 82 and 83 of her Opinion, first, Dole Food merely claimed, in its written submissions before the General Court, that the market shares taken as a basis by the Commission were exaggerated. In particular, at no point did it make any reference to double counting of bananas owing to sales of green bananas between importers, and merely complained, in a footnote, that the Commission had added together the figures for green and yellow banana sales.

81 Second, Dole Food had to concede at the hearing before the Court of Justice that the subject matter of the argument set out in those written submissions was not expanded upon at the hearing before the General Court.

82 Accordingly, as that point was not raised before the General Court with sufficient clarity, that court cannot be criticised for failing to examine the issue in greater depth in the judgment under appeal.

83 It is established case-law that the requirement that the General Court give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise (judgment in *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 91 and the case-law cited).

84 It follows that the first part of the third ground of appeal must be rejected as unfounded.

The second and third parts of the third ground of appeal, concerning the claim that aspects of the pre-pricing communications and the pricing factors constituting a restriction of competition were not clearly identified

– Arguments of the Dole companies

85 By the second part of their third ground of appeal, the Dole companies maintain that, by concluding, at paragraph 261 of the judgment under appeal, that the Commission was not required, when assessing whether an exchange of information constitutes a restriction of competition by object, to specify which of the subjects discussed fall within the definition of such a restriction by object, the General Court erred in law.

86 The Dole companies state that they argued before the General Court that the description in the contested decision of the subjects to which the pre-pricing communications related was too general for it to be possible, on that basis, for them to determine with certainty their future conduct on the market or to determine whether the Commission's assessment was sound. Moreover, as the frequency or periodic nature of the information exchanges was an important factor in determining whether those exchanges were lawful, it was essential for the Commission to state which subjects were considered to form part of the infringement, for the purpose of making a correct determination of the frequency or periodic nature of the exchanges.

87 By rejecting those arguments on the ground that the Commission was not required to set out an exhaustive list of factors to be regarded as unlawful in the relevant sector, first, the General Court failed to have regard to the fact that not all discussions concerning factors that might be relevant to price-setting are sufficiently deleterious to merit classification as a restriction of competition by object. Second, the General Court's response does not address the argument that it is necessary to draw up an exhaustive list so as to enable an undertaking to ascertain whether the Commission's reasoning is sound, such as the reasoning relating to the frequency of the contact which the Commission considered to be improper.

88 By the third part of their third ground of appeal, the Dole companies claim that, by concluding, at paragraphs 265, 266 and 376 of the judgment under appeal, that the Commission had described with sufficient precision the price-setting factors in relation to which the exchange of information constituted a restriction of competition by object, the General Court also erred.

89 The Dole companies contend that, according to the contested decision, exchanges of information relating to volume do not form part of the infringement for which they were held responsible, whereas, in its defence before the General Court, the Commission provided a detailed description of the communications constituting the infringement, which included that information.

90 The General Court concluded in those paragraphs of the judgment under appeal that it is apparent from recitals 136, 149 and 185 to the contested decision that those exchanges of data relating to volume did not form part of the improper conduct because the exchanges took place before the pre-pricing communications. That assertion is incorrect, as those recitals themselves indicate that the exchanges of information relating to volume took place at the same time as those communications. Therefore, contrary to what was concluded by the General Court, it is not clearly apparent from the contested decision that those exchanges do not form part of the pre-pricing communications.

91 Similarly, it remains unclear whether the Commission considered that informal exchanges of information on the industry in general formed part of the infringement. In particular, the General Court did not examine whether that specific subject was deliberately omitted from the list of allegedly improper subjects identified by the Commission.

92 Accordingly, the General Court's conclusion is based on a misrepresentation of the contested decision and the Commission's defence. The failure to specify those subjects prevented the Dole companies from ascertaining whether the Commission's reasoning concerning the classification of certain conduct as a restriction of competition by object and the determination of the frequency of the contact was sound.

– Findings of the Court

93 It is settled case-law that, first, the statement of reasons required under Article 253 EC must be appropriate for the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (judgment in *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 115 and the case-law cited).

94 Second, the requirement to state reasons must be assessed by reference to the circumstances of the 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 (judgment in *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 116 and the case law cited).

95 In the present case, first of all, the General Court referred, at paragraphs 253 to 255 of the judgment under appeal, to the statements made by the undertakings concerned with regard to the information exchanged in the pre-pricing communications.

96 At paragraph 256 of the judgment under appeal, the General Court concluded that the Commission had identified two types of information, namely (i) price-setting factors, that is, factors relevant to the setting of quotation prices for the forthcoming week and (ii) price trends and indications of quotation prices for the forthcoming week before those quotation prices were set.

97 Next, at paragraphs 262 to 264 of the judgment under appeal, the General Court observed that, according to the statements made by the Dole companies, those communications related to factors which had an influence on supply vis-à-vis demand, market conditions and price developments.

98 Lastly, at paragraphs 266 and 376 of the judgment under appeal, the General Court noted that the Dole companies had not challenged the Commission's finding that the data relating to import volumes did not form part of the pre-pricing communications.

99 Accordingly, the General Court was entitled to take the view, without erring in law, that, having regard to the circumstances of the case, the Commission had identified the improper conduct with sufficient precision and had therefore discharged its duty to state reasons.

100 In particular, the General Court was correct to find, at paragraph 261 of the judgment under appeal, that Article 253 EC did not require the Commission to set out in the contested decision an exhaustive list of factors that could not form the subject-matter of an exchange of information between competitors.

101 It follows that the second and third parts of the third ground of appeal must be rejected as unfounded.

The fourth part of the third ground of appeal, concerning the responsibility of the employees involved in the pre-pricing communications

102 By the fourth part of the third ground of appeal, the Dole companies contend that the General Court erred in law by failing to examine their argument that Chiquita and DFFE employees could not exchange important information concerning quotation price trends as they did not have ultimate authority to set those prices, a fact that was not contested by the Commission. In their view, that means that such conversations, taken as a whole, could not reduce uncertainty sufficiently to permit coordination of quotation prices. Thus, contrary to the view adopted by the General Court, their argument was not confined to the contention that the conduct of the employees involved in those exchanges could not be attributed to their companies.

103 As the Commission was right to point out, the Dole companies' arguments are based on a misreading of the judgment under appeal, as the General Court assessed in detail, at paragraphs 578 to 582 of the judgment, their arguments concerning the responsibility of the employees involved.

104 It follows that the fourth part of the third ground of appeal is unfounded.

The fifth part of the third ground of appeal, concerning the characterisation of the pre-pricing communications as constituting a restriction of competition by object

– Arguments of the Dole companies

105 By the fifth part of their third ground of appeal, the Dole companies submit that, by finding that the pre-pricing communications constitute a restriction of competition by object, the General Court erred in its legal characterisation of the facts. According to those companies, the exchange of information which took place cannot be regarded as capable of removing uncertainty as to the intended conduct of the participating undertakings as regards the setting of actual prices.

106 First, the pre-pricing communications were carried out by employees who were not responsible for setting quotation prices. Second, as those communications concerned quotation price trends, they were not capable of removing uncertainty as to actual prices. In that regard, all the market participants involved in the Commission's investigation stated that quotation prices were far removed from actual prices. Moreover, the Commission did not find there had been a restriction of competition by object in relation to the same type of information exchange involving two other undertakings.

107 At paragraphs 540, 541, 548 and 549 of the judgment under appeal, the General Court rejected those arguments, imposing, incorrectly, the burden of proving that the exchange of information was not capable of removing uncertainty as to the development of actual prices on the Dole companies. However, it was for the Commission to prove that the exchange of information was unlawful. According to the Dole companies, it is apparent from case-law that the mere fact that an exchange of information might have a certain influence on prices is not sufficient to establish the existence of a restriction of competition by object. The Commission was unable to put forward such evidence, however, in view of the fact that there is no reliable connection between quotation price movements and those of actual prices.

108 Furthermore, in so far as the General Court dismissed the Dole companies' argument based on statements made by another undertaking by stating, at paragraph 516 of the judgment under appeal, 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 anticompetitive conduct alleged', those companies contend that the General Court failed to have regard to the principle of the presumption of innocence and to fact that the burden of proof lies with the Commission.

109 Lastly, the Dole companies maintain that the pre-pricing communications relating to price-setting factors were not capable of removing uncertainty as to the intended conduct of the undertakings concerned. In particular, they point out that the General Court concluded that the exchanges concerning the industry in general were 'innocuous', that the contested decision did not include information on volume as part of the infringement and that the General Court took the view that weather conditions constituted public information that could be obtained from other sources.

110 In so far as the General Court considered that the pre-pricing communications none the less revealed the competitors' views on those factors, the Dole companies submit that, in the light of the relevant case-law, it is not possible to characterise the exchange of views on weather conditions as a restriction of competition by object, as such discussions are so far removed from the setting of actual price that they cannot reduce uncertainty and facilitate coordination of the prices of the products in question.

– Findings of the Court

111 It should be noted that, contrary to what is claimed by the Commission, the Dole companies do not merely seek from the Court a fresh assessment of the facts but put forward errors of law which, they claim, were committed by the General Court. The present part of the third ground of appeal is, therefore, admissible.

112 As regards the substance, it must be recalled that, to come within the prohibition laid down in Article 81(1) EC, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.

113 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49 and the case-law cited).

114 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50 and the case law cited).

115 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51 and the case law cited).

116 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for the purpose of determining whether such conduct is covered by that defined in Article 81(1)) EC, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see, to that effect, judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52 and the case law cited).

117 According to the case-law of the Court, in order to determine whether a type of coordination between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had, inter alia, to its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53 and the case law cited).

118 In addition, although the parties' intention is not a necessary factor in determining whether a type of coordination between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see, to that effect, judgment in *CB* v *Commission*, C 67/13 P, EU:C:2014:2204, paragraph 54 and the case law cited).

119 In so far as concerns, in particular, 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 (judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 32 and the case-law cited).

120 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 (judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 33 and the case law cited).

121 The Court has therefore held 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 (judgments in *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraph 86, and *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 35 and the case law cited).

122 In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object (see, to that effect, judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41).

123 Moreover, a concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices. Indeed, 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 ((see, to that effect, judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 36).

124 On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anticompetitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions' (judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37).

125 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 anticompetitive object, there does not need to be a direct link between that practice and consumer prices (judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 38 and 39).

126 Lastly, it should be pointed out that the concept of a concerted practice, as it derives from the actual terms of Article 81(1) EC, 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 (judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51 and the case-law cited).

127 In that regard, the Court has held that, 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. In particular, the Court has concluded that such a

concerted practice is caught by Article 81(1) EC, even in the absence of anticompetitive effects on the market (judgment in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51 and the case-law cited).

128 In the present case, the General Court examined, at paragraphs 442 to 585 of the judgment under appeal, the Dole companies' arguments concerning the relevance of quotation prices in the banana sector and the responsibility of the Dole Food employees involved in the pre-pricing communications.

129 As observed by the Advocate General at points 115 and 116 of her Opinion, it is apparent from the extremely detailed findings of the General Court, first, that bilateral pre-pricing communications were exchanged between the Dole companies and other undertakings in the banana sector and, as part of those communications, the undertakings discussed their own quotation prices and certain price trends. Moreover, the Dole companies do not contest that finding.

130 Second, the General Court found, at paragraph 574 of the judgment under appeal, that quotation prices were relevant to the market concerned, since, on the one hand, market signals, market trends or indications as to the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained and, on the other, in some transactions the actual prices were directly linked to the quotation prices.

131 Third, at paragraph 580 of the judgment under appeal, the General Court found that the Dole employees involved in the pre-pricing communications participated in the internal pricing meetings.

132 Furthermore, those findings of the General Court are to a large extent based on statements made by Dole Food and the Dole companies have not alleged any form of distortion in that regard.

133 Accordingly, the General Court was entitled to take the view, without erring in law, that the conditions for the application of the presumption referred to at paragraph 127 above were fulfilled in the present case, with the result that the Dole companies' claims that that court infringed the principle governing the burden of proof and the presumption of innocence are unfounded.

134 It also follows that the General Court was entitled to take the view, as it did at paragraphs 553 and 585 of the judgment under appeal, without erring in law, that it was permissible for the Commission to conclude that, as they made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors, the pre-pricing communications had the object of creating conditions of competition that do not correspond to the normal conditions on the market and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.

135 Consequently, the fifth part of the third ground of appeal must be rejected, as must, therefore, that ground of appeal in its entirety.

Fourth ground of appeal, alleging miscalculation of the fine

The first part of the fourth ground of appeal, relating to the claim that sales to companies which were not involved in the infringement alleged were taken into account

– Arguments of the Dole companies

136 By the first part of their fourth ground of appeal, the Dole companies maintain that the General Court erred in calculating the fine on the basis, inter alia, of sales made by Dole Food subsidiaries which were not involved in the infringement established.

137 The Dole companies observe that, according to the statement of objections and the contested decision, the only company that was found to have participated in the infringement was DFFE, Dole Food not having been involved or held liable as a parent company. However, at paragraphs 619 to 623 of the judgment under appeal, the General Court stated that the infringement had been committed by Dole Food, that the claim that its subsidiaries were autonomous was part of the line of argument relating to the distinction that had to be made between green and yellow bananas and that that claim was irrelevant and, in any event, unjustified.

138 By those assertions, the General Court misinterpreted the Dole companies' argument that it is not possible to impose fines calculated on the basis of the sales of bananas by Dole group companies which did not participate in the infringement and which resold bananas acquired from DFFE. As a consequence, the fine was based, incorrectly, on sales made by the other Dole Food subsidiaries.

– Findings of the Court

139 As observed by the Advocate General at point 134 of her Opinion, Dole Food's argument is based on a misunderstanding of the Court's settled case-law on the responsibility of parent companies for infringements of the rules on agreements, decisions and concerted practices committed by their wholly owned subsidiaries.

140 In accordance with that line of case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. That concept must be understood as designating an economic unit even if in law that unit consists of several natural or legal persons. When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (judgment in *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 42 and the case-law cited).

141 Article 23(2) 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) provides that the Commission may impose fines on undertakings which infringe Article 81 EC, provided that, for each undertaking participating in the infringement, the fine does not exceed 10% of its total turnover in the preceding business year.

142 That provision is designed, inter alia, to ensure that the fine has sufficient deterrent effect, which justifies the taking into consideration of the size and the economic power of the undertaking concerned, that is to say the global resources of the entity responsible for the infringement (see, to that effect, judgment in *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 102 and the case-law cited).

143 It is the intention to ensure that the fine has sufficient deterrent effect which justifies the taking into account of the financial capacity of the undertaking concerned (see judgment in *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 104).

144 Accordingly, the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 1/2003, the intended consequences for the undertaking in question, taking into account the turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed (judgment in *Britannia Alloys & Chemicals* v *Commission*, C-76/06 P, EU:C:2007:326, paragraph 25).

145 It is the Court's established case-law that it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the products in respect of which the infringement was committed, which gives an indication of the scale of the infringement (judgments in *Musique Diffusion Française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 121; *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 243; and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, C-397/03 P, EU:C:2006:328, paragraph 100).

146 According to the case-law of the Court of Justice, although Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Second, the exercise of that discretion is also limited by rules of conduct which the Commission imposed on itself (see, to that effect, judgment in *Shindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 58).

147 According to point 13 of the Guidelines, '[i]n 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'. Point 6 of the Guidelines states that '[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

148 It follows that point 13 of the Guidelines pursues the objective of adopting as the starting point for the calculation of the fine to be imposed on an undertaking an amount which reflects the economic importance of the infringement and the size of the undertaking's contribution to it. Consequently, while the concept of the value of sales referred to in point 13 of those guidelines cannot, admittedly, extend to encompassing sales made by the undertaking in question which do not fall, directly or indirectly, within the scope of the alleged cartel, it would none the less be contrary to the goal pursued by that provision if that concept were understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (judgment in *Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraph 76).

149 In any event, it should be noted that the proportion of the overall turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of that infringement (judgment in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 59).

150 In the present case, the General Court did not, therefore, err in law in finding, at paragraph 622 of the judgment under appeal, that 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 total sales of yellow bananas made by the companies of the group, other than DFFE, of which Dole is the ultimate parent company.

151 The first part of the fourth ground of appeal must therefore be rejected.

The second part of the fourth ground of appeal, concerning the claim that certain sales were counted twice

– Arguments of the Dole companies

152 By the second part of their fourth ground of appeal, the Dole companies claim that the General Court erred in the calculation of the fine by counting the same bananas twice. The sales figures used included sales of bananas by DFFE to a third-party undertaking and sales of those same bananas by another Dole Food subsidiary which had purchased them from that very same third-party undertaking.

153 The General Court rejected that argument at paragraph 630 of the judgment under appeal, disputing the accuracy of the figures, even though the Commission had never expressed any doubt in that regard and even conceded that it has not addressed that issue. In any event, if the General Court entertained any doubts in that regard, it should have used its fact-finding powers.

154 The General Court also found that those sales did not fall into the double counting category because the third-party undertaking in question was not one of the addressees of the contested decision. The fact nevertheless remains that sales of the same bananas were counted twice for the purpose of calculating the fine. Moreover, there is nothing in recital 452 to the contested decision to suggest that the concern to avoid double counting was limited to circumstances in which bananas were sold by one of the addressees of the contested decision to another such addressee.

– Findings of the Court

155 It is apparent from the case-law cited at paragraphs 140 to 149 above that the amount of the fine to be imposed must be determined by reference to the turnover of the undertaking concerned.

156 First, it is not disputed that the sale of bananas by one of the Dole Food subsidiaries to a third-party undertaking not involved in the cartel added to the undertaking's turnover and that, when another Dole Food subsidiary repurchased those bananas from that third-party undertaking in order to then sell them on to retailers, that second sale also added to that turnover.

157 Second, contrary to what is claimed by the Dole companies, it is absolutely clear from recital 452 to the contested decision that only sales of fresh bananas to other addressees of that decision were excluded from double-counting.

158 Accordingly, as the Commission was correct to point out and as the Advocate General observed at point 145 of her Opinion, it is unclear from the Dole companies' argument in that connection what error of law the General Court is alleged to have committed and it follows that the second part of the fourth ground of appeal must be rejected as inadmissible.

159 The fourth ground of appeal must therefore be rejected.

160 In light of all of the foregoing, the appeal must be dismissed.

Costs

161 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have

been applied for in the successful party's pleadings. As the Dole companies have been unsuccessful and the Commission has applied for costs, those companies must be ordered to pay the costs. Since they brought the appeal jointly, they must bear the costs jointly and severally.

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

1. **Dismisses the appeal;**

2. **Orders Dole Food Company, Inc. and Dole Fresh Fruit Europe, formerly Dole Germany OHG, to bear the costs jointly and severally.**

[Signatures]