Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

16 June 2015 *

(Competition — Agreements, decisions and concerted practices — European banana market in Italy, Greece and Portugal — Coordination in the fixing of prices — Admissibility of evidence — Rights of defence — Misuse of powers — Evidence of the infringement — Calculation of the fine)

In Case T-655/11,

FSL Holdings, established in Antwerp (Belgium),

Firma Léon Van Parys, established in Antwerp,

Pacific Fruit Company Italy SpA, established in Rome (Italy),

represented by P. Vlaemminck, C. Verdonck, B. Van Vooren and B. Gielen, lawyers,

applicants,

v

European Commission, represented by M. Kellerbauer and A. Biolan, acting as Agents,

defendant,

APPLICATION, primarily, for annulment of Commission Decision C(2011) 7273 final of 12 October 2011 relating to a proceeding under Article 101 [TFEU] (Case COMP/39482 — Exotic Fruit (Bananas)), and, in the alternative, for a reduction in the fine,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro (Rapporteur), President, S. Gervasoni and L. Madise, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written procedure and further to the hearing on 4 November 2014,

gives the following

* Language of the case: English.

Judgment

Facts giving rise to the dispute

1 By the present action, FSL Holdings ('FSL'), Firma Léon Van Parys ('LVP') and Pacific Fruit Company Italy SpA ('PFCI') (jointly referred to as 'the applicants' or 'Pacific') seek the annulment of Commission Decision C(2011) 7273 final of 12 October 2011 relating to a proceeding under Article 101 [TFEU] (Case COMP/39482 — Exotic Fruit (Bananas)) ('the contested decision').

2 The applicants are active in the importation, marketing and sales of 'Bonita' branded bananas in Europe (recital 14 of the contested decision). LVP, PFCI and the entities belonging to the same group and involved in the banana business in Europe may be referred to as 'Pacific', 'Pacific Fruit', 'Bonita' or 'Noboa', depending on the source of information, since the Bonita brand is owned by the Noboa Group (recitals 15 and 16 of the contested decision).

3 On 8 April 2005, Chiquita Brands International Inc. ('Chiquita') applied for immunity pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') in relation to the business of distribution and marketing of imported bananas as well as pineapples and other fresh fruit in Europe. That application was registered as Case COMP/39188 — Bananas (recital 79 of the contested decision).

4 On 3 May 2005, the Commission of the European Communities granted Chiquita conditional immunity from fines under point 8(a) of the 2002 Leniency Notice in respect of an alleged secret cartel affecting the sale of bananas and pineapples in the European Economic Area (EEA) (recitals 79 and 345 of the contested decision).

5 On 15 October 2008, the Commission adopted Decision C(2008) 5955 final relating to a proceeding under Article [101 TFEU] (Case COMP/39188 — Bananas) (summary published in OJ 2009 C 189, p. 12; 'the decision in Case COMP/39188 — Bananas'), finding that Chiquita, the Dole group and Internationale Fruchtimport Gesellschaft Weichert & Co. KG ('Weichert'), at the time under the decisive influence of the Del Monte group, had infringed Article 81 EC by engaging in a concerted practice by which they coordinated quotation prices for bananas that they set weekly for Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden between 2000 and 2002 (recital 80 of the contested decision).

6 In the context of the investigation in Case COMP/39188 — Bananas, the Commission carried out inspections at the premises of several importers of bananas, including at LVP's premises in Antwerp (Belgium) and, on 20 July 2007, addressed a statement of objections to a number of banana importers, including FSL and LVP, though FSL and LVP were not ultimately addressees of the decision in Case COMP/39188 — Bananas.

7 On 26 July 2007, the Commission received copies of documents from the Italian tax authority, which had been obtained during an inspection carried out at the home and office of an employee of Pacific in the course of a national investigation (recital 81 of the contested decision).

8 On 26 November 2007, Chiquita was informed orally by the Commission's Directorate-General for Competition ('DG Competition') that Commission officials would, on 28 November 2007, be carrying out an inspection at the premises of Chiquita Italia SpA. On that occasion, Chiquita was informed that an investigation relating to southern Europe would be conducted under case number COMP/39482 — Exotic Fruit (Bananas) and it was reminded that it had received conditional immunity from fines for the whole European Community and that it had a duty to cooperate (recital 82 of the contested decision).

9 From 28 to 30 November 2007, the Commission carried out inspections at the offices of banana importers in Italy and Spain 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 [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) (recital 83 of the contested decision).

10 In the course of the investigation, the Commission sent several requests for information to the parties and to customers as well as to other market participants, including ports and port authorities, the parties were asked to re-submit certain items of information and evidence which were contained in the investigation file of Case COMP/39188 — Bananas, and Chiquita was requested to identify the parts of its oral statements in that case which it deemed to be related to this investigation (recital 84 of the contested decision). On 9 February 2009, DG Competition issued a state-of-play letter to Chiquita in connection with its cooperation under the 2002 Leniency Notice (recital 85 of the contested decision).

11 On 10 December 2009 the Commission adopted a statement of objections in Case COMP/39482 — Exotic Fruit (Bananas) addressed to Chiquita, Fruit Shippers Ltd and the applicants. After having obtained access to the file, all addressees of the contested decision made known to the Commission their views and took part in the hearing held on 18 June 2010 (recitals 87 and 88 of the contested decision).

12 On 12 October 2011 the Commission adopted the contested decision.

Contested decision

13 The Commission states that the contested decision relates to a cartel between Chiquita and Pacific in the importation, marketing and sales of bananas in Greece, Italy and Portugal ('the southern European region') during the period from 28 July 2004 to 8 April 2005 (recitals 1, 73, 93 to 95, 306 and 330 of the contested decision).

14 The product which is the subject of the proceedings is bananas (fresh fruit). Both unripened (green) bananas and ripened (yellow) bananas are covered by the contested decision. Bananas are considered to be a 52-week product, traded on a week-to-week basis, the demand for which shows a slight seasonal variation, since there is higher demand in the first half of the year and lower demand in the warm summer months. Bananas can be sold branded or unbranded and can originate from within the European Union, from African, Caribbean and Pacific (ACP) countries or from non-ACP countries. Non-ACP bananas are mostly imported into the European Union from the Caribbean region, Central and South America as well as from certain African countries, and are transported in refrigerated ships to European ports (recitals 2 and 3 of the contested decision).

15 During the period concerned by the contested decision, 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. Banana import quotas were set annually and allocated on a quarterly basis with certain limited flexibility between the quarters of a calendar year (recital 53 of the contested decision).

16 The banana business drew a distinction between three 'tiers' of bananas: premium-quality 'Chiquita' branded bananas, second-tier Dole and Del Monte branded bananas, and third-tier bananas called 'thirds', which included a number of other brands, in particular Pacific's 'Bonita' brand and Chiquita's 'Consul' brand. That brand division was reflected in banana pricing (recital 27 of the contested decision).

17 As regards prices, the banana business drew a distinction between so-called 'T1' and 'T2' prices. T1 prices are prices for bananas which are 'duty unpaid', that is to say not including customs duties and licences, whilst T2 prices are prices for bananas that are 'duty paid' (recital 29 of the contested decision).

18 The banana business in Italy, Greece and Portugal operated on two layers: on the 'green' level, where green-selling importers sold unripened bananas to ripeners and wholesalers, and on the 'yellow' level, where ripeners as well as yellow-selling importers and wholesalers sold ripened bananas to other wholesalers, supermarkets or retailers. During the period in question, Chiquita and Pacific sold almost exclusively green bananas in the southern European region, though without having concluded any long-term contractual arrangements or framework contracts with wholesalers and ripeners (recitals 31, 32 and 39 of the contested decision).

19 The Commission states that the 'yellow' banana price consisted of the 'green' banana price which had been set one or even two weeks previously, increased by the margin charged for the services of ripening and other cost factors, that margin not being uniform in the southern European region, since there was less correlation between prices for yellow and green bananas in that region than in other parts of the European Union (recital 33 of the contested decision).

20 Where reference is made in the contested decision to the 'price' without any further specification, this means the green T2 price (before rebates and discounts) for the first brand of the respective party, that is to say Chiquita or Bonita (recital 42 of the contested decision).

21 The main actors involved in price-setting at Chiquita in southern Europe were Mr C1, who was at the material time [*confidential*],[1] and Mr C2, [*confidential*]. At Pacific, the main actors were Mr P1, [*confidential*], and Mr P2, [*confidential*]. In addition, during the period concerned, the [*confidential*] were Mr P3 [*confidential*] and Mr P4 [*confidential*] (recitals 12 and 18 of the contested decision).

22 The Commission explains that, during the period from at least 28 July 2004 until 'marketing week 15' of 2005, Chiquita and Pacific coordinated their price strategy in Greece, Italy and Portugal regarding future prices, price levels, price movements and/or price trends, and exchanged information on future market conduct regarding prices (recitals 94 and 187 of the contested decision).

23 According to the Commission, the facts at issue constitute an agreement within the meaning of Article 101(1) TFEU in that the undertakings concerned explicitly agreed on certain conduct on the market, in order knowingly to substitute practical cooperation between them for the risks of competition. The Commission also takes the view that, even if it is eventually not demonstrated that the parties explicitly subscribed to a common plan that constitutes an agreement, the conduct in question or parts of it would nevertheless form a concerted practice within the meaning of Article 101(1) TFEU, and that the communications between the parties influenced their conduct in setting banana prices for southern Europe (recitals 188 to 195 of the contested decision).

24 The Commission considers that the conduct adopted by the parties constitutes a single and continuous infringement of Article 101 TFEU, since the agreements and/or concerted practices found to exist formed, in its view, part of an overall scheme which laid down the lines of their action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that subject (recitals 209 to 213 of the contested decision).

1 — Confidential information omitted. In order to ensure anonymity, the names of persons have been replaced by the first letter of the name of the undertaking for which they worked ('C' for Chiquita and 'P' for Pacific) followed by a number. In addition, the names of the two lawyers who represented Chiquita during the administrative procedure have been replaced by A1 and A2, and the name of a legal advisor of Pacific has been replaced by A3.

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 101 TFEU 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 101 TFEU. Since the conditions for the application of those exceptions are not fulfilled in the present case, the Commission concludes that the practices at issue could not be exempted under Article 2 of Regulation No 26 (recitals 172 to 174 of 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 2006 Guidelines') and the provisions of the 2002 Leniency Notice.

27 The Commission determined a basic amount of the fine to be imposed, which corresponds to an amount of up to 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, irrespective of the duration of participation in the infringement (recital 319 of the contested decision).

28 Those calculations resulted in a basic amount of the fine to be imposed of:

— EUR 47 922 000 for Chiquita;

— EUR 11 149 000 for Pacific (recital 334 of the contested decision).

29 In the light of the particular circumstances of Case COMP/39188 — Bananas (see paragraph 5 above), the basic amount of the fine was reduced by 60% in that case, in order to take account of the specific regulatory regime for the banana business and of the fact that the coordination related to quotation prices. Since that set of factors did not exist in the present case, the Commission decided that a reduction of 20% only should be applied to the basic amount for all the undertakings concerned. Thus, the Commission indicated that, in spite of the largely identical nature of the regulatory regimes which applied at the time of the infringement in Case COMP/39188 — Bananas and in the present case, the price fixing in the present case did not concern quotation prices, which did not exist in the southern European region and that there was even evidence that the collusion in the present case had also included the coordination of prices which were at the levels of actual prices (recitals 336 to 340 of the contested decision).

30 Following that adjustment, the basic amounts of the fines to be imposed were determined as follows:

— EUR 38 337 600 for Chiquita;

— EUR 8 919 200 for Pacific (recital 341 of the contested decision).

31 Chiquita was granted immunity from fines under the 2002 Leniency Notice (recitals 345 to 352 of the contested decision). Since no other adjustment was made for Pacific, the rounded final amount of the fine imposed on it came to EUR 8 919 000.

32 The operative part of the contested decision reads as follows:

'Article 1

The following undertakings infringed Article 101 of the Treaty from 28 July 2004 until 8 April 2005 by participating in a single and continuous agreement and/or concerted practice regarding the supply of bananas in Italy, Greece and Portugal, which consisted of price fixing:

(a) Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA,

(b) FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA.

Article 2

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

(a) Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA, jointly and severally: EUR 0

(b) FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA, jointly and severally: EUR 8 919 000

…'

Procedure and forms of order sought by the parties

33 By application lodged at the Court Registry on 22 December 2011, the applicants brought the present action.

34 Upon hearing the Report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure and, in respect of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put a written question to the Commission and asked the parties to produce documents. The parties complied with those requests within the prescribed period. The Commission, however, refused to produce certain documents which it stated were confidential.

35 By order of 24 October 2014, the Court ordered the Commission, pursuant to Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure, to produce the documents which it had stated were confidential. The Commission complied within the prescribed period. Since the Court considered that those documents were not necessary for the purposes of deciding the case, they were removed from the file, without being communicated to the applicants.

36 At the hearing on 4 November 2014, the parties presented oral argument and replied to oral questions put by the Court.

37 The applicants claim that the Court should:

— primarily, annul the contested decision in so far as it finds that they infringed Article 101 TFEU (annulment of Articles 1 and 2 of the decision in so far as they relate to the applicants);

— in the alternative, annul Article 2 of the contested decision in so far as it imposes a fine on the applicants of EUR 8 919 000 and reduce the fine in line with the arguments raised in the application;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss the application; and

— order the applicants to pay the costs.

Law

39 In support of their application, the applicants put forward four pleas in law. The first alleges an infringement of essential procedural requirements and of the rights of the defence. The second alleges a misuse of powers. The third alleges the incorrect nature of the contested decision in that it does not establish to the requisite legal standard that the applicants infringed Article 101(1) TFEU, the incorrect assessment of the evidence and the inability of the evidence to support the finding of an infringement. Lastly, the fourth plea in law alleges an infringement of Article 23(3) of Regulation No 1/2003 and of the 2006 Guidelines by reason of an incorrect assessment of the gravity and duration of the infringement, as well as of the mitigating circumstances, and infringement of the principle of non-discrimination in the calculation of the fine.

40 In an introductory section entitled 'Description of the industry concerned', the applicants set out observations relating to the characteristics of the European banana market in general and of that of southern Europe in particular. At the hearing, the applicants stated that the parts of their written pleadings devoted to those observations were intended to inform the Court of the context of the case and did not contain any specific plea challenging the contested decision, formal note of which was taken in the minutes of the hearing.

I – *The principal head of claim, seeking the annulment of the contested decision*

A – *The plea in law alleging infringement of essential procedural requirements and of the rights of the defence*

41 In their first plea in law, the applicants invoke an infringement of essential procedural requirements and of the rights of the defence as a result of the Commission's use of documents obtained solely for the purpose of a national tax investigation and of documents from other files, and the exercise of undue influence over the company which applied for immunity. However, the factual elements invoked in support of the latter claim are the same as those intended to support the plea in law alleging a misuse of power, which the applicants confirmed at the hearing, with the result that it is appropriate to deal with those elements in the context of that plea in law.

1. Preliminary observations

42 In the first place, it must be noted that, according to settled case-law, the prevailing principle in EU law is that evidence may be freely adduced and the only relevant criterion for assessing evidence produced is its reliability (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 273; Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 72; and judgment of 12 December 2012 in Case T-410/09 *Almamet* v *Commission*, not published in the ECR, paragraph 38).

43 However, it is also clear from settled case-law that respect for fundamental rights is a condition of the lawfulness of EU acts and that measures incompatible with respect for fundamental rights are not acceptable in the European Union (see Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 284 and the case-law cited; Case T-390/08 *Bank Melli Iran* v *Council* [2009] ECR II-3967, paragraph 70; and *Almamet* v *Commission*, paragraph 42 above, paragraph 39).

44 EU law cannot therefore accept evidence obtained in complete disregard of the procedure laid down for gathering it and designed to protect the fundamental rights of interested persons. The use of that procedure must, therefore, be regarded as an essential procedural requirement within the meaning of Article 263(2) TFEU. According to the case-law, infringement of an essential procedural requirement has consequences, regardless of whether that infringement resulted in harm to the person relying on it (see, to that effect, Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, paragraphs 42 and 52, and *Almamet* v *Commission*, paragraph 42 above, paragraph 39).

45 In that respect, it is relevant to note that it has already been held that the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. Furthermore, the EU judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority (see Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 62, and Case T-50/00 *Dalmine* v *Commission*, paragraph 42 above, paragraph 86 and the case-law cited).

46 Accordingly, since the transmission of the documents in question has not been declared unlawful by a national court, those documents cannot be regarded as inadmissible evidence which must be removed from the file (Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 63).

47 In the second place, it must be recalled that it is settled case-law that the rights of the defence in any proceedings in which penalties, especially fines or penalty payments, may be imposed, such as those provided for in Regulation No 1/2003, are fundamental rights forming an integral part of the general principles of law, whose observance the EU judicature ensures (see *Almamet* v *Commission*, paragraph 42 above, paragraph 21 and the case-law cited).

48 In that respect, it should be pointed out that the administrative procedure under Regulation No 1/2003, which takes place before the Commission, is divided into two separate, successive stages, each having its own internal logic, namely a preliminary investigation stage and an inter partes stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in that regulation and which covers the period until notification of the statement of objections, is intended to enable the Commission to gather all the relevant information confirming whether or not there is an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the inter partes stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 27, and *Almamet* v *Commission*, paragraph 42 above, paragraph 24 and the case-law cited).

49 First, as regards the preliminary investigation stage, the starting point of that stage is the date on which the Commission, in exercise of the powers conferred on it by Articles 18 and 20 of Regulation No 1/2003, takes measures which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (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 182; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 38; and *Almamet* v *Commission*, paragraph 42 above, paragraph 25).

50 Secondly, it is apparent from the case-law that it is not until the beginning of the inter partes administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence (see *Almamet* v *Commission*, paragraph 42 above, paragraph 25 and the case-law cited). If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission and hence the information that could still be concealed from it (Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 60, and *Almamet* v *Commission*, paragraph 42 above, paragraph 25).

51 The fact nevertheless remains that the measures of inquiry adopted by the Commission during the preliminary investigation stage — in particular, the requests for information and the inspections under Articles 18 and 20 of Regulation No 1/2003 — suggest, by their very nature, that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected. Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (see *Almamet* v *Commission*, paragraph 42 above, paragraph 26 and the case-law cited).

52 Thus Article 20(4) of Regulation No 1/2003 requires the Commission to state reasons for the decision ordering an inspection by specifying its subject-matter and purpose. This is a fundamental requirement, designed to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable the undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 29; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 47; Case T-66/99 *Minoan Lines* v *Commission* [2003] ECR II-5515, paragraph 54; Case T-339/04 *France Télécom* v *Commission* [2007] ECR II-521, paragraph 57; and *Almamet* v *Commission*, paragraph 42 above, paragraph 28).

53 The Commission is thus obliged to state, as precisely as possible, what it is looking for and the matters to which the inspection must relate. That requirement is intended to protect the rights of defence of the undertakings concerned, which would be seriously compromised if the Commission could rely on evidence against undertakings which was obtained during an inspection but was not related to the subject-matter or purpose thereof (Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 18; *Roquette Frères*, paragraph 52 above, paragraph 48; *Minoan Lines* v *Commission*, paragraph 52 above, paragraph 55; and *Almamet* v *Commission*, paragraph 42 above, paragraph 29).

54 Although it can therefore be seen from the case-law that the information obtained by the Commission during inspections must not be used for purposes other than those specified in the order or decision under which the inspection is carried out, it cannot however be concluded that the Commission is barred from initiating an investigation in order to verify or supplement information which it happened to obtain during a previous inspection if that information indicates the existence of conduct contrary to the competition rules, since such a bar would go beyond what is necessary to protect professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules in the internal market and bringing to light infringements of Articles 101 TFEU and 102 TFEU (*Dow Benelux* v *Commission*, paragraph 53 above, paragraphs 17 to 19; *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 49 above, paragraphs 298 to 301; and *Almamet* v *Commission*, paragraph 42 above, paragraph 30).

55 In a new investigation, the Commission is entitled to request fresh copies of the documents obtained during the first investigation and then to use them as evidence in the case to which the second investigation relates, without the rights of defence of the undertakings concerned being affected as a result (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 49 above, paragraphs 303 to 305, and *Almamet* v *Commission*, paragraph 42 above, paragraph 30).

56 In the third place, it must be noted that the decision to split proceedings, which amounts to opening one or more new investigations, falls within the Commission's discretion in exercising the prerogatives conferred upon it by the Treaty in the area of competition law (see, to that effect, *Dow Benelux* v *Commission*, paragraph 53 above, paragraphs 17 to 19; *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 49 above, paragraphs 446 to 449; and judgment of 19 May 2010 in Case T-11/05 *Wieland-Werke and Others* v *Commission*, not published in the ECR, paragraph 101).

57 Thus the Commission is entitled both to disjoin and to join proceedings for objective reasons (judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 64, and Case T-59/07 *Polimeri Europa* v *Commission* [2011] ECR II-4687, paragraph 100).

58 The plea in law put forward by the applicants must be examined in the light of those principles.

2. The claim concerning the use as evidence of documents transmitted by the Italian tax authority

59 The applicants submit that the Commission's allegations are largely based on documents transmitted by the Italian tax authority Guardia di Finanza (Finance police), namely the handwritten notes of Mr P1, seized by that authority in the course of a national tax investigation.

60 The applicants state that they were not informed of the transfer of those documents, which were kept in the Commission's file for almost two years before they were communicated to the applicants, with the result that the applicants were unable to rely on the Italian procedural safeguards to prevent the disclosure of those documents to the Commission and their use during the investigation or to exercise their rights of defence.

61 According to the applicants, the minimal procedural safeguards laid down in Article 12(1) of Regulation No 1/2003, which must be applied by analogy in the present case, preclude the use of the documents at issue in the present proceedings. In addition, the authorisation obtained by the Guardia di Finanza from the Procuratore della Repubblica (public prosecutor) of Rome (Italy) to use those documents for administrative purposes cannot, they submit, cover the present proceedings in so far as the fines imposed by the Commission in competition matters are of a criminal law nature for the purpose of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR').

62 Accordingly, the applicants request that the documents at issue be removed from the case-file and not be taken into account as evidence in the present case.

63 The Commission argues that the legality of the transmission, by national authorities, of documents obtained under national criminal law is a matter governed by national law, and a document is considered inadmissible only if its transmission has been declared unlawful by a national court. In the present case, the Procuratore della Repubblica of Rome, on the contrary, authorised the use of the documents in question for administrative purposes. In that respect, the Commission rejects the allegation that procedures under EU competition law are of a criminal law nature.

64 Furthermore, the Commission argues that Article 12(2) of Regulation No 1/2003 concerns only the exchange of information within the European Competition Network (ECN) and does not prohibit the Commission from receiving documents from other sources.

65 The Court finds that a distinction should be drawn between the issue of the admissibility of the documents transmitted by the Italian authorities as evidence in the present case and the issue of safeguarding the applicants' rights of defence. It can be seen from the applicants' line of arguments that they first contest the admissibility of those documents as evidence and, secondly, invoke an infringement of their rights of defence.

a) The documents alleged to be inadmissible evidence

66 As a preliminary point, it must be noted that of the documents transmitted by the Guardia di Finanza to the Commission, four pages of Mr P1's notes were used by the Commission as evidence in the present case, namely two pages of notes concerning the lunch of 28 July 2004 and two pages of notes from August 2004. Besides those four pages, the Commission referred to a few other pages of Mr P1's notes, transmitted by the Guardia di Finanza, in order to support the credibility of the evidence of the infringement, namely Mr P1's notes (see paragraph 210 below) and his direct involvement in Pacific's management (see paragraph 296 below), but without relying on those pages as evidence of the infringement.

67 As regards the four pages of notes used as evidence of the infringement, it can be seen from the file that the two pages of notes concerning the lunch of 28 July 2004 were also found by the Commission during its inspections at Pacific in Rome.

68 Accordingly, it must be held that the two pages of notes concerning the lunch of 28 July 2004 are in the file of the present case irrespective of whether the documents transmitted by the Guardia di Finanza are admissible. At the hearing, the applicants did not contest the lawfulness of the inspections carried out by the Commission in the present case, which was noted in the minutes of the hearing, nor, accordingly, the admissibility as evidence of the documents obtained during those inspections.

69 In any event, it can be seen from the case-law cited in paragraphs 54 and 55 above that, although the information obtained by the Commission during inspections must not be used for purposes other than those specified in the order or decision under which the inspection is carried out, it cannot however be concluded from this that the Commission is barred from initiating an investigation in order to verify or supplement information which it happened to obtain during a previous inspection if that information indicates the existence of conduct contrary to the competition rules, and moreover that, in the context of that new investigation, the Commission is entitled to request fresh copies of the documents obtained during the first investigation and then to use them as evidence in the case to which the second investigation relates, without the rights of defence of the undertakings concerned being affected as a result.

70 It follows from the foregoing that the only documents transmitted by the Guardia di Finanza on which the Commission relied as evidence of the infringement in the present case and whose admissibility is contested are the two pages of notes of August 2004.

b) The admissibility of the documents transmitted by the Italian tax authority as evidence

71 The applicants claim that the safeguards laid down in Article 12(2) of Regulation No 1/2003, which provides that the information exchanged between the Commission and the competition authorities of the Member States can be used as evidence only 'in respect of the subject-matter for which it was collected by the transmitting authority', preclude the use of the documents transmitted by the Italian tax authority as evidence in the present case.

72 According to the applicants, while Regulation No 1/2003 is in principle applicable only within the ECN, it introduces a set of minimum standards and procedural safeguards, the scope of which must be extended to all information used as evidence by the Commission in a competition investigation. Any other interpretation would result in an unjustifiable difference, authorising the Commission to cooperate with national authorities not part of the ECN to obtain evidence in a less restricted and regulated manner and allowing it to circumvent the procedural safeguards and limitations laid down in Regulation No 1/2003.

73 The applicants submit that, consequently, the documents at issue in the present case could only be used as evidence in the national tax investigation for the purpose for which they were collected and not in a competition investigation to establish an infringement of Article 101 TFEU. Any other interpretation would imply a fundamental breach of the applicants' rights of defence and of the specific internal procedural rules applicable to competition investigations.

74 That argument must be rejected. It cannot be claimed that the use, by the Commission, as evidence in a procedure governed by Regulation No 1/2003, of documents obtained by national authorities of any kind for purposes other than the application of Articles 101 TFEU and 102 TFEU and for purposes other than those covered by the investigation carried out by the Commission, constitutes an infringement of the safeguards laid down in Article 12(2) of Regulation No 1/2003.

75 It must be observed in that regard that Regulation No 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement EU competition law for this purpose. The scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network (see, to that effect, *France Télécom* v *Commission*, paragraph 52 above, paragraph 79).

76 Article 12 of Regulation No 1/2003, which is contained in Chapter IV entitled, 'Cooperation', is therefore intended to regulate the exchange of information within the network formed by the Commission and the competition authorities of the Member States in order to allow the circulation of information within that network, while ensuring that the appropriate procedural safeguards for undertakings are respected.

77 In the explanatory memorandum accompanying the proposal for Regulation No 1/2003, the Commission explained the following:

'Paragraph 1 [of Article 12] creates a legal basis for the exchange of any information between the Commission and the Member States' competition authorities and its use as evidence in proceedings applying Community competition law. … [The objective is] to render possible the transfer of a case from one authority to another in the interest of effective case allocation. Paragraph 2 introduces limits on the use of information transmitted under paragraph 1, thereby ensuring that the undertakings concerned benefit from appropriate procedural safeguards.'

78 The prohibition on using information collected by the Commission and the competition authorities of the Member States in the exercise of their investigative powers as evidence, for purposes other than that for which it was obtained, laid down in Article 12(2) of Regulation No 1/2003, meets a specific need, namely the need to ensure that the procedural safeguards inherent to the collection of information by the Commission and by the national competition authorities in the context of their tasks are respected, while allowing an exchange of information between those authorities. However, it cannot be inferred from that prohibition that there is a general prohibition on the use as evidence, by the Commission, of information obtained by another national authority in exercise of its tasks.

79 In addition, it appears that the existence of such a general prohibition would render unsustainable the burden of proving conduct contrary to Articles 101 TFEU and 102 TFEU incumbent upon the Commission, and would therefore be incompatible with the task entrusted to the Commission by the Treaties of monitoring the application of those provisions.

80 It follows from the case-law cited in paragraphs 45 and 46 above that the lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. Furthermore, the EU judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority. Accordingly, if the transmission of the documents at issue was not declared unlawful by a national court, those documents cannot be considered to be inadmissible evidence which must be removed from the file.

81 In that regard, it suffices to note that, in the present case, the applicants have not adduced evidence capable of showing that the transmission of the documents in question was declared unlawful by a national court. Moreover, it cannot be seen from their arguments that the issue of the lawfulness of the transmission and use of the documents in question at the level of EU law has been brought before the competent Italian court (see, to that effect, Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 63, and Case T-50/00 *Dalmine* v *Commission*, paragraph 42 above, paragraph 87).

82 For the sake of completeness, it should be noted that the applicants' argument that the authorisation of the Procuratore della Repubblica of Rome was obtained for administrative purposes only must be rejected. According to the applicants, the procedure relating to the cartel cannot constitute 'administrative purposes', since the fines imposed by the Commission are of a criminal law nature for the purposes of Article 6 of the ECHR. The authorisation obtained by the Guardia di Finanza from the Procuratore della Repubblica therefore cannot cover the procedure followed by the Commission in the present case.

83 In the first place, it must be noted that the European Court of Human Rights held, in paragraph 44 of its judgment in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011, invoked by the applicants, that 'given various aspects of the case, [it] took the view that the fine imposed on the applicant company was of a criminal law nature, with the result that Article 6 § 1 was applicable, in this instance, under the criminal law aspect of that provision'.

84 However, that does not mean that the authorisation of the Procuratore della Repubblica of Rome, by which it authorised the use of the documents at issue for 'administrative proposes', must be interpreted as meaning that the Procuratore della Repubblica wished to exclude the use of the documents in a competition law procedure, if competition law is, in Italian law, considered to be part of administrative law. That is indeed the case, as can be seen, inter alia, from the very text of the judgment of the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v. Italy*, paragraph 83 above (paragraph 11 et seq. and 60).

85 In that regard, it must be noted that, according to the case-law of the European Court of Human Rights, the obligation to comply with Article 6 of the ECHR does not preclude, in an administrative procedure, a 'penalty' being imposed in the first instance by an administrative authority. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR must be subject to subsequent review by a judicial body endowed with unlimited jurisdiction (Case C-295/12 P *Telefónica and Telefónica de España* v *Commission* [2014] ECR, paragraph 51).

86 In addition, it is useful to note that it is undisputed that the Guardia di Finanza transmitted the documents in question to the Commission on 25 July 2007, after obtaining authorisation from the Procuratore della Repubblica of Rome to use those documents for administrative purposes (recital 81 of the contested decision), whereas the judgment of the European Court of Human Rights in

A. Menarini Diagnostics S.R.L. v. Italy, paragraph 83 above, invoked by the applicants, was delivered on 27 September 2011. Accordingly, the Procuratore's decision cannot be interpreted in the light of any characterisation of penalties in competition law in that judgment.

87 In the second place, it is clear from the file that it cannot be maintained that the Procuratore della Repubblica, when he gave the authorisations in question in the present case, was unaware that the documents concerned were to be used in a competition law investigation.

88 In that respect, the applicants stated in paragraph 466 of their response to the statement of objections that, by a decision of 13 July 2007, the Procuratore della Repubblica of Rome authorised an internal transfer, within the Guardia di Finanza, of documents seized at Mr P1's home, from the Nucleo Polizia Tributaria di Roma (Tax police section, Rome), which had seized the documents, to the Nucleo Speciale Tutela Mercati (Special section for the protection of markets). It can be seen from footnote No 2 in the letter accompanying the dispatch of documents from the Guardia di Finanza to the Commission that the Nucleo Speciale Tutela Mercati, hierarchically integrated in the Comando tutela dell'Economia (Command for the protection of the economy), is the department of the Guardia di Finanza specialised in the protection of competition throughout the national territory. The Nucleo Speciale Tutela Mercati is authorised to receive notifications from other departments of the institution and to transmit them, following an assessment, to the competent authority. Accordingly, by authorising the transfer of documents seized by the Nucleo Polizia Tributaria di Roma of the Guardia di Finanza in a tax investigation to the Nucleo Speciale Tutela Mercati of that same authority, the Procuratore della Repubblica could not have been unaware that, in doing so, he was authorising the use of those documents for the purposes of a competition investigation.

89 Furthermore, it can be seen from paragraph 467 of the applicants' response to the statement of objections, from recital 81 of the contested decision and from paragraph 21 of the defence, that the Procuratore della Repubblica subsequently, following a request sent by the Commission to the Guardia di Finanza on 21 December 2007 and a letter sent to it by the Guardia di Finanza on 3 January 2008, declared that the communication of the documents in question by the Commission to the parties was not prejudicial to the national investigation in Italy. Consequently, it must be held that, by that time at the latest, the Procuratore della Repubblica could no longer have been unaware that the documents were held by the Commission for the purposes of a competition law investigation.

90 It follows from the foregoing that the claim concerning the Commission's use of documents transmitted by the Italian Guardia di Finanza as evidence in the present case must be rejected.

c) The safeguarding of the applicants' rights of defence by the Commission

91 As regards whether the Commission should have granted the applicants access to the documents earlier, it has been noted in paragraph 47 above that it is settled case-law that the rights of the defence in any proceedings in which penalties, especially fines or penalty payments, may be imposed, such as those provided for in Regulation No 1/2003, are fundamental rights forming an integral part of the general principles of law, whose observance the EU judicature ensures.

92 Respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement (see Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 44 and the case-law cited).

93 In that regard, the statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law which requires observance of the rights of the defence in all proceedings. As noted in paragraph 48 above, as regards proceedings under Article 101 TFEU, it is

appropriate to draw a distinction between the two phases of the administrative procedure, namely the investigation phase preceding the statement of objections and the phase corresponding to the remainder of the administrative procedure. Each of these successive stages has its own internal logic; the first stage must enable the Commission to adopt a position on the course which the procedure is to follow, and the second must enable the Commission to reach a final decision on the infringement concerned (see Case C-534/07 P *Prym and Prym Consumer* v *Commission*, paragraph 48 above, paragraph 27 and the case-law cited).

94 As regards whether the Commission ought to have informed the applicants earlier, or even before the notification of the statement of objections, of the fact that it was in possession of the documents transmitted by the Italian authorities, it must be borne in mind that it is precisely the notification of the statement of objections, on the one hand, and access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure the rights of the defence which the applicants invoke in the context of the present plea (see, to that effect, Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 58).

95 It is by the statement of objections that the undertaking concerned is informed of all the essential elements on which the Commission is relying at that stage of the procedure. Consequently, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence (see Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 59 and the case-law cited).

96 If the abovementioned rights were extended, in the manner proposed by the applicants, to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be undermined, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission and hence the information that could still be concealed from it (see, to that effect, *Dalmine* v *Commission*, paragraph 45 above, paragraph 60).

97 It follows that, in the present case, the Commission was not required to inform the applicants of the transmission of documents by the Guardia di Finanza before the notification of the statement of objections.

98 Accordingly, it suffices to note that the Commission expressly indicated in paragraph 86 of the statement of objections that it relied on those documents as evidence. Moreover, it can be seen from a letter sent by the applicants to the Commission on 13 July 2009 that the Commission transmitted the documents it had received from the Guardia di Finanza to the applicants on 6 July 2009, that is to say, before the notification of the statement of objections on 10 December 2009. That was confirmed by the applicants at the hearing and noted in the minutes of the hearing.

99 In addition, it should be noted that the applicants do not claim that the fact that the Commission did not inform them, during the investigation stage, that it was in possession of documents transmitted by the Italian authorities could have had an impact on their subsequent ability to defend themselves during the administrative procedure initiated by the notification of the statement of objections (see, to that effect, Case C-407/04 P *Dalmine* v *Commission*, paragraph 45 above, paragraph 61).

100 It follows from the foregoing that the claim concerning the use as evidence of documents transmitted by the Italian tax authority must be rejected.

3. The claim concerning use of documents from other files

101 The applicants criticise the Commission's use of a document from the file of Case COMP/39188 — Bananas, obtained during surprise inspections at LVP carried out in the context of that case, namely the internal e-mail sent on 11 April 2005 at 9:57 a.m. from Mr P1 to Mr P2 ('the e-mail sent on 11 April 2005 at 9:57 a.m.').

102 The applicants submit that the Commission (i) used that document in relation to Chiquita's immunity application, and (ii) used it as evidence in the present case. Since the first part concerns the claim alleging the exercise of undue influence over the immunity applicant, it will be examined in that context (see paragraph 162 et seq. below).

103 As regards the use of the document in question as evidence in the present case, it can be seen from the file that the Commission asked the applicants to submit that document in the context of the present case. Thus, the document was produced by the applicants on 14 August 2008 as an annex to a response to a request for information from the Commission and in September 2008 as an annex to another request for information from the Commission.

104 It can be seen from the case-law cited in paragraphs 54 and 55 above that although the information obtained by the Commission during inspections must not be used for purposes other than those specified in the order or decision under which the inspection is carried out, it cannot however be concluded that the Commission is barred from initiating an investigation in order to verify or supplement information which it happened to obtain during a previous inspection if that information indicates the existence of conduct contrary to the competition rules, and that, in a new investigation, the Commission is entitled to request fresh copies of the documents obtained during the first investigation and then to use them as evidence in the case to which the second investigation relates, without the rights of defence of the undertakings concerned being affected as a result.

105 It follows from the foregoing that the claim concerning the use of a document from another file as evidence in the present case must be rejected and, accordingly, the first plea in law in its entirety.

B – *The plea in law alleging the exercise of undue influence over the immunity applicant and misuse of power*

106 The applicants make a distinction, at least formally, between the claim alleging the exercise of undue influence over the immunity applicant, invoked in support of the first plea in law, alleging infringement of essential procedural requirements and of the rights of the defence (see paragraph 41 above), and the plea in law alleging misuse of power.

107 At the hearing, the applicants explained that the facts intended to support the claim alleging the exercise of undue influence over the immunity applicant, put forward in the context of the first plea in law (see paragraph 41 above), are also intended to support the plea in law alleging misuse of power, which is otherwise entirely unsubstantiated. Accordingly, it is appropriate to consider that the applicants claim, in essence, that the facts at issue demonstrate that the Commission exercised unlawful influence over the immunity applicant, which also constitutes a misuse of power, and to examine all of those facts below in the context of the examination of the second plea in law.

108 As a preliminary, it must be noted that, in their line of argument developed in support of the present plea in law, the applicants rely on a series of arguments which are indistinguishable from those invoked in the context of the third plea in law in order to contest the accuracy or credibility of Chiquita's statements or of the inferences drawn from those statements by the Commission. In so far as those arguments do not concern the lawfulness of the procedure which led to the adoption of the contested decision, but rather whether the Commission established to the requisite legal standard the existence

of an infringement, they must be examined in the context of the third plea in law, alleging that the Commission failed to establish to the requisite legal standard the existence of an infringement of Article 101(1) TFEU and that it therefore did not discharge the burden of proof imposed on it by Article 2 of Regulation No 1/2003 (paragraph 173 et seq. below).

1. Preliminary observations

a) The leniency programme

109 In the context of its activity of pursuing infringements of Article 101 TFEU, the Commission put in place a leniency programme designed to give favourable treatment to undertakings which cooperate with it in investigations into secret cartels that affect the European Union (Case T-12/06 *Deltafina* v *Commission* [2011] ECR II-5639, paragraph 103, confirmed on appeal by Case C-578/11 P *Deltafina* v *Commission* [2014] ECR).

110 That leniency programme, initially established by the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the 1996 Leniency Notice') was subsequently extended, in the 2002 Leniency Notice, which is applicable in the present case, and then in the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice') (see, to that effect, Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 104).

111 Undertakings participating in that programme offer active and voluntary cooperation in the investigation by facilitating the Commission's task of establishing and suppressing infringements of the competition rules (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 505, and Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 90). In return for that cooperation, they may obtain favourable treatment as regards the fines that would otherwise have been imposed on them, provided that they meet the conditions laid down in the applicable leniency notice (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 108).

112 The leniency programme, as laid down in the 2002 Leniency Notice, envisages that the Commission will be able both to grant total immunity from fines to the first undertaking to cooperate in the investigation and to grant reductions in fines to undertakings that cooperate subsequently. In the former case, the undertaking in question will have the benefit of a complete exception to the principle of personal liability, under which, where an undertaking infringes the competition rules, it must answer for that infringement (see, to that effect, 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 77). In the other cases, the degree to which that exception will be applied will vary according to the chronological order in which the various requests to cooperate are submitted and the quality of the cooperation supplied (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 109).

113 It can be seen from the 2002 Leniency Notice that, in the context of the leniency programme provided for by that notice, reproduced in substance in the 2006 Leniency Notice, the procedure for granting an undertaking total immunity from fines has three distinct stages (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 111).

114 In the first stage, the undertaking intending to cooperate with the Commission must approach the Commission and provide evidence of a presumed cartel affecting competition within the EU. That evidence must be such as to enable the Commission either to adopt a decision to carry out an investigation, in the case provided for at point 8(a) of the 2002 Leniency Notice, or to find an infringement of Article [101 TFEU], in the case provided for at point 8(b) of the 2002 Leniency Notice (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 112).

115 In the second stage, once it has received the application for immunity, the Commission assesses the evidence supplied in support of the application in order to ascertain whether the undertaking satisfies the conditions set out at point 8(a) or (b), as appropriate, of the 2002 Leniency Notice. If the undertaking is the first to satisfy those conditions, the Commission will grant it, in writing, conditional immunity from fines, as provided for in points 15 and 16 of the 2002 Leniency Notice (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 113).

116 The grant of conditional immunity therefore means the creation of a special procedural status, during the administrative procedure, for the undertaking that satisfies the conditions set out at point 8 of the 2002 Leniency Notice which produces certain legal effects. However, that conditional immunity cannot in any way be treated as final immunity from fines, which is granted only at the end of the administrative procedure (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 114).

117 More particularly, the grant of conditional immunity, first, shows that the undertaking concerned was the first to meet the conditions set out at point 8(a) or (b) of the 2002 Leniency Notice, with the consequence that the Commission will not consider other applications for immunity from fines before it has taken a position on that undertaking's application (point 18 of the 2002 Leniency Notice) and, secondly, provides assurance to that undertaking that the Commission will grant it immunity from fines if, at the end of the administrative procedure, it concludes that the undertaking has satisfied the conditions set out at point 11(a) to (c) of the 2002 Leniency Notice (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 115).

118 In that regard, it should be observed that, according to point 11(a) to (c) of the 2002 Leniency Notice:

'In addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for any immunity from a fine:

(a) the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned;

(b) the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b), as appropriate;

(c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.'

119 Lastly, it is only in the third stage, at the end of the administrative procedure, when the Commission adopts the final decision, that it does or does not grant, in that decision, immunity from fines in the strict sense to the undertaking that was granted conditional immunity. It is at that precise time that the procedural status resulting from conditional immunity ceases to produce its effects. However, point 19 of the 2002 Leniency Notice states that final immunity from fines is granted only if the undertaking in question has met, throughout the administrative procedure and until the time when the final decision is taken, the three cumulative conditions set out at point 11(a) to (c) of that notice (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 117).

120 It thus follows from the system as provided for in the 2002 Leniency Notice that before the final decision is taken the undertaking seeking immunity does not obtain immunity from fines in the strict sense but benefits only from a procedural status that may be transformed into immunity from fines at the end of the administrative procedure if the requisite conditions are met (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 118, and Case T-404/08 *Fluorsid and Minmet* v *Commission* [2013] ECR, paragraph 134).

b) The scope of the obligation to cooperate

121 It follows from the actual wording of point 11(a) of the 2002 Leniency Notice (see paragraph 118 above), and in particular from the qualification that the undertaking concerned is to cooperate 'fully, on a continuous basis and expeditiously', that the obligation to cooperate borne by the undertaking which seeks immunity is a very general obligation whose outlines are not precisely defined, and the exact scope of which can be understood only in the context of which it forms part, namely in the framework of the leniency programme (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 124).

122 The grant of total immunity from fines constitutes an exception to the principle of the personal liability of the undertaking for the infringement of the competition rules which is justified by the aim of favouring the discovery, investigation and suppression and also the deterrence of the practices which form part of the most serious restrictions of competition. In those circumstances, it is therefore logical that, in exchange for the grant of total immunity from fines for its unlawful behaviour, the undertaking requesting immunity should be required to cooperate in the Commission's investigation, in the words of the 2002 Leniency Notice, 'fully, on a continuous basis and expeditiously' (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 125).

123 Indeed, it follows from the qualification 'fully' that the cooperation that an applicant for immunity must provide to the Commission in order to be granted immunity must be complete, absolute and unreserved. 'On a continuous basis' and 'expeditiously' mean that that cooperation must last throughout the administrative procedure and that it must, as a matter of principle, be immediate (Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 126).

124 It has consistently been held, moreover, that a reduction of the fine under the applicable leniency notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part (see, with respect to the 1996 Leniency Notice, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 395; Case C-301/04 P *Commission* v *SGL* Carbon [2006] ECR I-5915, paragraph 68; and *Erste Group Bank and Others* v *Commission*, paragraph 112 above, paragraph 281; with respect to the 2002 Leniency Notice, Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 127).

125 It is clear from the very concept of cooperation, as described in the 2002 Leniency Notice, that it is only where the conduct of the undertaking concerned reveals such a spirit of cooperation that a reduction may be granted on the basis of that notice (see, to that effect, with respect to the 1996 Leniency Notice, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraph 396, and *Erste Group Bank and Others* v *Commission*, paragraph 112 above, paragraph 282; with respect to the 2002 Leniency Notice, Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraph 128).

126 That consideration applies a fortiori to the cooperation necessary to justify the grant of total immunity from fines, since immunity constitutes treatment even more favourable than a mere reduction of the fine. Accordingly, the concept of cooperation that is provided 'fully, on a continuous basis and expeditiously' and is capable of justifying the grant of total immunity from fines means genuine and full cooperation characterised by a real spirit of cooperation (see, to that effect, Case T-12/06 *Deltafina* v *Commission*, paragraph 109 above, paragraphs 129 and 130).

2. The contested decision

127 It must be recalled that, as indicated in paragraph 3 et seq. above, on 8 April 2005, Chiquita applied for immunity from fines and, in the alternative, reduction of the fine in accordance with the 2002 Leniency Notice in relation to the business of distribution and marketing of imported bananas as well as pineapples and other fresh fruit in Europe. That application was registered as Case COMP/39188 — Bananas and, on 3 May 2005, Chiquita obtained conditional immunity from fines for an alleged secret cartel, as described in the information submitted by Chiquita on 8, 14, 21 and 28 April 2005, affecting the sale of bananas and pineapples in the EEA. The investigation in Case COMP/39188 — Bananas led to the adoption of Commission Decision C(2008) 5955 final of 15 October 2008 (OJ 2009 C 189, p. 12), relating to a proceeding under Article [101 TFEU] (Case COMP/39188 — Bananas), finding that Chiquita, the Dole group and Weichert, at the time under decisive influence of the Del Monte group, had infringed Article 81 EC by engaging in a concerted practice by which they coordinated quotation prices for bananas that they each set weekly for Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden between 2000 and 2002 (recitals 79 and 80 of the contested decision).

128 It was also noted in paragraphs 7 and 8 above that the Commission carried out an investigation relating to southern Europe in the context of Case COMP/39482 — Exotic Fruit (Bananas) after receiving, on 26 July 2007, copies of documents from the Italian tax authority, which had been obtained during an inspection carried out at the home and office of an employee of Pacific in the course of a national investigation (recital 81 of the contested decision).

129 In recitals 82 and 83 of the contested decision, the Commission explained that, on 26 November 2007, Chiquita was informed orally by DG Competition that on 28 November 2007, Commission officials would carry out an inspection at the premises of Chiquita Italia SpA in Rome and that DG Competition expected Mr C1 to be present for an interview that day. On that occasion, Chiquita was reminded that it had received conditional immunity from fines for the whole Community, that it had a duty to cooperate under the 2002 Leniency Notice and that an investigation into southern Europe would be carried out under case number COMP/39482 — Exotic Fruit. Lastly, Commission officials carried out an inspection at Chiquita Italia pursuant to Article 20(2) of Regulation No 1/2003 and carried out an interview with Mr C1.

130 As indicated in paragraph 10 above, in recitals 84 and 85 of the contested decision, the Commission noted that, in the course of the investigation, it had sent several requests for information to the parties, that they had been asked to re-submit certain items of information and evidence which were contained in the investigation file of Case COMP/39188 — Bananas and that Chiquita had been requested to identify the parts of its oral statements in that case which it deemed to be related to this investigation. On 9 February 2009, DG Competition issued a state-of-play letter to Chiquita in connection with its cooperation under the 2002 Leniency Notice (recital 85 of the contested decision).

131 The infringement at issue in the present case was considered to be clearly distinct from the infringement found in Case COMP/39188 — Bananas. The Commission indicated in that respect that the present case concerned a distinct (single and continuous) infringement because, inter alia, the geographical scope of the agreements, the staff involved, the period covered by the alleged infringement, the operation of the sector and the nature of the practices under investigation in the present case clearly differed from what was found in Case COMP/39188 — Bananas (recitals 80, 316 and 345 of the contested decision).

132 As regards Chiquita's leniency application, the Commission noted more specifically that, prior to that application, the Commission had not undertaken any inspection into the alleged cartel nor did it have in its possession any evidence to carry out an inspection, that, on 3 May 2005, Chiquita was granted conditional immunity from fines for an alleged secret cartel — as described in Chiquita's submissions of 8, 14, 21 and 28 April 2005 — affecting the sale of bananas and pineapples in the EEA, and that,

since the conduct under investigation in the present case was distinct from that in Case COMP/39188 — Bananas, the original investigation was divided into two cases, namely Case COMP/39482 — Exotic Fruit and Case COMP/39188 — Bananas. The Commission stated that, in that type of situation an immunity applicant has the duty to cooperate in both separate investigations which may originate from the same immunity application, and continue doing so even after obtaining final immunity with regard to the infringement(s) covered by one of the investigations (recital 345 of the contested decision).

133 The Commission also explained that, in view of certain declarations made by Chiquita during the proceedings, it had expressed its preliminary view — in the statement of objections of 10 December 2009 that it sent to Chiquita in the present case — that the infringement to which the contested decision relates was not covered by Chiquita's immunity application of 8 April 2005 and, alternatively, that it had not fulfilled its obligations under point 11(a) (obligation to cooperate) and (b) (termination of the infringement at the time of the application) of the 2002 Leniency Notice. As already noted in paragraph 130 above, prior to the statement of objections, the Commission had sent a state-of-play letter to Chiquita in connection with its cooperation under the 2002 Leniency Notice (recital 348 of the contested decision).

134 The Commission concluded by indicating that, based on all the arguments put forward by Chiquita, especially after the statement of objections, it had concluded that the infringement found in the contested decision was covered by Chiquita's immunity application. The Commission recalled, however, that immunity applicants must endeavour to spell out clearly on what information they base their allegations when applying for immunity (recital 349 of the contested decision).

135 Lastly, the Commission, in brief, recalled that Chiquita had provided it with several submissions explaining its involvement in the southern European banana business, including the collusive contacts with Pacific, and recalled that it was a contribution from Chiquita which had initially triggered the Commission's investigation. It therefore concluded that Chiquita had met its obligation to continuously cooperate and that, given the special circumstances of the present case, it would not be justified to withdraw immunity from that undertaking (recitals 351 and 352 of the contested decision).

3. The matters invoked by the applicants

136 The applicants claim that the Commission applied unlawful practices in order to encourage Chiquita to confirm its own suspicions and assumptions, contrary to the spirit of the 2002 Leniency Notice. The proof of that assertion, according to the applicants, lies in the fact that Chiquita did not put forward any specific evidence concerning the present case in its immunity application and that the Commission did not rely on that application to establish the infringement committed in the present case. The Commission therefore adopted, from the outset, a predetermined view of the case, by first creating a case of a cartel infringement and then using the immunity applicant in another case to support its allegations.

137 According to the applicants, by unduly steering the undertaking which applied for immunity, the Commission clearly not only exceeded its competence under the 2002 Leniency Notice, as well as its investigative and fining powers under Regulation No 1/2003, but also used its powers for purposes other than those for which they were conferred.

138 The Commission contests the applicants' assertions and argues that none of its actions during the administrative procedure can be interpreted as the exercise of undue pressure on Chiquita or as a steering of the immunity applicant.

139 It must be recalled, first of all, that the adoption by an EU institution of a measure with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case constitutes a misuse of powers. The Courts of the European Union thus hold that a measure is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated (Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 24; Joined Cases C-186/02 P and C-188/02 P *Ramondín and Others* v *Commission* [2004] ECR I-10653, paragraph 44; Joined Cases C-274/11 and C-295/11 *Spain and Italy* v *Council* [2013] ECR, paragraph 33; Case T-357/06 *Koninklijke Wegenbouw Stevin* v *Commission* [2012] ECR, paragraph 246; and Case T-385/11 *BP Products North America* v *Council* [2014] ECR, paragraph 120).

140 Next, it must be noted that the aim of the powers given to the Commission by Regulation No 1/2003 is to enable it to carry out its duty under the Treaty of ensuring that the rules on competition are applied in the internal market (see, by analogy, with respect to Regulation No 17, Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 20, and order of 17 November 2005 in Case C-121/04 P *Minoan Lines* v *Commission*, not published in the ECR, paragraph 34).

141 Lastly, the 2002 Leniency Notice, the operation of which has been explained in paragraphs 111 to 126 above, determines, generally and abstractly, the method which the Commission has bound itself to use in applying its leniency programme and, consequently, ensures legal certainty on the part of the undertakings (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraphs 211 and 213).

142 Although that Leniency Notice may not be regarded as a rule of law which the Commission is always bound to observe, it nevertheless forms a rule of practice from which the Commission may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraph 209 and the case-law cited, and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 70).

143 In adopting such rules of conduct and announcing through their publication that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraph 211 and the case-law cited, and in *Carbone-Lorraine* v *Commission*, paragraph 142 above, paragraph 71).

144 It must also be noted that, in accordance with the case-law cited above, the Commission may rely on evidence from other investigations to launch a new investigation (see paragraphs 54 and 55 above) and to disjoin or join proceedings (see paragraphs 56 and 57 above), and although, in accordance with the case-law cited in paragraphs 121 to 126 above, the immunity applicant must cooperate 'fully', the Commission must, as it itself recalled in paragraph 351 of the contested decision, 'remain neutral and abstain from leading the [immunity] applicant'.

145 Nevertheless, contrary to what is claimed by the applicants, the matters they put forward in support of the claim alleging the exercise of undue influence over the immunity applicant and the plea in law alleging a misuse of powers are not capable of demonstrating that the Commission infringed those principles in the present case. Thus, the facts invoked by the applicants are not capable of validating the allegations that 'the Commission has applied illegal practices to steer Chiquita as an immunity applicant in order to back up its own suspicions and presumptions, in conflict with the spirit of the

Leniency Notice' by establishing 'first … a case of a cartel infringement on the basis of speculative interpretation of handwritten, personal notes, and [by then using] the immunity applicant in another case to try and support this'.

146 In the first place, the applicants cannot, in general, derive any argument from the fact that the Commission first considered that Chiquita's leniency application did not cover the present proceedings, and then 'changed its mind' in the contested decision. As stated in the case-law cited in paragraphs 113 to 120 above, under the cooperation procedure, as envisaged in the 2002 Leniency Notice, it is only at the end of that process that the Commission definitively grants, or does not grant, immunity from fines to the immunity applicant, on the basis of the cooperation offered by that applicant throughout the procedure. The Commission is therefore not required to adopt a definitive position on a leniency application at the stage of the statement of objections (see, to that effect, *Fluorsid and Minmet* v *Commission*, paragraph 120 above, paragraphs 134 to 136).

147 The fact that the Commission did not rely on Chiquita's initial leniency application, which covered the entire EEA (see paragraphs 3, 4 and 127 above), as evidence of the infringement in the present case is also not capable of demonstrating that the Commission, during the subsequent procedure, misused its powers in order to pressure Chiquita to confirm the facts relating to the present case. It follows from the case-law cited in paragraphs 121 to 126 above that the duty of cooperation of an undertaking seeking total immunity from fines includes the obligation to cooperate fully, on a continuous basis and expeditiously throughout the procedure, which may also involve research and declarations concerning facts not covered by the initial declaration in response to questions put to it by the Commission, since, as the Commission states in paragraph 31 of its defence, replying to questions is an important part of the immunity applicant's duty to cooperate.

148 Moreover, it can be seen from the case-law cited in paragraphs 56 and 57 above that the Commission is entitled both to disjoin and to join proceedings for objective reasons. In the present case, the applicants have not invoked evidence to call into question the reasons stated by the Commission for its decision that, in the present case, it was appropriate to consider that the facts of Case COMP/39482 — Exotic Fruit and those of Case COMP/39188 — Bananas had to be regarded as two clearly distinct infringements (see paragraph 131 above).

149 In those circumstances, the Commission was entitled to consider that, in such a situation, an immunity applicant has the duty to cooperate with both separate investigations which may originate from the same immunity application, which covered the EEA in its entirety (see paragraphs 3, 4 and 127 above), and to continue doing so even after obtaining final immunity with regard to the infringement(s) covered by one of the investigations (see paragraph 132 above).

150 It follows that the applicants' argument based on the general idea that Chiquita 'adapted' its arguments to the facts as presented by the Commission must also be rejected.

151 In that respect, it must also be recalled that statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 166).

152 Although it is indeed possible that an undertaking which has applied for immunity from fines may submit as much incriminating evidence as possible, the fact remains that that undertaking will also be aware of the potential negative consequences of submitting inaccurate information, which could, inter alia, lead to a loss of immunity after it has been granted. Moreover, the risk of the inaccurate nature of those statements being detected and leading to those consequences is increased by the fact that such statements must be corroborated by other evidence (judgment of 19 December 2013 in Joined Cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens and Others* v *Commission*, not published in the ECR, paragraph 138).

153 Furthermore, the Court of Justice has already pointed out that a statement made by a company admitting the existence of an infringement by that company entails considerable legal and economic risks, including, inter alia, the risk of actions for damages being brought before the national courts, in the context of which the Commission's establishment of a company's infringement may be invoked (see *Siemens and Others* v *Commission*, paragraph 152 above, paragraphs 140 and 141 and the case-law cited).

154 In the second place, in view of Chiquita's obligations arising from its procedural status as an immunity applicant (see paragraphs 120 to 126 above), it cannot be considered that merely reminding it of that status constitutes the exercise of undue pressure, as the applicants' claim. Likewise, the latters' allegation that the Commission 'threaten[ed] to deny Chiquita's immunity in the case relating to northern Europe [(Case COMP/39188 — Bananas)] in order to secure Chiquita's cooperation in finding supporting evidence and influence the nature of Chiquita's statements as regards the facts in this case' is entirely unsubstantiated.

155 Lastly, the statement of Mr A1, Chiquita's lawyer, at the oral hearing, to which the applicants refer in footnote No 43 in the reply and from which it can be seen that, at the oral hearing, the Commission asked Chiquita's lawyers to explain to Mr C1 that he had to be more forthcoming, does not demonstrate that the Commission demanded more from Chiquita than that which is required as part of the cooperation expected of an immunity applicant (see paragraphs 121 to 126 above). The extract quoted by the applicants must also be placed in the context of the declaration as a whole, in the course of which Mr A1 and Mr A2 defended themselves against the Commission's calling into question of Chiquita's willingness to cooperate, and explained that the Commission could not expect Mr C1 to be very forthcoming during the inspections when the Commission had expressly demanded that he not be notified beforehand in order to preserve some element of surprise. The statements of Chiquita's lawyers and, especially, of Mr C1 himself, in relation to that situation, therefore show that Mr C1, as an individual, had felt harassed and had perceived the inspection as 'hostile' until the lawyers explained to him that Chiquita had decided to cooperate with the Commission and that he could therefore be more forthcoming in his statements.

156 In the third place, the applicants claim that the Commission's pressuring mechanisms were multiple, in that the Commission told Chiquita in several letters that inspections would be carried out at its premises and that its employees would be interviewed, asked Chiquita to submit documents that it had previously submitted in the case relating to northern Europe (Case COMP/39188 — Bananas) and confirmed that it had added documents from that case to the file of the present case.

157 First of all, it must be pointed out that the Commission asserted in paragraph 34 of the defence, without being contradicted in that respect by the applicants in the reply, that the applicants' assertion that the Commission sent several letters to Chiquita informing it of future inspections is factually wrong. In that respect, the Commission reiterates the assertion in recital 82 of the contested decision that it only informed Chiquita orally on 26 November 2007 that it would visit Chiquita's premises two days later and that it wished to interview Mr C1. That step seems justified in order to enable Chiquita to ensure that Mr C1 would be present on that day and cannot by itself constitute an improper pressuring mechanism on the immunity applicant. Next, asking Chiquita to submit documents which it had already submitted in Case COMP/39188 — Bananas is not unlawful, but rather is a prerequisite for the use of those documents in the present case, as can be seen from the case-law cited in paragraphs 54 and 55 above. Lastly, the applicants' allegation that the Commission informed Chiquita that it had added documents from Case COMP/39188 — Bananas to the file of the present case is in no way substantiated, with the result that it is also incapable of demonstrating a misuse of power committed by the Commission.

158 In the fourth place, the information in the file referred to by the applicants out of context is also incapable of demonstrating that the Commission exercised improper pressure on the immunity applicant.

159 First, Chiquita's submissions in Case COMP/39188 — Bananas, invoked by the applicants, according to which '[p]rices for UK/Ireland, Southern Europe and France were not communicated to competitors', describe the manner in which Chiquita, on Thursday mornings, communicated its quotation prices to its competitors. Case COMP/39482 — Exotic Fruits did not concern quotation prices, with the result that the statements made by Chiquita in the present case do not contradict its submissions in Case COMP/39188 — Bananas.

160 Secondly, the statements of Mr A2, Chiquita's lawyer, at the oral hearing, to which the applicants also refer, and in the course of which Mr A2 stated that observations on the period prior to 8 April 2005 'would not be necessarily supportive of the Commission's case', concern the possibility, for the Commission, to have another interview with Mr C1 following Chiquita's response to the statement of objections, the facts that Mr C1 would be likely to comment on during that interview and more generally the need, for Chiquita, to comment on the period prior to 8 April 2005, the date of its immunity application. Mr A2 then stated that Chiquita had considered that proposing an interview between the Commission and Mr C1 on two occasions was sufficient with respect to Chiquita's obligations as an immunity applicant, especially since Chiquita had decided to comment only on the facts subsequent to 8 April 2005 set out in the statement of objections. In that context, indicating that observations on the period prior to that date 'would not be necessarily supportive of the Commission's case' cannot be interpreted as a declaration that there was no infringement before 8 April 2005. On the contrary, Mr A2 clearly indicated at the oral hearing that Chiquita did not contest that an infringement had occurred prior to 8 April 2005, but that it contested the fact that the infringement continued after that date.

161 Thirdly, Mr A2's statement at the oral hearing, referred to in footnote No 25 in the reply, according to which, '[f]rom Chiquita's perspective, it appears as though DG Competition had a preconceived view of the case from the outset', '[i]n order to sustain its theory of the case, DG Competition [had] required Chiquita's cooperation in finding supportive information and evidence', it was however 'incumbent on the Commission to build its case on the basis of the evidence provided', '[n]ot to first construe a case and use the immunity applicant to try and support this' and 'if the information obtained and provided by Chiquita [did] not match DG Competition's predetermined view of the case, Chiquita [could not] be held responsible for this' must be viewed in its context, namely Chiquita's defence in view of the statement of objections in the present case and the prospect that it would not obtain immunity in that case. The last sentence quoted by the applicants ends as follows: 'If the information obtained and provided by Chiquita does not match DG Competition's predetermined view of the case, Chiquita cannot be held responsible for this, and DG Competition certainly cannot use it as a reason to deny immunity.' The same applies to Mr A2's statements cited in footnotes Nos 45 and 46 in the reply, which form part of an argument intended to contest the division of the case in two, since that would have the effect of depriving Chiquita of immunity as regards a part of the internal market, whereas it had obtained conditional immunity in respect of the entire internal market.

162 In the fifth place, the applicants criticise the Commission's use of a document from the file in Case COMP/39188 — Bananas, obtained during surprise inspections at LVP carried out in the context of that case, namely the e-mail sent on 11 April 2005 at 9:57 a.m., in the context of the Commission's management of Chiquita's cooperation.

163 First, according to the applicant, in November 2007, during the inspections at Chiquita Italia, the representatives of the Commission informed the employees of that company of the existence of a document which proved illegal conduct by Chiquita and the applicants — namely the e-mail sent on 11 April 2005 at 9:57 a.m. — even though that e-mail had not been added to the investigative file of the present case.

164 The Commission submits that, during the inspections in November 2007, no copy of the e-mail sent on 11 April 2005 at 9:57 a.m. was handed over to Chiquita, the Commission officials having simply referred to the fact that Chiquita could find a document which indicated collusive contacts around

11 April 2005 in the file in Case COMP/39188 — Bananas (recital 248 of the contested decision). Nevertheless, as an addressee of the statement of objections in that case, Chiquita was already entitled to see the document in question, granting it access being lawful and even legally required under Article 27(2) of Regulation No 1/2003. In addition, the Commission submits that it could use that document to advance the procedure which led to the adoption of the contested decision, since, under the case-law, it could collect evidence of other investigations. Article 28(1) of Regulation No 1/2003 does not prohibit the opening of an investigation in order to verify or supplement information which it happened to obtain during a previous investigation.

165 It must be pointed out that the Commission's assertion that, during the inspections in November 2007, no copy of the document in question was handed over to Chiquita, the Commission officials responsible for carrying out interviews having simply referred to the fact that Chiquita could find a document which indicated collusive contacts around 11 April 2005 in the file of the case relating to northern Europe, was confirmed by Chiquita and by Mr C1 at the oral hearing and was not contradicted by the applicants. In the light of the abovementioned case-law according to which the Commission may use evidence in one case as a starting point for investigations in another case (see paragraphs 54 and 55 above), and in the light of the case-law that the immunity applicant's obligation to cooperate extends throughout the procedure and includes the duty to react to new circumstances (see paragraphs 121 to 126 above), using a document in the file of another case in order to put a question to the immunity applicant does not appear unlawful.

166 Secondly, the applicants criticise the fact that the Commission later showed two versions of the e-mail sent on 11 April 2005 at 9:57 a.m. to Chiquita employees, suggesting that they constituted proof of illegal contacts between Mr P1 and Mr C1.

167 In that respect it must be noted that the Commission indicated in recital 248 of the contested decision that Chiquita was provided with a copy of the e-mail in question after the state-of-play letter was sent in order to give it the opportunity to express its views on that e-mail, which might show that it had continued the infringement after making its leniency application.

168 However, it can be seen from Chiquita's statement of 5 March 2009 and from its statement at the oral hearing, that, before the state-of-play letter was dispatched, Chiquita received a non-confidential version of the e-mail in which it was indicated that all the redacted names belonged to Pacific employees and that it was only after the dispatch of that letter that it had received a version of the e-mail which showed that one of the redacted names referred to Mr C1, with the result that it was only at that time that it understood that the e-mail could constitute evidence of a continuation of the infringement by Chiquita after the immunity application.

169 The exchange of letters between the applicants and the Commission that took place on 17 October and on 6 and 14 November 2008, read in conjunction with the applicants' responses of 14 August 2008 and of September 2008 to the Commission's requests for information, shows that the Commission asked Pacific to produce a non-confidential version of the e-mail in question.

170 It follows from the matters examined in paragraph 103 et seq. above and from the aforementioned pieces of evidence in the file that, at the time when the Commission submitted the e-mail in question to Chiquita, that e-mail had been produced by the applicants in the context of the present case, with the result that the Commission was entitled to make use of it vis-à-vis Chiquita. The Commission cannot be criticised in that respect for submitting a non-confidential version of that document to Chiquita in which the names of Pacific employees had been redacted in order to protect the confidentiality of those names.

171 However, it also appears justified that, after showing Chiquita a version of that document in which all of the names had been redacted and in which it was indicated, erroneously, that all those names belonged to Pacific employees, the Commission provided Chiquita with a version showing that one of

those names referred to Mr C1, since that was the only way in which Chiquita could, on the one hand, understand that the document might show anti-competitive contacts between Pacific and Chiquita after the latter's immunity application and, on the other, comment on a piece of evidence liable to justify a refusal to grant it immunity in the present case. It appears justified for the Commission to allow Chiquita an opportunity to do so in the context of the management of its immunity application and the applicants cannot, therefore, claim that the Commission exercised undue influence over the immunity applicant in that respect.

172 It follows from all the foregoing considerations that the second plea in law must be rejected.

C – The plea in law alleging the absence of sufficient evidence of an infringement of Article 101(1) TFEU

173 The applicants submit that the Commission has not sufficiently established that their conduct constituted an infringement of Article 101(1) TFEU and that it has therefore failed to discharge the burden of proof imposed on it by Article 2 of Regulation No 1/2003.

174 This plea is divided into two parts. In the first part, the applicants claim that the evidence adduced by the Commission does not support the facts as described by that institution. In the second part, the applicants claim that the facts of the present case do not constitute an infringement of Article 101 TFEU. The applicants allege, first, that the Commission has not succeeded in proving that they were involved in an agreement and/or a concerted practice, secondly, that the Commission has not established that their conduct had an anti-competitive object or effect, and thirdly, that the Commission has not shown that that conduct constituted a single and continuous infringement.

1. The first branch, alleging an erroneous assessment of the evidence

a) Preliminary observations

The principles relating to the burden of proof

175 It can be seen from Article 2 of Regulation No 1/2003 and from settled case-law that, in the field of competition law, where there is a dispute as to the existence of an infringement, 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 (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58; Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 62; Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, paragraph 71; and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 688).

176 For that purpose, it must gather sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see, to that effect, Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20; 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 127; Joined Cases T-185/96 T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 47; Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraph 62; and Case T-141/08 *E.ON Energie* v *Commission* [2010] ECR II-5761, paragraph 48).

177 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 49 above, paragraphs 513 to 523, and *Dresdner Bank and Others* v *Commission*, paragraph 176 above, paragraph 63 and the case-law cited).

178 In that respect, it must be noted that the Commission may take account of evidence from outside the infringement period if that evidence forms part of the body of evidence relied on by the Commission in order to prove that infringement (see, to that effect, judgment of 2 February 2012 in Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, not published in the ECR, paragraph 193) and that it may rely on factual circumstances which take place subsequent to anti-competitive conduct in order to confirm the content of an objective item of evidence (Case T-82/08 *Guardian Industries and Guardian Europe* v *Commission* [2012] ECR, paragraph 55).

179 As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (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, paragraphs 55 to 57, and *Dresdner Bank and Others* v *Commission*, paragraph 176 above, paragraphs 64 and 65).

180 Admittedly, where the Commission bases its decision solely on the conduct of the undertakings in question on the market to conclude that there has been an infringement, it is sufficient for those undertakings to prove the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the European Union competition rules had been infringed (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 186 and the case-law cited). Thus, if the Commission finds that there has been an infringement of the competition rules on the basis that the established facts cannot be explained other than by the existence of anti-competitive conduct, the Court will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, *Compagnie royale asturienne des mines and Rheinzink* v *Commission*, paragraph 176 above, paragraph 16; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 176 above, paragraphs 126 and 127; and Case C-89/11 P *E.ON Energie* v *Commission*, paragraph 175 above, paragraph 74).

181 However, where the Commission relies, in establishing an infringement of competition law, on documentary evidence, the burden is on the undertakings concerned not only to put forward a plausible alternative to the Commission's view but also to allege that the evidence relied on in the contested decision to establish the existence of the infringement is insufficient (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 725 to 728; *JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 187; and Case T-141/08 *E.ON Energie* v *Commission*, paragraph 176 above, paragraph 55).

182 As regards the evidence that may be relied on in order to establish an infringement of Article 101 TFEU, it must again be observed that the prevailing principle in EU law is that evidence may be freely adduced (see paragraph 42 above and the case-law cited). In particular, no provision or any general principle of EU law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Article 101 TFEU, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaties (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 192).

183 Lastly, as regards the probative value which should be attached to the various pieces of evidence, it must be emphasised that the sole criterion relevant for evaluating freely adduced evidence is the reliability of that evidence (see Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 84 and the case-law cited; Case T-50/00 *Dalmine* v *Commission*, paragraph 42 above, paragraph 72; and *JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 273). According to the general rules relating to evidence, the reliability and, thus, the probative value, of a document depends on the person from whom it originates, the circumstances in which it came into being, the person to whom it was addressed and whether it appears sound and reliable (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, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1053). It is necessary, in particular, to attach great importance to the fact that documents were drawn up in close connection with the events (Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 312, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 181) or by a direct witness of those events. Furthermore, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (*JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraphs 207, 211 and 212).

184 In the assessment of the evidence adduced by the Commission, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of a decision imposing a fine (*JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 177; *Dresdner Bank and Others* v *Commission*, paragraph 176 above, paragraph 60; and Case T-141/08 *E.ON Energie* v *Commission*, paragraph 176 above, paragraph 51).

185 In that latter situation, it is necessary to take into account the principle of the presumption of innocence, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union and which applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150; Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176; Case C-89/11 P *E.ON Energie* v *Commission*, paragraph 175 above, paragraphs 72 and 73; and *JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 178).

186 The applicants' claims must be examined in the light of those observations.

The evidence adduced by the Commission in the present case

187 In recitals 94 and 95 of the contested decision, the Commission indicated that, in the period from at least 28 July 2004 until 'marketing week 15' of 2005, Chiquita and Pacific coordinated their commercial strategy in Greece, Italy and Portugal by coordinating their price strategy regarding future

prices, price levels, price movements and/or price trends, and exchanging information on future market conduct regarding prices. The Commission stated that the cartel arrangement was set up at a meeting between Chiquita and Pacific on 28 July 2004 and that, following that event, the parties engaged immediately in further collusive contacts. According to the Commission, the evidence indicates that in the period from February to early April 2005 Chiquita and Pacific engaged in such contacts on an almost weekly basis.

188 In recital 96 to the contested decision, the Commission indicated that the main evidence of the cartel arrangement consists of the following:

— documents obtained during inspections by the Italian Guardia di Finanza in the framework of a national investigation (Mr P1's notes);

— documents obtained during the Commission's inspections of 28 to 30 November 2007 and statements made in the course of those inspections;

— corporate statements made by the immunity applicant, Chiquita;

— replies to requests for information as well as subsequent submissions by Chiquita.

189 The Commission then distinguishes between the evidence concerning the overall infringement, consisting in Chiquita's statements (recitals 97 to 101 of the contested decision), the evidence concerning the meeting of 28 July 2004, consisting in Chiquita's statements and Mr P1's notes (recitals 102 to 120 of the contested decision), the evidence concerning the follow-up contacts in August 2004, consisting in Chiquita's statements and Mr P1's notes (recitals 121 to 125 of the contested decision), and lastly the evidence concerning the further contacts in February-April 2005, consisting in an internal e-mail sent by Mr P1 to Mr P2 on Monday 11 April 2005 at 9:57 a.m. including a table entitled 'Chiquita Prices — 2005', which contained Chiquita price information for weeks 9 to 15 of 2005, and a similar undated table found in Mr P2's office with information for weeks 6 to 13 of 2005 (recitals 126 to 139).

b) The assessment of the evidence in the present case

190 The applicants claim that, despite the considerable efforts deployed by the Commission and by Chiquita in order to find evidence of the alleged infringement in the present case, the documentary 'evidence' of collusive contacts between the competitors used by the Commission to substantiate its allegations consists solely in a little set of three handwritten notes and one internal e-mail, drafted by Mr P1, a former employee of PFCI, who died more than a year before the beginning of the Commission's investigation. The applicants also refer to Mr P1's notes concerning the lunch of 28 July 2004, his two pages of notes from August 2004 and an internal e-mail sent by Mr P1 to Mr P2 on 11 April 2005 at 9:57 a.m.

191 The applicants submit that, given the absence of any other direct documentary evidence or any reasoned and well supported admission of guilt by the immunity applicant, the Commission's allegations are based solely on its interpretation of the abovementioned handwritten notes and internal e-mail. The Commission, however, has totally misinterpreted those documents, placed them outside their context and generalised their cryptic, imprecise and fragmentary wording, thereby ignoring the numerous exculpatory documents and statements submitted to the Commission by Chiquita and PFCI.

192 Accordingly, the applicants claim that neither the handwritten notes nor the e-mail constitute sufficient evidence of the alleged anti-competitive conduct and that it is possible to provide a fully plausible alternative interpretation of each of those documents.

193 Furthermore, the applicants claim that the interpretation of those documents put forward by the Commission is expressly contradicted by Chiquita statements, and in particular the statements of Mr C1, as well as the other evidence adduced.

Mr P1's notes and the lunch meeting of 28 July 2004

– The reliability of Mr P1's notes

194 The applicants claim that the reliability of Mr P1's notes is diminished due to their very nature as well as the identity of the author of those notes, that, at the time of the lunch of 28 July 2004, Mr C1 and Mr P1 had several legitimate reasons to contact each other and that, since they were drafted after the meeting in question, those notes cannot be considered 'contemporaneous' evidence.

195 In the first place, the applicants submit that Mr P1's notes were found in personal notebooks seized at his home during a national tax investigation, that those notes were never shared or discussed with anyone else, nor were they intended to be. It was well known within PFCI that Mr P1 'often used to leave the office, go to a bar, have a few drinks and then reflect on what had happened during the previous day, writing down his personal ideas, thoughts and reflections, which could be related to his business or private life'. The applicants emphasise that Mr P1 died in July 2006 at the age of 32 and that extreme caution should therefore be exercised in drawing conclusions from those personal notes, which could give rise to all sorts of interpretations, particularly since they are generally very unclear, inconsistent and fragmentary and that they contain numerous spelling and grammatical mistakes, evidencing that their author was not a native English speaker.

196 In addition, the applicants emphasise that Mr P1 was only 26 when he first joined Pacific and that he was new to the banana business, which was dominated by experienced businessmen to whom he gave the impression of being 'disorientated' and 'scared a little bit'. Although 'hard-working' and 'financially accurate and organised', he was also 'sensitive, pedantic and self-important'. At the time of the lunch meeting of 28 July 2004, Mr P1 had only been working at PFCI for seven months, after being transferred to Rome from LVP offices in Antwerp. That transition had not been very smooth and Mr P1 did not have a good working relationship with his more experienced colleagues from the sales team, with the result that he was relatively isolated at work. Nevertheless, he was 'very ambitious' and made attempts to gain the confidence of Mr P2, [*confidential*], hoping that would be entrusted with a more senior role at PFCI or LVP, 'of which [he had] often been found fantasizing'. According to the applicants, that might have led Mr P1 to make serious exaggerations in his writings.

197 It was noted in paragraph 183 above that the sole criterion relevant for evaluating freely adduced evidence is the reliability of that evidence, which depends on the person from whom it originates, the circumstances in which it came into being, the person to whom it was addressed and whether it appears sound and reliable. It was also noted that great importance should be attached to the fact that documents were drawn up in close connection with the events or by a direct witness of those events.

198 In the light of those principles, the applicants' line of argument cannot generally call into question the reliability of Mr P1's notes.

199 First, neither the fact that those notes were found in personal notebooks, which concern not only the professional, but also the private life of Mr P1, nor the fact that those notebooks were found in his home can call into question the reliability of those documents.

200 The personal nature of Mr P1's notes, which were not intended to be shared with anyone, does not plead against, but rather in favour of their reliability. Although the Court has in the past taken into account, inter alia, the fact that the author of a document could have had a personal interest in embellishing the facts in order to present his superiors with a result in keeping with their

expectations, in order to conclude that the probative value of a document is reduced (see, to that effect, *Dresdner Bank and Others* v *Commission*, paragraph 176 above, paragraph 132), such reasoning cannot be applied in the present case, where the fact that Mr P1's notes were not intended to be read by anyone pleads in favour of the view that they are an honest reflection of the matters in question as perceived by their author.

201 Accordingly, the applicants' argument that, because of his personality and his position within PFCI and in the banana business, Mr P1, in an attempt to 'earn the respect of his superiors', might have had a tendency to make serious exaggerations in his writing is not persuasive.

202 Secondly, although the brevity of the notes in question, which are composed of key words, and the fact that their author died in July 2006 (recital 18 of the contested decision) — that is to say, a short time after the inspection carried out by the Guardia di Finanza at his home on 30 May 2006, in the course of which the documents in question were found, and before the transmission of those documents to the Commission in July 2007 — and therefore could not explain their content, indeed requires a certain amount of caution in the interpretation of those notes, those circumstances cannot generally call into question the reliability of those notes.

203 It should be recalled, in that respect, that the evidence in question concerns clandestine conduct, involving meetings held secretly and a bare minimum of documentation. In view of the difficulty of obtaining direct evidence of such conduct, such as notes or minutes of meetings contemporaneous with the infringement, its probative value cannot be called into question merely because it is handwritten or fragmentary, contains abbreviations and codes and because it may also require further clarification or must be examined in the context of other information in the Commission's possession (see, to that effect, Case T-186/06 *Solvay* v *Commission* [2011] ECR II-2839, paragraphs 405 and 406).

204 In the present case, it must also be noted that, contrary to what is claimed by the applicants, Mr P1's notes are not obscure, contradictory or incoherent. Furthermore, the fact that Mr P1 was not a native English speaker cannot, in general, call into question the reliability of his notes. Although the General Court has in the past taken into account the command, by the author of a report, of the language used in the conversations which were the subject-matter of that report in order to evaluate its reliability (see, to that effect, *Dresdner Bank and Others* v *Commission*, paragraph 176 above, paragraph 132), in the present case, not only can it be seen from Mr P1's notes that he had a good command of English, but, in addition, the Commission indicated, without being contradicted by the applicants, that Mr P1 was a graduate of the University of California (United States), where he had obtained a degree in business studies (recital 169 of the contested decision), which was also confirmed by Mr P2 of Pacific at the oral hearing. In any event, it must be noted that the Court has already held that the fact that a document is undated or unsigned or is badly written does not impugn its entire probative force, especially where its origin, probable date and content can be determined with sufficient certainty (see, to that effect, Case T-541/08 *Sasol and Others* v *Commission* [2014] ECR, paragraph 232 and the case-law cited).

205 Thirdly, neither Mr P1's young age nor his position within PFCI and more generally in the banana business are arguments capable of calling into question the reliability of his notes. The statements of Mr C1 cited by the applicants in that respect are not such as to invalidate that finding. As the Commission asserted, without being contradicted by the applicants, the statement of Mr C1, who was at least 15 years older than Mr P1, according to which his first impression of Mr P1 was that of 'a young guy, rather disorientated' who was 'scared a little bit', refers to the two men's first encounter at a meeting of the trade association Associazione Nazionale Importatori Prodotti Ortofrutticoli (National association of fruit and vegetable importers, ANIPO), which was composed of experienced businessmen, described by Mr C1 as a 'group of old foxes'. The Commission rightly states that, in that context, it is not surprising that a younger and less-experienced person might not feel comfortable his first time attending a meeting of that association.

206 In addition, the applicants twist the words of Mr C1 by claiming that he 'admitt[ed] that he did not find [Mr P1] a very consistent person and did not see himself doing business with him'. In fact, such negative assessments of Mr P1's character, which are nowhere to be found in the passage of the oral hearing to which the applicants refer, cannot be inferred *a contrario* solely from Mr C1's positive assessment of Mr P2's character.

207 As regards the applicants' assertion that '[i]t has also been confirmed on numerous occasions that, besides being hard-working, financially accurate and organised, [Mr P1] was also sensitive, pedantic and self-important', it must be noted that here the applicants refer solely to the statement made by Mr P2 at the oral hearing, which was made in accordance with Pacific' defensive strategy prepared by its legal advisers, consisting in calling into question the credibility of Mr P1's character by insisting that he had a tendency to exaggerate his own role in his notes. Furthermore, even if Mr P1 was 'self-important', it has already been found in paragraphs 199 to 201 above that the fact that those notes were personal and not intended to be read renders unlikely the assumption that he exaggerated his own importance in those notes in order to gain the respect of his superiors. Moreover, the fact, put forward by the applicants themselves, that Mr P1 was 'financially accurate' pleads rather in favour of the reliability of his note taking.

208 Fourthly, in the same vein, and as the Commission rightly pointed out, neither Mr P1's alleged isolation in the office and lack of communication with his colleagues nor his alleged professional aspirations, which, moreover, seem entirely normal for an employee of his age, are capable of undermining the reliability of his notes. In addition, it must be noted that, in order to support their claims, the applicants refer to a document of limited probative value, namely a letter written by their legal adviser, Mr A3, and prepared for the purpose of their response to the statement of objections.

209 Fifthly, and lastly, while it can be seen from the foregoing considerations that the applicants have failed to put forward any concrete evidence capable of casting doubt on the reliability of Mr P1's notes, the Commission, on the other hand, invokes several pieces of evidence which support the reliability of those notes (recitals 115 to 119 of the contested decision), and the applicants have not been able to refute them. Thus the Commission submits the reliability of Mr P1's notes and the diligent and sensible nature of his note taking are confirmed by the fact that the matters reported in those notes have been corroborated by other sources.

210 First of all, a comparison of Mr P1's notes concerning a meeting of 14 January 2004 with those taken by Mr P2 concerning the same meeting shows that they tally in several respects (recital 167 of the contested decision).

211 In addition, Mr P1's notes in relation to Portugal correctly refer to the fact that, at the time of the lunch of 28 July 2004, Chiquita had an agent in Portugal and to the fact that Chiquita planned to change that structure, which is confirmed by several of Chiquita's replies and by an organisational chart and a document on Chiquita's strategic priorities for 2005; moreover, Mr P1's notes describe the Portuguese market as being 'less stable' and having the 'lowest prices' compared to the two other markets in question, namely Greece and Italy, and on which Chiquita bananas did not enjoy 'premium status', information which is also confirmed by a reply and a table of prices submitted by Chiquita and a reply submitted by Pacific following a request for information. Those overlaps between Mr P1's notes and other evidence in the file may be found, but that finding is without prejudice to the subsequent examination of the applicants' line of argument calling into question the reliability of Chiquita's statements.

212 Next, Mr P1's notes in relation to Greece correctly describe Chiquita's hierarchic structure for that market (see recital 10 of the contested decision) and mention discussions on shipping cooperation between Chiquita and Pacific in relation to the ports of Salerno (Italy) and Aigio (Greece). Pacific admits that cooperation on shipping in relation to those ports was discussed between Pacific and Chiquita. An internal e-mail of 23 February 2005 submitted by Chiquita also attests to discussions on

co-loading which, according to Chiquita's statements, continued until June 2006. As regards the internal e-mail of 23 February 2005, it must be noted that, despite the parties' divergent interpretations of that e-mail and irrespective of the type of agreement and the market which formed the subject-matter of the discussions referred to therein, it is clear from that e-mail that it concerned the (possible) cooperation between Chiquita and Pacific in relation to co-loading, which shows that that subject was discussed between the two competitors and makes the e-mail in question a piece of evidence which confirms the reliability of Mr P1's notes.

213 Furthermore, Mr P1 referred to a (possible) reduction by Chiquita of the supply of Consul branded bananas to Greece and it can be seen from a table provided by Chiquita that it indeed reduced its sales of bananas of that brand as from week 18 of 2005.

214 As regards Mr P1's notes in relation to strategic discussions between Pacific and Chiquita concerning the Italian market (which mention, inter alia, a '[d]ecrease Consul: 15 000/week', the focus on increasing the volume in Chiquita and the idea to '[g]ive space to Bonita' and that 'Bonita pushes prices'), the tables of Chiquita's prices show that Chiquita had indeed begun to increase the volume of sales of bananas of its premium brand, Chiquita, as from the second semester of 2004, and was going to begin considerably reducing the sale of bananas of its inferior brand, Consul, in Italy in the course of 2005.

215 In addition, Mr P1's remarks on Chiquita's strategy in relation to Italy are confirmed by an internal memorandum of Chiquita, drawn up by Mr C2 for the attention of Mr C1 after the end of the licencing regime which terminated at the end of 2005 (see recital 35 and footnote No 60 in the contested decision), which contains an analysis of the Italian market at the beginning of the post-licencing regime period, and according to which:

'At the dawn of the new system it would have been opportune to expect a "constraint" market between Chiquita and Bonita. This is one of the reasons why Chiquita renounced from importing Consul. Unfortunately, while the actions of Chiquita from the top of the market have been constant, the steering of the market from the "bottom" by Bonita has been totally inexistent.'

216 It may be acknowledged that that memorandum confirms the accuracy of an element in Mr P1's notes, namely Chiquita's intention to reduce the sales of its Consul brand in favour of its Chiquita brand, without it being necessary to rule on the issue — disputed by the parties (recitals 118 and 119 of the contested decision) — of whether that memorandum constitutes evidence of anti-competitive conduct on the part of Chiquita and Pacific. It can be seen from recitals 118 to 120 of the contested decision that the Commission referred to the memorandum in question solely as a piece of evidence supporting the reliability of Mr P1's notes, and not as a piece of evidence confirming the conclusion of an agreement at the lunch of 28 July 2004 or the implementation of such an agreement (see, in that respect, paragraphs 257 to 260 below).

217 Furthermore, contrary to what is claimed by the applicants, the fact that that document was written after the date of Mr P1's notes in no way diminishes its probative nature. It can be seen from the case-law cited in paragraph 178 above that the Commission may take account of evidence from outside the infringement period if that evidence forms part of the body of evidence on which the Commission relied in order to prove that infringement, and the document in question also refers to the past, including the licencing regime period.

218 In the reply, the applicants do not refute the evidence which has just been set out and merely submit that 'it is not because some lines in [Mr P1's] notes refer to topics which were indeed discussed or because a number of factual statements on the banana business can be verified due to the information being in the public domain that the notes in their entirety can be considered to constitute a credible piece of evidence'. In those circumstances, it must be held that the applicants have failed to refute the evidence relied on by the Commission and referred to in paragraphs 210 to 217 above.

219 In the second place, the applicants claim that, at the time of the lunch meeting of 28 July 2004, Mr C1 and Mr P1 had several legitimate reasons to contact each other, including with regard to the future of ANIPO and possible arrangements on co-sourcing and co-shipping, which is supported by Mr C1's statements. Short of licensees and seeking alternative supplies via several of its competitors, Chiquita therefore entered into such arrangements with other competitors and approached Mr P2 of PFCI in order to conclude such an arrangement with PFCI. Since PFCI did not accept that proposal, which it considered would be commercially disastrous, the applicants submit that it is not surprising that Mr C1 tried his luck again, this time by proposing a similar arrangement directly to the inexperienced newcomer, Mr P1.

220 That argument must be rejected without it being necessary to examine whether Mr C1 and Mr P1 had legitimate reasons to meet. It suffices to note that, although such legitimate reasons could indeed provide an alternative explanation for their meeting, they would in no way diminish the collusive nature — if established — of their contacts in other respects. As the Commission noted in recital 147 of the contested decision, the assertion that there were contacts between competitors which were allegedly legitimate in no way rules out the possibility that collusive contacts also took place. The Court of Justice has already stated 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 (see Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 64 and the case-law cited). As the Commission rightly states, in order to call into question the findings made in the contested decision, it is not enough for the applicants merely to show that the contacts also served a legitimate objective; they must show that the contacts only served such an objective.

221 In the third place, the applicants claim that Mr P1's notes are not a credible reproduction of the conversation that took place during the lunch of 28 July 2004 — which, moreover, lasted for only about 40 to 45 minutes and took place next to a noisy hotel swimming pool — since as Mr C1 confirmed, Mr P1 did not take any notes during that lunch which could be regarded as 'contemporaneous' evidence. Those notes were probably written sometime after the meeting and were therefore Mr P1's personal reflections on what had been discussed, reflecting his ideas on how a co-sourcing and co-shipping arrangement with Chiquita would work, as Mr C1 also confirmed.

222 As noted in paragraphs 183 and 197 above, in order to evaluate the probative value of a document, great importance should be attached to the fact that documents were drawn up in close connection with the events or by a direct witness of those events. In the present case, it is undisputed that Mr P1 participated in the lunch of 28 July 2004 and he may therefore be described as a direct witness of that lunch. Furthermore, because of the small number of participants in that lunch — namely Mr P1, Mr C1 and Mr C2 — and because Mr P1 was the only representative on Pacific's side, he was not simply a silent witness, but an active participant in the conversation, which confers a high probative value on his testimony. The fact that it was therefore a direct conversation between the three protagonists renders unlikely the idea, implied by the applicants, that the probative value of Mr P1's testimony could be diminished by the fact that it was noisy during the lunch, which could have impeded Mr P1's understanding of the conversation.

223 Consequently, Mr P1's notes may be considered contemporaneous evidence of the lunch of 28 July 2004 even if they were not taken during, but shortly after, that lunch. It suffices to note that, as the Commission rightly stated in recital 166 of the contested decision, it is not contrary to the nature of a contemporaneous document to record statements made a short time before, and nothing in Mr P1's notes suggest that, even if they were written after an event had taken place, they did not correspond to the content of the discussions at that event (see, to that effect, *Guardian Industries and Guardian Europe* v *Commission*, paragraph 178 above, paragraph 39). The fact that the notes follow a chronological and regular order of events and dates also supports the hypothesis that they were written at the time, or at the very least a short time after, the respective events. In addition, it must

be recalled that it was noted in paragraph 210 above that, at least as regards one event, namely the meeting of 14 January 2004, the file contains notes taken by Mr P1, on the one hand, and by Mr P2, on the other, which tally in several respects (recital 167 of the contested decision).

224 It follows from the foregoing that the applicants' arguments seeking to call into question, in a general manner, the reliability of Mr P1's notes must be rejected.

– The interpretation proposed by the applicants of the notes on the lunch meeting of 28 July 2004

225 The applicants claim that, in trying to prove the conclusion of an anti-competitive agreement between Chiquita and PFCI, the Commission relies on its own interpretation of a couple of lines found in Mr P1's handwritten notes (recital 105 of the contested decision), presented as 'contemporaneous documentary evidence' of a working lunch that took place between Mr C1 and Mr C2 of Chiquita, and Mr P1 of PFCI, on 28 July 2004, in the Shangri La Corsetti restaurant in Rome, and which was the 'starting point of the collusive arrangement between Chiquita and Pacific', whereas not only is the probative value of those notes extremely limited, but, in addition, the Commission has totally misinterpreted them, given the context and background against which they were written by Mr P1.

226 In the contested decision, the Commission explained that the lunch of 28 July 2004 at the Shangri La Corsetti restaurant in Rome between Mr C1 and Mr C2 of Chiquita, and Mr P1 of Pacific, served as the starting point of the collusive agreement between Chiquita and Pacific and that, following that meeting, Mr C1 and Mr P1 began calling each other regularly. According to the Commission, the contemporaneous evidence related to that meeting — namely Mr P1's notes (recital 105 of the contested decision) — shows how Chiquita and Pacific used the meeting to set up the price coordination scheme which would subsequently develop (recitals 102 to 104 of the contested decision).

227 The Commission claims that it can be seen from those notes that Chiquita and Pacific — referred to as 'Bonita' — discussed their businesses in Portugal, Greece and Italy and set out a three step 'Action Plan' for their continued cooperation. According to that action plan the two parties would, as a first step, get in contact the following week to concert on prices in Portugal as regards whether to 'stay' the same, go 'up', or go 'down'. That is consistent with Chiquita's statement that, following the meeting of 28 July 2004, Mr C1 and Mr P1 would occasionally exchange more specific price trends for the following week discussing in such terms that both parties would understand whether the prices should go up, go down or stay the same. As a second step, the action plan shows that the two parties would give priority to their strategy concerning Italy (by the use of the expression 'look at Italy first') and finally, as a third step, the focus would be on their joint strategy for Greece (by the use of the expression 'Greece for later') (recital 106 of the contested decision).

228 The applicants submit, on the contrary, that Mr P1's notes in relation to the lunch of 28 July 2004 constitute his own reflections on the topic discussed at that lunch, confirmed by Mr C1, namely 'the possibility for Chiquita to source bananas from Noboa in Ecuador'. Accordingly, the notes must be interpreted as Mr P1's personal ideas on how a co-sourcing arrangement would work in practice.

229 It must be recalled that it can be seen from the considerations in paragraphs 194 to 224 above that the arguments put forward by the applicants in order to contest, in a general manner, the reliability of Mr P1's notes cannot succeed and the probative value of those notes must, on the contrary, be regarded as high because they were written by a direct witness of the events and their reliability is supported by other pieces of evidence. In those circumstances, the applicants' argument that those notes must be interpreted as reflecting the personal ideas of Mr P1 and not the conversation which actually took place during the lunch of 28 July 2004 cannot succeed.

230 First, it must be noted that Mr C1's assertion, quoted by the applicants, that the topic of conversation at the lunch was 'the possibility for Chiquita to source bananas from Noboa in Ecuador', does not undermine the Commission's interpretation, since the Commission does not deny that the possibility of co-sourcing was also discussed at that lunch (recital 151 of the contested decision). However, it cannot be seen from the quotation used by the applicants that that point was the only topic discussed at that meeting and it has already been indicated in paragraph 220 above that, in order to call into question the findings made in the contested decision, it is not enough for the applicants merely to show that the contacts also served a legitimate objective; they must show that the contacts only served such an objective.

231 That interpretation, like the interpretation that the notes reflect only the personal ideas of Mr P1, must be rejected given the clarity of the notes concerning Pacific and Chiquita's intention to coordinate their prices.

232 Thus, the Commission rightly submits that the interpretation that the notes concerning the lunch of 28 July 2004 constitute the personal reflections of Mr P1 on the possibility for Chiquita to source bananas from Noboa in Ecuador does not square with the fact that it is clear from those notes that Chiquita and Pacific discussed their businesses in Portugal, Greece and Italy, that they envisaged 'cooperation [on an weekly] basis to hold price' and set up a three step '[a]ction plan' according to which '[Mr P1]' and '[Mr C1]' would 'talk next week for Portugal' in order to take a 'price decision' on whether it was necessary to stay at the same level, go 'up' or go '[d]own'. That interpretation is confirmed by Chiquita's statement of 22 May 2008, according to which, after the meeting of 28 July 2004, Mr C1 and Mr P1 occasionally exchanged specific price trends for the following week, using terms which would allow the two parties to understand whether the prices should go up, go down or stay the same (recital 100 of the contested decision), which may be found to be established, subject to the subsequent examination of the applicants' line of argument concerning the statements of Chiquita (see paragraph 336 et seq. below).

233 Secondly, the applicants' interpretation, according to which the notes show that Mr C1 gave Mr P1 a basic overview of the market in order to inform the newcomer of the sales structure in which PFCI would become involved if it supplied bananas to Chiquita, cannot be accepted, since it fails to take into consideration that the indication that the Portuguese market is the 'le[ast] stable of 3 T2 markets' is followed by the expression 'cooperation [on a weekly] basis to hold price', which, as the Commission points out, cannot be explained by the intention to inform a newcomer of Chiquita's sales structure in Portugal.

234 The applicants claim however that the interpretation that the expression 'cooperation [on a weekly] basis to hold price' demonstrates that Chiquita and Pacific agreed to cooperate on prices is contradicted by the explanations provided by Chiquita and the prices that PFCI expected to achieve in Portugal. A more credible explanation is therefore that Mr C1 explained to Mr P1 that working with an agent implied that Chiquita would cooperate with that agent on a weekly basis to decide on the prices to be set for the Portuguese market. Alternatively, Mr P1 could also have thought that entering into a co-shipping arrangement with Chiquita would create an opportunity for PFCI to hold prices if it moved to a weekly service in Portugal.

235 First of all, that interpretation is unconvincing, since, in view of the stage of the action plan indicated by the use of the expression 'talk next week for Portugal: price decision: Stay, up, down. [Mr P1]/[Mr C1]', it is apparent that the phrase 'cooperation [on a weekly] basis to hold price' in relation to Portugal refers to a bilateral cooperation between Mr C1 and Mr P1.

236 Next, the statements of Chiquita and of Mr C1 to which the applicants refer, namely that the topics of discussion at the lunch were co-sourcing and co-shipping, do not contradict the Commission's conclusions concerning Mr P1's notes (see, in that regard, paragraph 230 above).

237 Lastly, the applicants submit that the expression 'cooperation [on a weekly] basis to hold price' cannot be interpreted as referring to a cooperation between the competitors. Otherwise, in the light of the '[a]ction plan' for Portugal, indicated by the use of the expression 'talk next week for Portugal: price decision: Stay, up, down', Mr P1 and Mr C1 should have had weekly contacts to 'hold price' as of week 32, which the Commission has not proved. In addition, the evidence in the file, namely the notes of Mr P1 of 2 August 2004 and the weekly price report for week 32 of 2004, expressly shows that PFCI expected to have to reduce its prices in Portugal in week 32. Moreover, the Commission conveniently ignores that the word 'up' is crossed out in Mr P1's notes.

238 That argument must be rejected.

239 The phrase 'cooperation [on a weekly] basis to hold price' cannot be interpreted as indicating that prices should absolutely stay at the same level the following week, but refers to a cooperation with the aim of maintaining in general some level of price stability through weekly discussions in the course of which it had to be decided whether the prices should stay at the same level, go up or go down for the respective week (by the phrase '[a]ction plan: talk next week for Portugal: price decision: Stay, up, down'). Accordingly, the fact that Pacific expected to reduce its prices in Portugal the week after the lunch of 28 July 2004 cannot demonstrate that the parties did not agree to cooperate as regards prices during that meeting. Likewise, the fact that the word 'up' was crossed out in Mr P1's notes cannot call into question the Commission's interpretation, and it must be observed that the fact that Mr P1 crossed out that word in his notes concerning the '[a]ction plan' in relation to Portugal for the following weeks is consistent with the fact, invoked by the applicants, that Pacific actually expected to reduce its prices in Portugal during the week in question.

240 In addition, irrespective of whether the Commission was required to prove the implementation of the cooperation referred to in the note relating to the lunch of 28 July 2004 and of the examination of the evidence of subsequent contacts between the parties, it suffices to note that the fact that the Commission has not adduced proof specifically showing that Mr P1 and Mr C1 contacted each other as of the week after the lunch of 28 July 2004 cannot constitute evidence that the two men did not collude at that lunch.

241 Thirdly, the applicants claim that the notes relating to Greece indicate that Mr C1 gave Mr P1 a brief overview of Chiquita's business in Greece in order to convince him of the advantages of a co-sourcing arrangement. The expression 'Help push Chiquita/Bonita combo' can therefore be understood as meaning that Mr C1 accustomed Mr P1 to the idea of providing fruit and licences to a competitor in the context of a co-sourcing arrangement. Since Chiquita was running out of licences, it had decided to reduce sales of its Consul branded bananas, in favour of its Chiquita brand bananas for which it could receive a higher price, which explains the expression: 'also reduce Consul. Chiquita's ideas: all Chiquita, only premium brand'. In that context, the expression 'Help push Chiquita/Bonita combo' refers to the reduced competition for Pacific's Bonita brand following Chiquita's unilateral decision to increase the volume of its Chiquita branded bananas, and to reduce that of its inferior brand, Consul. Alternatively, that line could also be understood as referring to Mr C1's directions on quality requirements for the bananas sourced from PFCI.

242 According to the applicants, the expressions 'Chiquita's price in Greece = Italy' and 'They believe it should be = for Bonita Italy & Greece' are of little importance, since neither Chiquita's prices nor PFCI's prices were equal in Italy and Greece. The lines in question must therefore be considered in the light of the co-sourcing discussions, with the result that they mean that Mr C1 tried to convince Mr P1 to enter into a co-sourcing arrangement by explaining to him that, if PFCI imported Chiquita bananas under its licences, which would then be sold at a premium price, Chiquita would pay a part of that price to Pacific to compensate the latter's lost revenue resulting from the decline in the volume imported of its Bonita branded bananas. Those expressions therefore do not constitute evidence that two competitors discussed their respective pricing strategies, let alone actual market prices.

243 Accordingly, the applicants submit that nothing in the notes suggests that an anti-competitive agreement was entered into between Chiquita and PFCI relating to pricing strategies in Greece, nor has the Commission shown that such an agreement was implemented. In that respect, the facts unequivocally show that the price difference between PFCI's sales in Greece and Italy did not decrease at all, which would have been the case if the alleged agreement had been entered into and implemented.

244 The Commission submits that Mr P1's notes reveal, in relation to pricing in Greece, that Chiquita had indicated its aim of bringing its price in Greece up to the level of its price in Italy where its price was higher (as indicated by the use of the expression 'Chiquita's price in Greece = to Italy') and had explained that it thought that the same approach should also apply for Pacific's Bonita branded bananas in Greece and Italy (as indicated by the use of the expression '[Chiquita] believe it should be = for Bonita Italy & Greece'). Moreover, according to the Commission, the issue of how the respective prices of Chiquita and Pacific in Greece and Italy should interrelate constitutes a highly sensitive subject concerning the two competitors' respective pricing strategies (recitals 109 and 110 of the contested decision).

245 Furthermore, the Commission submits that the contested decision does not state that the reduction of sales of the brand Consul or the 'push[ing] Chiquita/Pacific combo' was part of a price-fixing arrangement. It is therefore not necessary to examine the applicants' argument seeking to demonstrate that the decision to reduce sales of its Consul brand in favour of its Chiquita brand arose from a unilateral decision on the part of Chiquita.

246 Irrespective of whether the notes relating to Greece show an agreement or a concerted practice and whether the Commission had to absolutely distinguish between those two forms of unlawful conduct (see in that respect paragraph 437 et seq. below), it must be held that there is nothing in those notes to support the applicants' interpretation that they reflect discussions on sharing the higher price obtained for Chiquita branded bananas imported under Pacific licences. On the contrary, it can be seen from those notes that Mr C1 and Mr P1 exchanged price-fixing intentions and strategies and that Mr C1 shared with Mr P1 his view that Pacific should attempt to bring its price level in Greece up to the price level in Italy (as indicated by the expression 'they believe it should be = for Bonita Italy & Greece'). Whether the actual prices then corresponded exactly to those intentions is irrelevant in that respect and the absence of an alignment of prices in accordance with what was envisaged cannot in any event undermine the conclusion that the notes show an exchange of price information relating to Greece between Chiquita and Pacific.

247 Fourthly, the applicants claim, first of all, that the expression 'Push Dole & Del Monte out' in the notes relating to Italy cannot reflect a discussion between Mr C1 and Mr P1 since — given that Dole and Del Monte had a combined market share of around 40% in Italy — it is clearly not credible that Chiquita and PFCI, whose Italian market share was only around 10%, would have discussed, let alone agreed, such a strategy, which was, moreover, confirmed by Mr C1 who stated at the hearing on 18 June 2010, as regards Mr P1's notes expressing the idea of '[p]ush[ing] Dole & Del Monte out', that '[t]his is only a guy who doesn't know what he is talking about' and that 'this is totally unreasonable'.

248 The applicants then assert that the expressions used in the following lines relating to the reduction of the volume of Consul branded bananas and the increase of that of Chiquita branded bananas must again be understood as Mr C1's explanations concerning Chiquita's unilateral plan to focus, due to the lack of licences, on the more profitable sale of Chiquita branded bananas, from which Mr P1 concluded that Chiquita's strategy in that respect would give space to Bonita. Likewise, the expressions 'Regulates supply (Ecuador)' and 'Bonita pushes prices' reflect Mr P1's idea that procuring bananas also for Chiquita in Ecuador would allow Pacific to push prices down in that country. The reduction of the volume of Consul branded bananas was not implemented by Chiquita in Italy until almost a year after the lunch of 28 July 2004, with the result that that reduction can in no event be linked to anything

discussed during that lunch, nor constitute an effect of an anti-competitive practice, and, in any event, the personal conclusions drawn by Mr P1 from Mr C1's explanations neither imply nor demonstrate that any kind of anti-competitive agreement to divide markets or coordinate prices was concluded.

249 Lastly, the applicants claim that the expressions 'local agreement (Italy/Portugal/Greece)' and 'too big (H. Office) Not possible' must also be interpreted in the context of the discussions on co-sourcing and that they indicate that Mr P1 considered it too complicated to finalise a co-sourcing agreement if the head offices of Chiquita and PFCI were involved, as evidenced by the fact that previous discussions between Chiquita's head office and LVP had not led to an agreement, with the result that it was preferable to conclude the agreement at the local level.

250 It must be pointed out, first of all, that it can be seen from recital 112 of the contested decision that the Commission does not allege that the parties agreed to '[p]ush Dole & Del Monte out [of the Italian market]', nor that such an intention would have been based on an agreement 'to challenge the position of two strong competitors on the market by reducing the volume of "Consul" branded bananas, replacing them by "Bonita" branded bananas and pushing prices up'. Accordingly, it is not necessary to examine whether the notes prove that point, nor to decide on the plausibility of the possible explanations of the lines in question put forward by the Commission in its pleadings and described by the applicants as being 'based on pure speculation'.

251 Inasmuch as the applicants' argument can be understood as again relating to the intention to undermine the reliability of Mr P1's notes by invoking Mr C1's statement at the hearing of 18 June 2010 that the idea of '[p]ush[ing] Dole & Del Monte out' is 'totally unreasonable' and shows that the author of those notes 'is only a guy who doesn't know what he is talking about', it suffices to note that the line of argument based on the alleged lack of reliability of Mr P1's notes has already been rejected in paragraph 194 et seq. above and, moreover, subject to the subsequent examination of the applicants' line of argument concerning the statements of Mr C1 as a whole (see paragraph 336 et seq. below), that, by itself, Mr C1's statement that the idea of '[p]ush[ing] Dole & Del Monte out [of the market]' is unreasonable — a statement which, read in its context and in its entirety, is furthermore not entirely unequivocal — cannot show that the parties did not discuss that subject, or that all the notes do not reflect the lunch of 28 July 2004.

252 Next, the parties' differing views on the interpretation of the phrases 'Decrease Consul 15,000/wk … Focus on incr[easing] the volume in Chiquita … Give the space to Bonita … Regulates supply (Ecuador)' concern the issue of whether it must be concluded that those expressions reflect Mr P1's own reflections on Mr C1's explanations regarding Chiquita's unilateral strategy of increasing the volume of its Chiquita brand, or a common strategy of the competitors intended to encourage a price increase and regulate supply in Ecuador by changing their import strategies as regards their respective brands. In that respect, it must be noted, without it being necessary to rule on the parties' arguments relating to whether or not the regulation of the market by the CMO allowed any flexibility as regards the volumes imported, that the applicants' interpretation to the effect that the notes reflect explanations and unilateral thoughts cannot succeed, since it is contradicted by the expression 'Local agreement', which immediately follows the extracts in question, and by the extracts from all of the notes which show that they reflect bilateral decisions (see paragraphs 231, 232 and 235 above).

253 The applicants' reference to the fact that Chiquita did not begin to implement the strategy of reducing volumes of its Consul brand and increasing those of its Chiquita brand until a year after the lunch of 28 July 2004, and their reference to the statements of Mr C1 asserting that that strategy was based on internal business considerations only, concern not so much the issue of what was discussed at the meeting of 28 July 2004 as the possible follow-up given to that lunch and therefore, as the Commission rightly emphasises, relate to the effects of the collusion.

254 Lastly, in view of all the notes and the foregoing considerations, it is necessary to reject the applicants' allegation that the expressions 'Local agreement (Italy/Portugal/Greece)' and 'too big (H. Office) Not possible' must also be interpreted in the context of the co-sourcing, and that they indicate that Mr P1 considered it too complicated to finalise an agreement on co-sourcing if the head offices of Chiquita and PFCI were involved, as evidenced by the fact that the previous discussions between Chiquita's head office and LVP had not led to an agreement, with the result that it was preferable to conclude the agreement at the local level.

255 Fifthly, and in the same manner, the applicants' argument that none of the phrases in the notes under the heading 'Action Plan' is clear enough to conclude that an agreement was concluded between Chiquita and PFCI and that a three-step action plan had been set up for their continued cooperation also cannot succeed. The 'Action Plan' at the end of Mr P1's notes concerning the lunch of 28 July 2004 consists, on the contrary, in a summary of the conversation that took place during that lunch and the strategy agreed between the parties on that occasion.

256 It follows from all of the foregoing that the applicants' alternative explanations are not such as to contradict the conclusions drawn by the Commission from Mr P1's notes relating to the lunch of 28 July 2004.

– Whether there is evidence capable of confirming the existence of an anti-competitive agreement

257 The applicants claim that the Commission has failed to produce any evidence demonstrating that Chiquita and Pacific entered into an anti-competitive agreement during the lunch meeting. In their view, all of the facts mentioned by the Commission to demonstrate that '[Mr P1]'s notes are well anchored in reality' are consistent with the alternative interpretation which they put forward. The only additional document which, according to the Commission, confirms '[Mr P1]'s strategy related remarks' is an internal Chiquita memorandum drafted by Mr C2 after the end of the licensing regime, which contains an analysis of the banana market after the end of that regime.

258 According to the applicants, the Commission's interpretation in recitals 118 and 119 of the contested decision — according to which the expression 'the steering of the market from the "bottom" by Bonita has been totally inexistent' confirms that Chiquita expected the market to be steered by Bonita and that it was disappointed by the results — must be rejected since the internal memorandum does not cover the period examined. It cannot be concluded that Chiquita expected PFCI to behave on the market in a certain way because of an agreement entered into at the lunch of 28 July 2004 and a more plausible explanation is that PFCI simply acted differently to what Chiquita had unilaterally expected. Moreover, the very fact that the memorandum states that steering by PFCI 'has been totally inexistent' is in direct contradiction with the Commission's statements regarding the implementation of an agreement between Chiquita and PFCI to coordinate their behaviour on the market.

259 The applicants' argument must be rejected.

260 It has already been pointed out above that the Commission referred to the memorandum in question solely as a piece of evidence supporting the reliability of Mr P1's notes, and not as a piece of evidence confirming the conclusion of an agreement at the lunch of 28 July 2004 or the implementation of such an agreement (see paragraph 216 above).

261 In addition, regardless of the fact that the Commission indicated that it could be seen from the body of evidence on which it relied in the present case that the parties had followed up the collusion on 28 July 2004 during their subsequent contacts until 8 April 2005 (recitals 187 to 195 of the contested decision), it must be recalled, in view of the notes on the lunch of 28 July 2004 alone, that, where there is documentary evidence of an anti-competitive agreement, the Commission is not required to adduce evidence substantiating the existence of that agreement or its implementation and that it is rather for the applicants to demonstrate that the evidence relied on by the Commission is insufficient.

262 In that respect, it can be seen from the case-law cited in paragraph 181 above that, where the Commission relies on documentary evidence in establishing an infringement of competition law, the burden is on the undertakings concerned not only to put forward a plausible alternative to the Commission's view but also to plead that the evidence relied on in the contested decision to establish the existence of the infringement is insufficient.

263 Accordingly, the applicants' argument that the very fact that the memorandum indicated that PFCI's steering 'has been totally inexistent' is in direct contradiction with the Commission's statements regarding the implementation of an agreement between Chiquita and PFCI to coordinate their behaviour on the market cannot call into question the reliability of the notes on the lunch of 28 July 2004.

264 It follows from the foregoing that the applicants' argument alleging a lack of evidence capable of confirming the existence of an anti-competitive agreement must be rejected and, accordingly, the line of argument relating to Mr P1's notes and to the lunch of 28 July 2004 must be rejected in its entirety.

The follow-up contacts between Chiquita and PFCI after 28 July 2004

265 The applicants contest the Commission's assertion that the price-related contacts were more frequent than indicated by Chiquita and that they started almost immediately following the meeting of 28 July 2004 (recital 121 of the contested decision). Neither the list of telephone calls submitted by PFCI nor the two notes of Mr P1 invoked by the Commission substantiate that assertion.

– The telephone records of Mr P1

266 It must be noted that, in the contested decision, the Commission indicated that, after the meeting of 28 July 2004, Mr C1 and Mr P1 started calling each other regularly, with a total of around 15-20 calls from September 2004 until June 2006 approximately, and referred in that respect to the records of calls made by Mr P1 on his mobile phone and to the statements of Mr C1 and of Chiquita made during the inspections in November 2007 and on 15 February and 22 May 2008 (recital 101, footnote No 160 in the contested decision).

267 The Commission stated that the records of calls made by Mr P1 on his mobile phone during the periods from February to July 2004, from October to December 2004 and from January to November 2005 indicate that he made 14 calls to Mr C1 and initiated two calls with Chiquita Italy. The Commission also indicated that Pacific claimed that it was not in possession of records of calls made on the fixed line and that, as regards the mobile phone, it could only provide records for 2005, with the result that the records, which in any event only concern outgoing calls from Mr P1 to Mr C1 or to Chiquita, are fragmentary and do not give a full picture (recital 101, footnote No 159 in the contested decision).

268 The applicants submit that, although the Commission was in possession of the mobile phone records of Mr P1 for the period from February to July 2004, from October to December 2004 and from January to November 2005, the Commission was only able to identify 14 calls from Mr P1 to Mr C1, which all occurred after 20 January 2005 (footnote No 159 in the contested decision), and that, between 20 January and 8 April 2005, only two calls lasting, respectively, 20 seconds and 1 minute and 5 seconds occurred. Consequently, the Commission cannot use those phone records to support its conclusion that Mr P1 and Mr C1 implemented an anti-competitive agreement between 28 July 2004 and 8 April 2005.

269 It should be noted, first of all, that as the Commission rightly points out, because of the fragmentary nature of the telephone records (see paragraph 267 above), the absence of further phone records showing contacts between the competitors cannot be interpreted as proving that such contacts did not take place. The applicants' argument that the Commission used the fragmentary nature of the records to justify the assumption that such calls took place and thus reversed the burden of proof must be rejected in that regard since, in order to justify its conclusion that there was a consistent pattern of communication between the parties, the Commission does not rely on that fragmented nature, but rather on a body of evidence (see paragraphs 187 to 189 above), including the phone records, which show that two telephone contacts occurred between Mr P1 and Mr C1 in January and April 2005.

270 In addition, the brevity of those two calls cannot prove the absence of anti-competitive content in the conversations, since it is possible, in the context of an established system of exchanges, to communicate information on future intentions regarding prices in a short time.

271 Lastly, the applicants' argument that none of the evidence relied on by the Commission proves that the parties communicated regularly as from 28 July 2004 must be dealt with after the examination of the applicants' subsequent arguments, in particular the argument that Mr C1's statements expressly contradict the conclusion that he communicated regularly with Mr P1, in the context of the examination of whether the Commission was entitled to characterise the infringement in question as 'single and continuous' (see paragraph 475 et seq. below).

272 It follows from the foregoing, and subject to the examination of the applicants' subsequent arguments, that the arguments based solely on Mr P1's telephone records must be rejected.

– Mr P1's notes of August 2004

273 It must be noted that, in the contested decision, the Commission stated that Mr P1's notes reveal that on two separate instances in August 2004, approximately a week and two weeks after the meeting of 28 July 2004, he was in contact with Mr C1 and Mr C2 of Chiquita to discuss future prices in Greece and in Italy and the market developments in Portugal respectively. According to the Commission, those notes constitute evidence of the first follow-up contacts between Chiquita and Pacific after the meeting of 28 July 2004 and confirm that the meeting of 28 July 2004 was not simply an isolated incident but that, in line with the collusive scheme set up at that meeting, the parties took follow-up action to implement it (recitals 122 and 124 of the contested decision).

274 The Commission indicates, first of all, that it can be seen from the first of the two notes (recital 123 of the contested decision) that there was a contact between Mr P1 and Mr C1 on Friday 6 August 2004 (week 32) during which pricing information was exchanged and that even if it is not possible, due to the passage of time, to interpret all the details, that note shows that, after discussing their respective schedules for vessel arrivals, Pacific and Chiquita discussed and exchanged price data, as confirmed by the fact that the prices mentioned by Mr P1 (as indicated by the use of the expression 'Bonita: € 10,75 … Chiquita € 10,75 actual → not bellow [*sic*]… Greece → € 15,50- € 16,25 — same levels') correspond closely to the T2 prices that Chiquita and Pacific actually achieved with their main customers around the time of that contact (recital 124 of the contested decision).

275 The Commission states, moreover, that a second note of Mr P1 shows that another contact between Pacific and Chiquita took place shortly after 11 August 2004, during which Mr P1 and Mr C2 discussed, at the very least, the (stable) market conditions on the Portuguese market, since the note indicates 'Chiquita → [Mr C2] … Portugal — stable' and that the stability of the Portuguese business is confirmed by the actual prices that Chiquita obtained for green bananas in Portugal during the period from 6 to 20 August 2004 (recital 125 of the contested decision).

276 The applicants claim that the Commission ignores the actual content of Mr P1's notes of 6 August 2004 (paragraph 274 above) and interprets them in such a way as to fit its allegations. The Commission thus infers from only three lines in those notes that the parties discussed price information because the prices mentioned in these lines seem to correspond to the T2 prices actually obtained by Chiquita and PFCI in Greece and Italy, but simply ignores other prices and information contained in those notes.

277 In support of their argument, the applicants contest the Commission's assertion that the prices indicated in the notes correspond to the prices actually obtained by Chiquita and Pacific during the period in question and claim that the other information contained in the notes is not accurate, does not correspond to actual events, was common knowledge and does not correspond to the 'Action Plan' allegedly set up on 28 July 2004 between Mr C1 and Mr P1.

278 First, it must be noted that, in view of the price lists submitted by the parties, the applicants' arguments that the prices indicated in the notes do not correspond to the prices actually charged by Chiquita and Pacific cannot succeed. Thus, the notes contain the phrase 'Bonita: € 10,75 … Chiquita € 10,75 actual → not bellow [*sic*] … Greece → € 15,50- € 16,25 — same levels', and the price lists confirm that:

— for Chiquita, the actual green T2 price per box charged to its main Greek customers in week 33/2004 was EUR 15.00-15.50 and the actual green T2 price per carton charged to most of its Italian customers in week 33/2004 was EUR 16.00-16.25;

— for Pacific, the actual T2 price per box charged to its main Greek customers in week 31/2004 (when a Pacific vessel arrived in Greece) was EUR 10.50-10.75 and the actual T2 price per box charged to its main Greek customers in week 34/2004 (when the following Pacific vessel arrived in Greece) was EUR 10.25 (recital 124, footnote No 192 in the contested decision).

279 First of all, the applicants' argument that the prices indicated in the notes do not correspond to Chiquita's actual prices is based on the consideration of all the numbers set out beside the word 'Chiquita' (EUR 11.50 — 11.75, EUR 10.50 — 10.75, EUR 10.75, and lastly EUR 15.50 — 16.25), yet all of those figures do not necessarily correspond to Chiquita's prices. Since the figures between EUR 10 and 11 correspond to the prices charged by Pacific, their indication after the word 'Chiquita' may mean that they correspond to the prices that Chiquita advised Pacific to charge, which appears to be supported by the phrase 'not bellow [*sic*]'. In that respect, the argument that, since PFCI did not have any sales in Greece in week 33, it would have been impossible for it to coordinate its prices with Chiquita during that week must be rejected, since it is entirely possible that the notes concern weeks 31 or 34, in the course of which, moreover, Pacific's prices corresponded to those set out in the notes. Next, the applicants have not been able to refute the finding that the figures 15.50 and 16.25 correspond to the prices charged by Chiquita to its Greek and Italian customers during the period in question. Lastly, the applicants' argument that the notes do not refer to Italy must be rejected since, even though they do not refer to that country by name, the phrase 'Greece → € 15,50- € 16,25- same levels' and the actual price levels indicated in paragraph 278 above show, as the Commission rightly states, that the notes make a price comparison per box of Chiquita for Greece and Italy.

280 Secondly, the applicants claim, citing evidence, that the phrases '[w]e are going there next week. 93,000 boxes for 2 weeks' under the heading 'Greece' and '→ Bonita: € 10,75 → 0,25 (transport)' do not correspond to actual events in view of certain data concerning the quantity of bananas delivered in Greece by PFCI in 2004 and 2005 and the cost of transporting bananas to Greece and reject the explanations proposed by the Commission in that respect as speculation which is neither credible nor plausible; the Commission, also citing evidence, argues the same thing as regards the interpretations put forward by the applicants.

281 It must be pointed out that, in the contested decision, the Commission merely stated that it was clear from the notes in question that there had been a contact between Mr P1 and Mr C1 on Friday 6 August 2004, that it was clear from the numerous references to future prices that information concerning the future conduct of the two undertakings as regards pricing had been exchanged, that the pricing information discussed concerned the prices in Greece and Italy, which was confirmed by the fact that the prices mentioned in the notes corresponded to the prices actually obtained, and that, due to the passage of time, it could not interpret all of the other information (see paragraph 274 above). Accordingly, since it is neither proven nor even alleged that that other information would allow the rebuttal of the Commission's interpretation — the applicants merely arguing, and attempting to prove, that that information is 'not accurate, nor do[es it] correspond to actual events' — there is no need for the Court to rule on the arguments and evidence put forward by the applicants in relation to that information.

282 Thirdly, the applicants argue that, besides inaccurate information, the notes also contain references to information which, in week 32, was common knowledge. It should be noted, however, that, as the Commission points out, this may simply indicate that, in their anti-competitive contacts, the parties also exchanged information that could have been obtained from other sources. In that respect, it must also be noted that a competitor'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 (Case T-588/08 *Dole Food and Dole Germany* v *Commission* [2013] ECR, paragraph 279).

283 Fourthly, the applicants submit, as regards the second note of August 2004 (recital 125 of the contested decision) (see paragraph 275 above), that the Commission did not explain how that note demonstrates any contact between Mr P1 and Mr C2 or the implementation of any agreement and that the assertion that Mr C2 had announced that the price in Portugal would remain unchanged could be a piece of gossip overheard by Mr P1 in PFCI's office.

284 That line of argument must be rejected however, since, in view of all the evidence already examined, it appears justified to conclude from the expression 'Chiquita → [Mr C2] … Portugal — stable', in the second note of August 2004, that that there had been a contact between Mr P1 and Mr C2 during which the latter had indicated to the former that prices in Portugal would remain stable, particularly since the applicants have not put forward any evidence in support of their allegation that the fact that Mr C2 had announced that the prices would remain stable was 'gossip' overheard by Mr P1, and that the stability of the actual prices obtained by Chiquita for green bananas sold in Portugal during the period from 6 to 20 August 2004 is confirmed by a price list of Chiquita's agent in Portugal.

285 Fifthly, and lastly, the applicants claim that the follow-up contacts inferred by the Commission from the notes of 6 August 2004 do not correspond to the 'Action Plan' allegedly set up on 28 July 2004 between Mr C1 and Mr P1 since, according to the Commission's interpretation of that 'Action Plan', Chiquita and PFCI would only focus on their joint strategy for Greece after they had considered their joint strategies for Portugal and Italy. However, the Commission has not put forward any evidence of any possible follow-up contacts concerning those two countries.

286 That line of argument must be rejected. Not only do the two notes of August 2004 show that the parties discussed Portugal (see paragraphs 283 and 284 above) and, implicitly, Italy (see paragraphs 278 and 279 above) as well as Greece, but in addition the Commission rightly points out that the mere fact that the parties did not follow strictly the order of their anti-competitive arrangements as established in the 'Action Plan' of 28 July 2004 cannot cast doubt on the reliability of its evidence.

287 It follows from all of the foregoing considerations that the applicants' arguments seeking to call into question the evidence relating to follow-up contacts between Chiquita and PFCI after 28 July 2004 must be rejected.

The additional contacts between February 2005 and April 2005

288 The applicants submit that the Commission relies on a single internal e-mail sent by Mr P1 to Mr P2 on 11 April 2005 at 9:57 a.m. (recital 127 to the contested decision) and on an undated table entitled 'Chiquita Prices — 2005' (recital 130 to the contested decision) to show 'the almost weekly occurrence of price collusion between week 6 and week 15 of 2005', whereas those documents must be understood as a mixture of the notes taken by Mr P1, his tasks as financial controller within PFCI and his tendency to exaggerate in order to win the respect of his superiors.

289 The applicants (i) invoke evidence intended to show that Mr P1 had no responsibility for setting prices within PFCI and that he carried out benchmarking analyses on the basis of publicly available information, (ii) advance their own interpretation of the e-mail sent on 11 April 2005 at 9:57 a.m., namely, inter alia, that nothing indicates that the information in that e-mail was obtained from Chiquita and lastly (iii) assert that that interpretation is confirmed by the statements of Chiquita and of Mr C1.

– Contested decision

290 In the contested decision, the Commission indicated that the continuation and implementation of the price coordination scheme that was set up by Pacific and Chiquita during the meeting of 28 July 2004 are evidenced by an internal Pacific e-mail sent by Mr P1 to his superior Mr P2 ([*confidential*]) on Monday 11 April 2005 (week 15 of 2005) at 9:57 a.m. and by an undated table entitled 'Chiquita Prices — 2005' which contained Chiquita price information for weeks 6 to 13 of 2005. According to the Commission, together those documents show the almost weekly occurrence of price collusion between Mr P1 of Pacific and Mr C1 of Chiquita in the period between February and early April 2005 (weeks 6/2005 to 15/2005) (recital 126 of the contested decision).

291 The Commission explains that, in his e-mail sent on 11 April 2005 at 9:57 a.m., Mr P1 reported to Mr P2 about the content of his recent collusive price contacts with Mr C1 (as indicated by the use of the phrase 'Following is an update of the prices discuss[ed] with [Mr C1]'), including sensitive pricing information concerning Chiquita (recital 127 of the contested decision). The Commission then asserts that the table contained in that e-mail shows Chiquita's banana prices (as indicated by the use of the phrase 'Chiquita Prices — 2005 … Gross Prices in Euro') for weeks 9 to 15 of 2005 separately per brand (Chiquita and Consul) and country (Italy, Greece and Portugal). In respect of the week of Monday 11 April 2005, namely week 15, the prices are marked '(f)' for forecast, showing collusion on future prices. The forecasted Chiquita prices for Italy, Greece and Portugal correspond, furthermore, to the T2 prices that Chiquita actually achieved with its main customers in that week (recital 128 of the contested decision).

292 The Commission then indicates that, with reference to the Chiquita prices listed in the table for the various weeks, a set of explanatory notes at the bottom of the table shows the content of Mr P1's almost weekly collusive contacts on future prices with Mr C1. The notes read as follows: 'Week 10 — he will increase P & S [Portugal and Spain] to our levels'; 'Week 13 — Chiquita is feeling the pressure to reduce prices only in Italy (after easter). We both agreed that we should remain with prices unchanged'; 'Week 14 — Chiquita is feeling the pressure to reduce prices in Italy, specially the North. He call[ed] to ask that we share our strategy for next week and try to remain unchanged'; 'Week 15 — … I spoke to [Mr C1] and he will give instructions to keep all prices unchanged' (recital 129 of the contested decision).

293 According to the Commission, the almost weekly occurrence of such collusive contacts in the period February to April 2005 is further evidenced by the undated table entitled 'Chiquita Prices — 2005' which was found in print-out format in the office of Mr P2 (Pacific) in the same binder as the e-mail sent on 11 April 2005 at 9:57 a.m. and which consisted of an earlier version of the same table as was contained in that e-mail (recital 130 of the contested decision). The Commission notes that, whereas the table in the e-mail sent on 11 April 2005 at 9:57 a.m. related to weeks 9 to 15 of 2005, the undated table entitled 'Chiquita Prices — 2005' relates to weeks 6 to 13 of 2005 and contains the same explanatory notes for weeks 10 and 13 as the table in the e-mail sent on 11 April 2005 at 9:57 a.m. (as indicated by the use of the following phrases: 'Week 10 — he will increase P & S [Portugal and Spain] to our levels'; 'Week 13 — Chiquita is feeling the pressure to reduce prices only in Italy (after easter). We both agreed that we should remain with prices unchanged'). That confirms — as Mr P1 indicated in his e-mail sent on 11 April 2005 at 9:57 a.m. (which contains the phrase 'Following is an update of the prices discuss[ed] with [Mr C1]') — that the table and explanatory notes were updated on a regular, almost weekly, basis by Mr P1 upon colluding with Mr C1 on the weekly prices for green bananas in Portugal, Greece and Italy (recital 131 of the contested decision).

– The context and circumstances of the e-mail sent on 11 April 2005 at 9:57 a.m.

294 First, the applicants state that Mr P1 had at no point in time any responsibility for sales or setting volumes or prices within Pacific.

295 That argument must be rejected. The Commission has asserted, without being validly contradicted by the applicants, that, irrespective of his responsibilities within Pacific, Mr P1 was present and participated in internal meetings in which prices were discussed, that he reported to Mr P2 about his collusive contacts with Chiquita and that he discussed prices with the members of the Pacific sales team, for example with Mr P3, as evidenced by the e-mail sent on 11 April 2005 at 9:57 a.m., which includes inter alia the following phrases: 'I've informed [Mr P3] and [Mr P4] that Aldi had remained unchanged for week 15'; '[Mr P3] keeps telling me that prices are going down in Italy'.

296 Likewise, the Commission puts forward a set of evidence intended to show Mr P1's direct involvement in the management of PFCI, namely:

— various extracts from his notes, which show his deep involvement in all areas of the banana business, including issues of pricing, volumes, licences and deliveries, as well as contacts with customers and other market players (such as port operators), which is shown by his discussions with the staff of PFCI and Mr P2 and by his business trips;

— an e-mail of 23 February 2005 sent from Mr C1 to Mr C3 and Mr C4 of Chiquita, concerning imports, which refers to Mr P1 as a contact person and an intermediary between the Chiquita employees and Mr P2, and the e-mail sent on 11 April 2005 at 9:57 a.m. (see paragraphs 290 to 292 above);

— a series of Pacific inspection documents.

297 In addition, as the Commission points out (recital 324 of the contested decision), the fact that both the e-mail sent on 11 April 2005 at 9:57 a.m. and the undated table containing Chiquita's price information for weeks 6 to 13 of 2005 were found in Mr P2's office, in print-out format and stored in a binder, indicates that the information 'gathered' by Mr P1 was used by Pacific.

298 Since the applicants merely assert that '[Mr P1] did not have any decision-making power in relation to sales, setting volumes or prices, nor was he involved in any discussions in which price levels were set', and that 'nothing in the file demonstrates that [Mr P1] actually communicated information about Chiquita to the sales team', it must be found that they have failed to refute the evidence put forward by the Commission.

299 The e-mail sent on 11 April 2005 at 11:24 a.m. by Mr P1 to Mr P2 and other Pacific managers, cited by the applicants, is not capable of bringing that finding into doubt. That document does not constitute evidence that Mr P1 was not involved in setting prices.

300 The applicants claim in that respect that Mr P1 observed in the e-mail sent on 11 April 2005 at 9:57 a.m. that, although '[Mr P3] kep[t] telling [him] that prices are going down in Italy by Euro 0.75 to 1.00', he believed that '[PFCI] should be able to remain at Euro 17.00 in Italy'. The e-mail sent the same day at 11:24 a.m., containing the Weekly Price Report for week 15, shows that PFCI's prices in Italy had indeed gone down by EUR 0.45 due to overstocking, which, according to the applicants, clearly shows that, unlike Mr P3, Mr P1 was not at all involved in PFCI's price setting and that Chiquita's prices, which remained unchanged for week 15, did not have a decisive impact on PFCI's price setting.

301 That line of argument was already refuted by the Commission in recitals 137 and 138 of the contested decision, and the applicants have not been able to call into question the explanations put forward in those recitals in their written pleadings before the Court. Thus, the Commission indicated that the purpose of the two e-mails was evidently different, since the first indicated that prices in Italy were generally going down, but that there were reasons to try to keep the price unchanged, whereas the second, which reflects Pacific's internal pricing discussions, contains price information that was intended to be included in Pacific's weekly report, and the two e-mails therefore show that Pacific had a clear idea of what price levels should be applied by its sales staff prior to discussions with customers (recitals 137 and 138 of the contested decision). The Commission therefore rightly concludes that the first e-mail contains *ex ante* information on Chiquita's price intentions while the second e-mail concerns the weekly *ex post* reporting of initial negotiations with customers in Italy, with the result that it is reasonable to consider that the second e-mail is based on updated information that changed Mr P1's initial assessment. Moreover, Mr P1, in the second e-mail, provided the reasons for which he eventually considered a price decrease, namely lower prices in the north of Italy, newly arrived quantities of bananas and Pacific's unsold stocks. The fact that Mr P1 sent those two e-mails shows that, contrary to what is claimed by the applicants, he was involved in setting prices at Pacific.

302 Lastly, the applicants' argument that the fact that Pacific's prices in Italy went down in week 15 of 2005 whereas Chiquita's prices remained unchanged shows that Chiquita's prices had no influence on Pacific's prices also cannot be accepted. The mere fact that an undertaking does not act on a collusion on prices is not capable of showing that there was no infringement of EU competition law (see, to that effect, Case T-18/03 *CD-Contact Data* v *Commission* [2009] ECR II-1021, paragraph 67 and the case-law cited) and, moreover, it can be seen from the foregoing paragraph that the e-mail of 9:57 a.m., which included the table of Chiquita's prices, concerned Pacific's price intentions and that the e-mail of 11:24 a.m. explains precisely why the real price deviated from those intentions. That does not prove that the price intentions did not influence the real prices.

303 In conclusion, as regards the applicants' argument concerning Mr P1's role, it must be recalled that, in any event, according to the case-law, the attribution to an undertaking of an infringement of Article 101 TFEU 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; Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 58; and *Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 581). The applicants have failed to refute the evidence put forward by the Commission, consisting inter alia in Pacific's statutes, to show that Mr P1 was such a person.

304 In those circumstances, the applicants' argument that Mr P1 did not have final responsibility for setting prices is in any event irrelevant and must be rejected (see, to that effect, judgment in *Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 582).

305 Secondly, it must be held that the applicants' argument intended to demonstrate that Mr P1 carried out benchmarking analyses on the basis of publicly available information is not capable of refuting the fact that he also received anti-competitive information from Mr C1. Thus, the fact that Mr P2 asked Mr P1 to examine publicly available figures, as shown by the e-mail of 8 December 2004, cannot constitute evidence that Pacific did not have confidential information on Chiquita's prices. The statement in that e-mail that Pacific had no other source of independent verification besides Sopisco does not justify the conclusion that Pacific did not have other direct sources of information on competitors' prices.

306 Thirdly, and lastly, it has already been held in paragraph 220 above that the fact that the competitors also had legitimate contacts at the material time, which is shown by an internal e-mail sent by Mr C1 on 23 February 2005 cited by the applicants, does not prove that no anti-competitive contacts took place. The Commission acknowledged that Mr P1 and Mr C1 pursued co-loading/co-shipping discussions during the infringement period (recital 152 of the contested decision). However, as noted in paragraph 220 above, the Court of Justice has emphasised 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 (see *General Motors* v *Commission*, paragraph 220 above, paragraph 64 and the case-law cited).

– The interpretation of the e-mail sent on 11 April 2005 at 9:57 a.m. proposed by the applicants

307 The applicants claim that nothing in the e-mail sent on 11 April 2005 at 9:57 a.m. suggests that the information it contains was obtained from competitors or was not publicly available at the time the e-mail was sent. Furthermore, that information is inaccurate.

308 First, according to the applicants, several statements in the e-mail refer to facts which were common knowledge in the market. Thus, the notes concerning week 13 refer to the fact that 'Chiquita [was] feeling the pressure to reduce prices only in Italy (after easter)'. Prices start to go down after Easter every year, which may not have been apparent to Mr P1. Similarly, the fact that a Wong vessel would be supplying Di Leonardo with significant volumes would have been common knowledge in the market. Since the Wong vessel had already arrived on 4 April 2005, the volume discharged in the port of Ravenna (Italy) would have been known at least a couple of days before then, with the result that, as suppliers of Di Leonardo, Chiquita and PFCI would have been informed by Di Leonardo that it did not need significant volumes from them.

309 That argument cannot be accepted since it is based, inter alia, on a partial quotation of the e-mail sent on 11 April 2005 at 9:57 a.m. Thus, the applicants fail to mention that the phrase 'Chiquita is feeling the pressure to reduce prices only in Italy (after easter)' is followed by clear evidence of an agreement on future pricing, namely the phrase: 'We both agreed that we should remain with prices unchanged'. Similarly, the applicants claim that, on week 14, the arrival of the vessel from Wong was already public knowledge in the market, but they ignore the fact that Mr P1 clearly identified the source of that information, since he noted:

'Following is an update of the prices discuss[ed] with [Mr C1]. He was the one who told me about Di Leonardo/Wong.'

310 In the same vein, the applicants fail to mention other statements in the e-mail that cannot be regarded as relating to general market conditions only or as consisting of public or customer information, but which show, on the contrary, that Pacific discussed future prices and intentions with Chiquita. Thus the e-mail contains, inter alia, the following phrases: 'He call[ed] to ask that we share our strategy for the next week and try to remain unchanged'; 'Following is an update of the prices discuss[ed] with [Mr C1]', and 'Week 15 — … I spoke to [Mr C1] and he will give instructions to keep all prices unchanged.' Those statements show anti-competitive contacts between Mr P1 and Mr C1 irrespective of the fact, noted by the applicants, that Mr P1 did not spell Mr C1's name correctly, and cannot be

interpreted as 'embellishments of general statements made by [Mr C1] in the framework of legitimate contacts engaged in at the beginning of 2005, to allow [Mr P1] to emphasise his presumed knowledge of and role in the banana business', as the applicants allege.

311 In that respect, it is also necessary to reject the applicants' argument that, since the notes relating to weeks 13 and 14 do not mention Mr C1 by name, it is impossible to know to whom the pronoun 'he' refers and it cannot be concluded that the phrases 'we both agreed' or 'he call[ed] to ask that we share our strategy' refer to Mr C1 or to any other Chiquita employee, when they may simply refer to internal discussions within PFCI. In view of the phrases 'Following is an update of the prices discuss[ed] with [Mr C1]' and 'I spoke to [Mr C1] and he will give instructions to keep all prices unchanged', of the fact that all the phrases in question are annotations to a table of Chiquita's prices, and of all the evidence gathered by the Commission (see paragraphs 188 and 189 above), the Commission could legitimately conclude that the phrases 'we both agreed' and 'he call[ed] to ask that we share our strategy' refer to Mr C1.

312 Secondly, the applicants claim that nothing in the e-mail indicates that the information was obtained prior to its disclosure in the market, or that it was obtained from Chiquita, and that the Commission has not submitted any evidence in that respect. By the time the e-mail sent on 11 April 2005 at 9:57 a.m. was sent, on Monday of week 15 of 2005, the price information relating to weeks 9 to 14 was no longer current and was already known in the market, so Mr P1 could easily have obtained that information from the PFCI sales team, following their negotiations with the customers in previous weeks or through publicly available information.

313 Similarly, the applicants claim that, as regards the information relating to week 15, particular consideration should be given to the time at which the e-mail was sent, which was 9:57 a.m. Although it is not possible to evaluate when Mr P1 drafted some of the other parts of the e-mail, it is likely that the information in relation to week 15 was added that same morning, after he had spoken to a member of the sales team about Chiquita's prices for that week, as reported to them by their customers. According to the applicants, that explanation is entirely consistent with the setting and communication of Chiquita's prices to the market, which usually occurred shortly after 9 a.m. on Monday mornings, and Chiquita confirmed in that respect that 'it is fair to assume that [at] 9:57 a.m. on Monday morning, Chiquita prices of the same week may already have been known to the customers'. In addition, even if Mr P1 had not obtained Chiquita's price information from customers, Chiquita indicated that '[i]f overall market conditions had also more or less remained the same, as [Mr C1] repeatedly indicated to us in interviews, it would have been logical and an obvious conclusion for [Mr P1] to draw up, even prior to Monday morning, that Chiquita's prices would not change in the upcoming week'.

314 It must be noted that, in the contested decision, the Commission indicated that Pacific confirmed that its weekly negotiations with its Italian customers started on Monday mornings at around 10 a.m., but that they were not necessarily concluded at that time and that often more than one negotiation and sale to a customer took place during the course of a week (recital 135 of the contested decision), which the applicants also confirmed in their written pleadings, while at the same time claiming that, by the time PFCI set its prices in Italy on Monday morning, PFCI was already aware of Chiquita's prices from its customers. As regards Greece and Portugal, the applicants confirmed that sales were also made on an individual basis. Since PFCI did not have regular weekly deliveries, but rather fortnightly ones for those two countries, the sales representatives would start contacting customers approximately 10 days before the expected arrival of the ship and negotiations with customers would continue until agreement on prices and volumes was reached. According to the applicants, the fact that, in Portugal and in Greece, Chiquita set its prices on Thursdays and Fridays for the following week's deliveries, meant that PFCI, which only had fortnightly deliveries and sales in those countries, would know Chiquita's prices in advance from its customers and would take those prices, amongst other information gathered in the market, into account when determining its prices.

315 In the light of the foregoing, it is not likely, at the very least as regards the prices for Italy, that Mr P1 added information relating to week 15 that same morning, before sending the e-mail, after being informed of Chiquita's prices by a member of the sales team who had learned them from his customers. Chiquita's statements in that respect must, moreover, be assessed in the light of the context in which they were provided, namely Chiquita's defence after the Commission's state-of-play letter in which the Commission indicated that, as a result of the e-mail sent on 11 April 2005 at 9:57 a.m., it had reason to believe that Chiquita had not ceased its unlawful conduct at the time of its application for immunity, namely 8 April 2005, which could have constituted a reason to refuse to grant it immunity in the present case. Chiquita therefore had a specific reason to argue that Mr P1 could have learned of Chiquita's prices for week 15 the Monday morning before sending the e-mail from a source other than Mr C1, namely to demonstrate that there had been no further contact between Mr C1 and Mr P1 after 8 April 2005.

316 As regards Chiquita's statement in response to the state-of-play letter, Chiquita indicated therein that it had initially assumed that the e-mail sent on 11 April 2005 at 9:57 a.m. reflected an internal discussion at Pacific because it had received a non-confidential version of that document in which all the names were redacted and had been informed, incorrectly, that those names referred to Pacific employees. However, Chiquita did not indicate in that statement, as the applicants claim, that it had initially assumed that Pacific had obtained the information contained in the e-mail from the market.

317 In addition, the wording used in the e-mail, namely the phrase 'Week 15 — … I spoke to [Mr C1] and he will give instructions to keep all prices unchanged', indicates that the information on Chiquita's prices came from Chiquita itself and not from customers. It also contradicts the hypothesis that Mr P1 himself concluded that the prices would remain unchanged because the overall market conditions had remained more or less the same.

318 As regards the confidential nature of the information concerning weeks 9 to 14, the Commission rightly concluded that it was probable that the information in question had not been exchanged for the first time on 11 April 2005 but previously, at a time when that information was sensitive, and that the applicants therefore chose the wrong time to evaluate the confidentiality of that information (recitals 126 to 131 of the contested decision, see paragraphs 290 to 293 above). In that respect, it must be recalled that the Commission indicated that the fact that the e-mail sent on 11 April 2005 at 9:57 a.m. refers to an exchange on previous weeks is explained by the regular updating of the table on the discussion with Chiquita, which is proved by the undated table entitled 'Chiquita — Prices 2005', covering weeks 6 to 13, which contains the same wording as the e-mail sent on 11 April 2005 at 9:57 a.m. concerning the contacts with Chiquita (recitals 130 and 131 of the contested decision, see paragraph 293 above). Accordingly, the applicants' assertion that the undated table also does not allow any conclusion as to the source of the information contained therein, when it was received and whether, at that time, it was competitively sensitive or not, cannot be accepted.

319 In any event, even if the parties also exchanged information that could have been obtained from other sources, it must be noted that, as the Commission points out (recital 155 of the contested decision), contacts between competitors do not become legitimate because banana prices were widely known in the business.

320 The exchange of information between competitors does not become legitimate because that information or certain parts of it is publicly known, since each economic operator must determine independently the policy which he intends to adopt on the internal market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a

competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (see Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 121 and the case-law cited).

321 In that respect, it must again be pointed out, as was noted in paragraph 282 above, that a competitor'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 (*Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 279).

322 Furthermore, it must be noted that the regular sharing of information relating to prices may have the effect of artificially increasing transparency on a market where competition is already reduced as a result of the specific regulatory context and exchanges of information between competitors (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 179 above, paragraph 281, and *Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 405).

323 Likewise, the applicants' claim that the price information was known by customers before it was transmitted to the competitors and, therefore, could be collected on the market must be rejected. That fact, if proved, does not mean that, at the time that the price lists were sent to the competitors, those prices already constituted objective market data that were readily accessible. The fact that those price lists were sent directly allowed the competitors to become aware of that information more simply, rapidly and directly than they would via the market. Further, that prior notification allowed them to create a climate of mutual certainty as to their future pricing policies (see, to that effect, judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 463).

324 Lastly, as regards the applicants' claim that the price information which was transmitted was known by the customers of the undertaking concerned before it was transmitted to the competitors and that, therefore, the information disclosed could already have been collected on the market by those competitors, it should be recalled that the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti-competitive intention (Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 54; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 100; Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 66; Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 154; and *Lafarge* v *Commission*, paragraph 323 above, paragraph 462).

325 Thirdly, the e-mail sent on 11 April 2005 at 11:24 a.m. cannot prove, as the applicants claim, that the information contained in the e-mail sent on 11 April 2005 at 9:57 a.m. is incorrect, with the result that the latter e-mail loses all credibility, since it has already been found in paragraphs 299 to 301 above that the purpose of the two e-mails was evidently different, the first containing *ex ante* information on Chiquita's price intentions while the second concerns the weekly *ex post* reporting of initial negotiations with customers in Italy, updated as a result of lower prices in the north of Italy, newly arrived quantities of bananas and Pacific's unsold stocks.

326 Fourthly, and lastly, the applicants claim that the Chiquita price changes indicated in the e-mail sent on 11 April 2005 at 9:57 a.m. relating to weeks 9 to 10 and 10 to 11 of 2005 are incorrect. They submit that if Mr P1 and Mr C1 had really had regular discussions on prices, it could at least have been expected that the Chiquita prices reported by Mr P1 would be correct. The Commission thus tries to conceal the fact that the prices indicated in the documents on which it relies do not correspond to the actual prices.

327 The Commission contests that assertion and contends that the prices set out in the e-mail correspond to the actual prices and, moreover, that discussions on prices such as those reflected by the e-mail sent on 11 April 2005 at 9:57 a.m. are anti-competitive even if the prices discussed vary from the actual prices obtained subsequently.

328 It suffices to note that, in any event, even if the actual prices charged subsequently did not correspond to the price intentions exchanged by the parties, that would not diminish the anti-competitive nature of those exchanges since 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 101 TFEU, 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 (Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraphs 31, 35 and 38, and *Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 545).

329 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, and *Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 546).

330 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 (*Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 547).

331 It follows from the foregoing that the applicants have not been able to refute the Commission's findings in relation to the contacts between Chiquita and Pacific from February to April 2005. Accordingly, it is necessary to reject their conclusion that, even if it were to be held that the e-mail sent on 11 April 2005 at 9:57 a.m. reflected discussions on prices between Mr C1 and Mr P1, that e-mail contains only indirect evidence of at most four contacts between the two men in relation to weeks 10, 13, 14 and 15 of 2005.

– The statements of Chiquita and of Mr C1 concerning the e-mail sent on 11 April 2005 at 9:57 a.m.

332 The applicants claim that their interpretation of the e-mail sent on 11 April 2005 at 9:57 a.m. is entirely consistent with the interpretation given by Chiquita and Mr C1, and cite various statements made by the latter in that respect.

333 Without it being necessary to examine all the extracts cited by the applicants, it suffices to note, as has already been emphasised above (see paragraph 315 above), and subject to the subsequent examination of the applicants' argument based on the statements of Chiquita and of Mr C1 (see paragraph 336 et seq. below), that the purpose of the statements in question was to rebut the Commission's allegation that Chiquita had continued the infringement after 8 April 2005, the date of its application for immunity, which was allegedly proved by the e-mail sent on 11 April 2005 at 9:57 a.m. Accordingly, it is not surprising that the statements of Chiquita and of Mr C1 in that connection endeavour to demonstrate that the e-mail does not show an exchange of anti-competitive information that took place after 8 April 2005.

334 However, in their statements, Chiquita and Mr C1 do not assert that that e-mail does not reflect anti-competitive discussions that occurred earlier, as can be seen, inter alia, from Mr C1's witness statement in Chiquita's statement of 13 October 2009.

335 It follows that the applicants' line of argument that Chiquita's statements confirm their interpretation of the e-mail sent on 11 April 2005 at 9:57 must be rejected.

The statements of Chiquita and of Mr C1

336 The applicants claim that the Commission completely misrepresents Chiquita's statements and especially those of Mr C1. According to the applicants, those statements expressly contradict the Commission's findings and instead appear to be consistent with the alternative explanations provided by Pacific concerning the documentary evidence adduced by the Commission.

337 The Commission argues that Chiquita's statements are consistent overall with the finding of an infringement and are in line with the documentary evidence, even though they contain some defensive passages.

– Preliminary observations

338 It must be recalled that, as already indicated in paragraph 182 above, the prevailing principle in EU law is that evidence may be freely adduced, and no provision or any general principle of EU law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings.

339 As regards the level of credibility to attribute to Chiquita's statements, it must be observed that, in the present case, as the first whistle-blower on the cartel, Chiquita could reasonably have expected to benefit from the absolute immunity from fines provided for in point 8 of the 2002 Leniency Notice. Therefore, it cannot be ruled out that it might have felt inclined to maximise the significance of the infringing conduct which it was revealing, so as to harm its competitors on the market (see, to that effect, Case T-110/07 *Siemens* v *Commission* [2011] ECR II-477, paragraph 64).

340 That does not however mean that Chiquita's statements are to be regarded as devoid of all credibility. Thus, it has been held that, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful cartel is understandable, 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 to submit distorted evidence. Indeed, given the inherent logic of the procedure provided for in the Leniency Notice, 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 that procedure (see, to that effect, *Siemens* v *Commission*, paragraph 339 above, paragraph 65, and Case T-208/06 *Quinn Barlo and Others* v *Commission* [2011] ECR II-7953, paragraph 53).

341 In addition, as indicated in paragraphs 151 to 153 above, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence and, although it is possible that an undertaking which has applied for immunity from fines may submit as much incriminating evidence as possible, the fact remains that that undertaking will also be aware of the potential negative consequences of submitting inaccurate information, which could, inter alia, lead to a loss of immunity after it has been granted, the risk of the inaccurate nature of those statements being detected and leading to those consequences being increased by the fact that such statements must be corroborated by other evidence. Likewise, a statement made by a company and admitting the existence of an infringement by that company entails considerable legal and economic risks, including, inter alia, the risk of actions for damages being brought before the national courts, in the context of which the Commission's establishment of a company's infringement may be invoked.

342 None the less, in so far as Chiquita's statements are disputed by other undertakings which are also alleged to have agreed upon the common understanding, they must be supported by other evidence in order to constitute adequate proof of the existence and the scope of the common understanding (see, to that effect, *Siemens* v *Commission*, paragraph 339 above, paragraph 66; Case T-235/07 *Bavaria* v *Commission* [2011] ECR II-3229, paragraph 79; and *Polimeri Europa* v *Commission*, paragraph 57 above, paragraph 54).

343 As regards Mr C1's statements, it must be stated, as a preliminary remark, that his testimony cannot be classified as different than or independent from that of Chiquita. Not only was he employed by that company since 1989, thus for a large part of his professional life, and was still employed there during the Commission's investigation, but he also spoke to the Commission on behalf of Chiquita in the context of the latter's obligation to cooperate for the purposes of obtaining immunity from fines (recital 97 of the contested decision). In addition, Chiquita's statements essentially consist in a summary of statements made by Mr C1 in the course of interviews, and the Commission partly assimilated Mr C1's direct statements with Chiquita's statements (recital 97 et seq. of the contested decision). It follows that Mr C1's statements cannot be considered to constitute other evidence supporting Chiquita's statements, within the meaning of the case-law cited in paragraph 342 above, but must be regarded as forming part of those statements (see, to that effect, *Siemens* v *Commission*, paragraph 339 above, paragraphs 69 and 70).

344 In addition, it must be noted that the testimony of a direct witness of the circumstances which he sets out must, in principle, be classified as evidence with a high probative value (*Siemens* v *Commission*, paragraph 339 above, paragraph 75).

– Contested decision

345 In the contested decision, the Commission indicated that throughout the proceedings, Chiquita made a number of statements relating to the banana business in southern Europe, including several oral statements, a reply to the Commission's state-of-play letter in relation to its cooperation under the 2002 Leniency Notice and statements during the oral hearing. In addition, during an interview carried out by Commission officials under Article 19 of Regulation No 1/2003 during the Commission's inspections Mr C1 gave a statement on behalf of Chiquita as part of Chiquita's leniency application (recital 97 of the contested decision).

346 The Commission notes that Chiquita submitted that in the period from 28 July 2004 until 8 April 2005 (the date of its application under the Leniency Notice) it had engaged in an infringement comprising occasional illicit contacts with Pacific concerning the exchange of price trend data for the following week (recital 98 of the contested decision).

347 According to the Commission, Chiquita explained that, in the context of a number of discussions between Mr C1 of Chiquita and Mr P1 of Pacific (then [*confidential*]) which principally related to the sourcing of bananas in Ecuador, co-loading arrangements, complaints about port services in Salerno, the dissolution of the trade association ANIPO and the sale of bananas in Portugal, Italy, Greece and other countries, the representatives of Chiquita and Pacific would also discuss and exchange views on forthcoming market developments and price intentions, with the price intentions being expressed in price variations (recital 99 of the contested decision).

348 The Commission indicates that Chiquita further explained that, on occasion, views on the general trends in the market were exchanged between the parties, with some of those discussions leading to more specific exchanges on price trends for the following week. Chiquita stated that while Mr C1 of Chiquita would not give express or overt price indications to Mr P1 of Pacific, he would state his views on the general market tendencies in terms such as 'the market is soft', 'there is not much fruit around', 'I don't think the market will collapse' or 'no reason for me to change'. According to Chiquita's submission, such descriptions would, however, be easily understood by any person familiar

with the banana industry as having a specific meaning with regard to prices. According to Chiquita, as prices would normally vary by a range of EUR 0.50, an indication that 'the market is soft' would mean that prices were expected to go down by EUR 0.50, an indication that 'there is not much fruit around' would mean that prices were expected to go up by EUR 0.50 and an indication that 'no reason for me to change' would mean that Chiquita prices would remain unchanged. Indeed, Chiquita's statements show that the price intentions were exchanged in such a way that both parties would understand whether the prices in the following week should go up by EUR 0.50, go down by EUR 0.50 or stay the same (recital 100 of the contested decision).

349 Lastly, the Commission notes that, according to Chiquita, the persons directly involved in the price related contacts were Mr C1 of Chiquita and Mr P1 of Pacific, and those contacts also included Mr C2 of Chiquita ([*confidential*]). Chiquita explains that, after Mr C1 of Chiquita had met Mr P1 of Pacific for the first time on 24 June 2004 at a meeting of the trade association ANIPO, a lunch meeting was organised on 28 July 2004 between Mr P1 of Pacific and Mr C1 and Mr C2 of Chiquita. After the meeting of 28 July 2004, Mr C1 of Chiquita and Mr P1 of Pacific started calling each other regularly, with a total of around 15-20 calls from September 2004 until approximately June 2006. Chiquita explained that while the frequency of the calls depended on the issues to be discussed, they were more frequent at the end of 2004 and the beginning of 2005 when the future of the trade association ANIPO was greatly discussed amongst its members and when Mr P1, a newcomer on the market, turned to Mr C1 for his views and indications on market trends and market related issues. It further explained that in less than half of those 15-20 calls did a discussion on general or more specific price trends take place, with around five calls relating to future market trends of a more general nature and another five calls including Mr C1's 'more specific price expectations by way of market trend indications' for the following week. Chiquita further reported that those contacts had taken place before prices in Italy were regularly communicated to customers on Monday mornings by the Chiquita sales force. According to Chiquita, the calls in which price trend data was exchanged between Chiquita and Pacific ended at the latest when Chiquita applied for immunity on 8 April 2005 (recital 101 of the contested decision).

– The applicants' line of argument calling into question the probative value of the statements of Chiquita and of Mr C1

350 The applicants claim that Chiquita's statements explicitly contradict the Commission's findings and that the Commission misinterpreted them in a way which fits its allegations, totally ignoring their exculpatory nature, whereas those statements are consistent with PFCI's alternative explanations for Mr P1's handwritten notes of 28 July 2004 and the e-mail sent on 11 April 2005 at 9:57 a.m.

351 According to the applicants, the allegation that Chiquita and PFCI entered into an anti-competitive agreement which was subsequently implemented is expressly contradicted by the statements of Chiquita and Mr C1, the key witness in this case. Since Mr C1 is the only surviving participant in the alleged anti-competitive contacts with Mr P1, his point of view and recollections are obviously crucial to the outcome of the case and he is undeniably the best-placed person to interpret the notes of the lunch of 28 July 2004 and the e-mail sent on 11 April 2005 at 9:57 a.m. Significant weight should therefore be attached to the fact that he contradicts the Commission's interpretation of those documents and that he has continuously denied that he discussed, let alone entered into an agreement with PFCI to coordinate their behaviour on the market.

352 The applicants submit that the Commission totally ignored and left out the unambiguous exculpatory statements made by Chiquita and Mr C1, which raises a fundamental issue of procedural fairness. The Commission has a duty to carry out an objective investigation and cannot ignore exculpatory evidence, especially when that evidence expressly undermines its allegations. In addition, the Commission failed to provide Pacific with customer replies to requests for information and to organise an additional interview with Mr C1.

353 Retreating slightly from the categorical nature of their line of argument, the applicants admit that it is true that Chiquita may not have formally contested the finding of an infringement in the period before 8 April 2005. According to the applicants it is nevertheless clear that, in substance, Chiquita and Mr C1 expressly contradicted the Commission's allegations that Chiquita and PFCI entered into any institutionalised cartel to coordinate their prices.

354 It must be noted, first of all, that the relevant passages of Chiquita's statements (Chiquita's statements of 15 February 2008; of 22 May 2008; of 5 March 2009, and of 13 October 2009) essentially reproduced Mr C1's statements made during the interviews conducted by Chiquita's management and its lawyers (see also recital 250 of the contested decision). The examination of the present part of the third plea in law therefore consists essentially in the analysis of the content and reliability of Mr C1's statements.

355 Next, account must be taken of the fact that the circumstances constituting the alleged infringement as inferred by the Commission from the available evidence (see paragraphs 187 to 189 above) are a meeting between Mr C1 and Mr C2 of Chiquita, and Mr P1 of PFCI, during a lunch on 28 July 2004, during which the parties decided to coordinate their price strategy from then on and which was therefore the starting point of the infringement, and telephone calls between Mr C1 and Mr P1 between July 2004 and 8 April 2005 during which the two men colluded on price trends of Chiquita and of Pacific, thus implementing the agreement entered into at the lunch of 28 July 2004 (recitals 102, 103, 121 and 126 of the contested decision). Mr C1 is therefore one of the two protagonists in the alleged cartel, with the result that his statements are important evidence.

356 Lastly, in accordance with the case-law (see paragraphs 342 and 343 above), since the statements of Chiquita and of Mr C1 are disputed by Pacific, they must be supported by other evidence in order to constitute adequate proof of the existence and the scope of the infringement. The Commission claims that those statements are supported by other evidence since, in order to support its finding of an infringement, it does not rely only on the statements of Chiquita and of Mr C1, but also on the documents obtained during inspections by the Italian Guardia di Finanza in the framework of a national investigation, namely Mr P1's notes, and on the documents obtained during the Commission inspections on 28 to 30 November 2007, namely, inter alia, an internal e-mail sent by Mr P1 to Mr P2 on Monday 11 April 2005 at 9:57 a.m. and an undated table found in the office of Mr P2 (see paragraphs 187 to 189 above).

357 It is clear from the applicants' line of argument put forward in its written pleadings, summarised in paragraphs 350 to 353 above and confirmed at the hearing, that they do not allege, as such, a lack of other evidence supporting the statements of Chiquita and of Mr C1, but rather they claim that those statements explicitly contradict the inferences drawn by the Commission from other evidence. In support of their line of argument, the applicants refer to a number of extracts from the statements of Chiquita and of Mr C1.

358 At the hearing, the applicants specified, however, that they also claim that Mr C1's statements to the effect that his contacts with Mr P1 consisted in the exchange of general market trends are not supported by other evidence. That argument is linked to the applicants' allegation that the Commission failed to establish correctly that, in the present case, the infringement may be characterised as single and continuous, and must accordingly be examined in that context (see paragraphs 493 to 497 below).

359 At present, it is therefore necessary to examine, in the first place, whether the statements of Chiquita and of Mr C1 explicitly contradict the Commission's conclusions, before examining, in the second place, the extracts cited by the applicants and dealing with, in the third place, the claims that the Commission failed to communicate certain documents to Pacific and to organise an additional interview with Mr C1.

360 In the first place, it is apparent from a reading of the statements of Chiquita and of Mr C1 (Chiquita's statement of 15 February 2008, of 22 May 2008, of 5 March 2009 and of 13 October 2009) that if those statements take on in certain respects a defensive character by comparison with the allegations made by the Commission on the basis of all of the evidence, they in no way contradict 'expressly, explicitly and consistently' the Commission's conclusions and can in no case constitute 'exculpatory evidence'. Similarly, Mr C1 did not 'deny' the Commission's conclusions in view of the documentary evidence gathered by it.

361 The Commission's finding set out in recital 98 of the contested decision, called into question by the applicants, that, in its statements, 'Chiquita has submitted that in the period from 28 July 2004 to 8 April 2005 … it engaged in an infringement comprising occasional illicit contacts with Pacific in relation to the exchange of price trend data for the following week', thus correctly summarised the statement made by Mr C1 during the inspections carried out at Chiquita's premises on 28 and 29 November 2007 and the statements made by Chiquita during the Commission investigation to which the parties refer.

362 However, those statements, although they do not refute the conclusions drawn by the Commission from other evidence, are less explicit than those conclusions, which the Commission acknowledged, inter alia, in recitals 104 and 121 of the contested decision.

363 In that respect, it must be noted that the Commission examined the applicants' line of argument that Chiquita's statements contradicted the Commission's objections in recital 158 et seq. of the contested decision. The Commission thus found that, although Chiquita's statements contained certain defensive passages, those statements were consistent overall with the finding of an infringement and were in line with the documentary evidence (recital 159 of the contested decision).

364 The Commission claims that the interview with Mr C1, which was conducted during the inspections in November 2007, took place at a time when Mr C1 had yet to prepare a line of defence and that the statements made in that context are therefore particularly credible. The Commission states that, whilst Mr C1 had, on occasion, been reluctant to disclose his full knowledge about the cartel behaviour, he nevertheless admitted that the two parties engaged in collusive conduct which clearly went beyond purely coincidental conversations about co-loading and co-shipping (recital 159 of the contested decision).

365 In addition, the Commission indicates that, by e-mail of 17 April 2005 (sent 10 days after its immunity application) Chiquita's Chief Executive Officer for Europe warned members of its staff — including Mr C1 — that the company would consider disciplinary action against those who failed to report, within 48 hours, their knowledge of any anti-competitive contacts with competitors. According to Chiquita, Mr C1 was interviewed for the first time the day after the expiry of that period. The Commission states that the fact that Mr C1 failed to report the collusive contacts with Pacific within the 48 hour period presumably affected negatively his willingness to report his knowledge of the collusion once the proceedings started, in 2007, for fear of disciplinary action (since he had not reported the contacts with Pacific concerning prices within the specified period in 2005) (recitals 159 and 251 of the contested decision).

366 The Commission further explained that, in Chiquita's reply to the Commission's state-of-play letter, Chiquita explained the disciplinary measures that its employees would risk for any breach of Chiquita's compliance measures (whether it be non-termination of possible illegal conduct, inappropriate communications with competitors or provision of incomplete, misleading or false answers), up to and including termination of employment, and indicated that Mr C1 had consistently been informed of such consequences since 2005. The Commission submits that, in the light of this, the defensive nature of some statements made by Chiquita several years after the facts at issue cannot

cast doubt on the probative value of the precise and detailed information contained in the documentary evidence drawn up by Pacific at the time of the infringement, which were also corroborated by Chiquita's statements (recital 159 of the contested decision).

367 The applicants claim that the Commission's assertions concerning the value of Mr C1's statements are incoherent and contradictory. On the one hand, the Commission stresses that Mr C1's statements are particularly credible, but on the other hand, it tries to downplay their importance when it comes to their exculpatory nature. The Commission's assertion that Mr C1's statements must be seen against the backdrop of his own participation in the infringement and that therefore he had an interest in playing down the anti-competitive contents of his contacts with Mr P1 is speculative and in no way not anchored in reality. Mr C1 was, on the contrary, threatened with termination and personal liability if he failed to disclose the facts fully during the interviews. In addition, since the statements were made at a time when Chiquita believed that it could potentially lose its immunity both in the case relating to northern Europe and the present case, as a result of a failure to cooperate on its part, its employees had no incentive to conceal any potentially illegal acts but rather, on the contrary, actually had an incentive to over-report.

368 That line of argument must be rejected.

369 First, although Mr C1's statements must indeed be treated as Chiquita's statements, in that those statements cannot support each other as evidence (see paragraph 343 above), it is nevertheless necessary to take certain differences into account when assessing the possible motives underlying the statements of an individual admitting his own participation in an infringement and the statements of an undertaking made as an immunity applicant.

370 Thus, just as the case-law has recognised that an individual, in contrast to an undertaking, cannot have a personal interest in maximising the infringing conduct of that undertaking's competitors (see, to that effect, *Siemens* v *Commission*, paragraph 339 above, paragraph 70), it must be acknowledged that, although Chiquita, as an immunity applicant, had no interest in concealing the circumstances of the infringement, it is entirely possible that Mr C1, as an individual, was not overly enthusiastic about having to admit his personal participation in the infringement, especially since he had not reported the infringement within the specified period (see paragraph 365 above), despite Chiquita's actions intended to encourage him to reveal all aspects of his contacts with Mr P1. An individual may feel some reluctance to admit conduct which could be considered negative from a professional, or even personal perspective, especially in a situation such as that in the present case where one individual within an undertaking is accused of participating in an infringement (see in that respect Mr C1's statement at the oral hearing admitting that he was 'sorry' for what had happened and that he would not have acted in that way if he had been aware that in so doing he was committing an infringement of European law).

371 In addition, as the Commission rightly emphasises, in view of his potential personal liability, for instance under national civil or even criminal law, Mr C1 had an obvious interest in playing down the anti-competitive contents of his contacts with Mr P1.

372 Accordingly, it is entirely plausible that Mr C1 was reluctant to reveal the full extent of his contacts with Mr P1 and, inter alia, to admit the collusive nature of those contacts, despite pressure from Chiquita to ensure that he would not conceal any information.

373 Secondly, the Commission rightly asserts that Mr C1's statements made during the Commission's inspections in November 2007, at a time when Mr C1 had not yet prepared a line of defence, are particularly credible. Moreover, it can be seen from the statements of Chiquita and of Mr C1 that, in order to preserve some element of surprise, the latter had not been notified beforehand of the Commission's inspections (see paragraph 155 above). Despite the explanations of Chiquita's lawyers during the inspections (see also paragraph 155 above), it is therefore credible that Mr C1 had not yet

had time to prepare a line of defence. The fact that Mr C1, despite the further explanations provided in subsequent statements, always maintained in essence what he had asserted in those first statements (see Chiquita's statements of 5 March 2009) is an argument in favour of the reliability of all of his statements.

374 It follows from the foregoing, and subject to the subsequent examination of the extracts invoked by the applicants (see paragraph 376 et seq. below), that the general thrust of Mr C1's statements, taken as a whole, does not contradict the Commission's conclusions, that the Commission provided a logical explanation of the defensive nature of his statements and that it did not rely solely on those statements in order to establish the infringement, but on a body of evidence including, inter alia, documentary evidence (see paragraphs 187 to 189 above), with the result that it could invoke those statements in order to support the other evidence (see paragraph 342 above); that does not, however, prejudice the subsequent examination of the applicants' line of argument concerning the continuous nature of the infringement (see paragraph 358 above and paragraph 475 et seq. below).

375 In that regard, it has already been held that whilst the lack of clarity of a piece of evidence incontestably reduces its force as evidence, that is no reason for rejecting it entirely. It must be borne in mind that the fact that a document refers only to certain of the facts mentioned in other items of evidence does not mean that the Commission cannot rely on it to corroborate other evidence (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 42 above, paragraph 263).

376 In the second place, the applicants cite various extracts from the statements of Chiquita and of Mr C1 in order to support their claim that those statements call into question the Commission's conclusions and are, on the contrary, consistent with the alternative explanations proposed by Pacific.

377 First, the applicants claim that the statements indicate several times that Mr P1 and Mr C1 met for the first time at a meeting of ANIPO in June 2004, that the lunch meeting of 28 July 2004 was only their second meeting and that, according to Chiquita, during that lunch, they discussed 'the possibility for Chiquita to source bananas from Noboa in Ecuador'. Those statements make no reference to any price discussions during that meeting, let alone that the parties agreed to coordinate their pricing behaviour.

378 It must be noted that, in order to establish its conclusions concerning the lunch of 28 July 2004, the Commission did not rely on Chiquita's statements, but on Mr P1's notes (recitals 102 to 120 of the contested decision), while acknowledging that that documentary evidence shows that there were other topics of discussion at that lunch than those invoked by the parties (recital 104 to the contested decision). In addition, the fact that Mr C1 stated that the topic of discussion at that meeting was the possibility for Chiquita to procure bananas from Noboa in Ecuador and that he did not state that prices had been discussed or that he had agreed to coordinate his behaviour as regards prices with Mr P1 cannot be interpreted as a denial of the Commission's conclusions. Mr C1 neither denied having discussed the parties' behaviour as regards prices nor stated that the possibility for Chiquita to procure bananas from Noboa in Ecuador was the only subject discussed at that lunch.

379 In that respect, it must also be noted that the Commission indicated in recital 106 of the contested decision that the conclusion established on the basis of Mr P1's notes that, at the lunch of 28 July 2004, the parties had set up an action plan in accordance with which they would get in contact the following week to concert on prices in Portugal as regards whether to 'stay' the same, go 'up', or go 'down' is consistent with Chiquita's statements of 15 February 2008 and of 22 May 2008, according to which, following the meeting on 28 July 2004, Mr C1 and Mr P1 would occasionally exchange more specific price trends for the following week discussing in such terms that both parties would understand whether the prices should go up, go down or stay the same. The Commission remarks (footnote No 171 in the contested decision) that, when providing those statements, Chiquita had not

seen those handwritten notes, as it received access to those notes only when accessing the file following the Commission's adoption of the statement of objections on 10 December 2009 (see paragraph 11 above).

380 In that context, it is useful to bear in mind that the statements made by an undertaking lodging an application for immunity before it is aware of the information gathered by the Commission in its investigation have a particularly high probative value.

381 In that respect, it must be noted that whilst the fact that a statement was introduced at a very late stage of the procedure, namely in the response to the statement of objections, does not in itself mean that no probative value whatsoever may be attached to that statement, it nevertheless has less probative value than one made spontaneously. In particular, when the undertaking lodging an application for immunity is aware of the information gathered by the Commission in its investigation, the inherent logic of the procedure provided for in the Leniency Notice, according to which any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the undertaking (see paragraph 340 above), does not apply to the same degree as where it is a spontaneous statement, made without knowledge of the Commission's objections. Similarly, the consideration that statements made under the Leniency Notice run counter to the interests of the declarant and must in principle be regarded as particularly reliable evidence (see paragraph 341 above) may not be fully applicable in respect of the response to the statement of objections coming from an undertaking lodging an application for immunity (see, to that effect, *Quinn Barlo and Others* v *Commission*, paragraph 340 above, paragraphs 108 and 109).

382 Secondly, the applicants submit that the statements indicate that, after the lunch meeting of 28 July 2004, Mr C1 and Mr P1 started calling each other on a sporadic basis between September 2004 and September 2006 and that the main topics discussed during those calls were the possible sourcing of bananas in Ecuador, co-loading arrangements, complaints about the ports in Salerno, the future of ANIPO and occasionally sales in northern Italy. That is not contested however, and does not contradict the Commission's conclusion, since the statements also indicate that market development trends and price intentions were discussed.

383 In that respect, the applicants nevertheless claim that those discussions could be explained by the fact, confirmed by Chiquita, that Mr P1 was very new to the banana market and was interested in Mr C1's experience and that this type of general discussions also corresponded to the sort of discussions which would take place between the various operators in the framework of ANIPO, with the result that it can in no way be concluded that Mr C1 and Mr P1 implemented any price coordination agreement.

384 It must be noted that the Commission did not rely solely on the statements in question in order to conclude that Mr C1 and Mr P1 had set up a price coordination agreement, but on all the evidence cited in Chapter 4 of the contested decision (see recitals 190 and 191 of the contested decision). In addition, the fact that Mr P1 was interested in Mr C1's experience neither undermines nor contradicts the conclusion that the two men exchanged information relating to prices during their telephone conversations. Furthermore, not only do the applicants in no way support their argument that the type of discussion that took place between Mr P1 and Mr C1 corresponded to the sort of discussions which would take place in the framework of ANIPO, but even if that were the case, it would not diminish the unlawful nature of the exchanges on prices between Mr P1 and Mr C1. Lastly, the applicants fail to point out that Mr C1 not only stated that he discussed general market trends with Mr P1, but also explained that he had occasionally discussed more specific price trends for the following week with Mr P1, using terms such that the two parties would understand whether the price should go up, go down or stay the same.

385 Thirdly, as regards the last point, the applicants submit that while Mr C1 indeed indicated that a few of the calls between him and Mr P1 had led to more specific exchanges on price trends for the following week, he specified, however, that he had never given express and overt price indications. It was only

later, under pressure from the Commission, that Chiquita added that any person familiar with the banana industry would generally understand that those general descriptions had a specific meaning with regard to prices, since, in a market where it is common knowledge that prices vary by a range of EUR 0.50, those general descriptions meant respectively that prices were going to go down by EUR 0.50, go up by EUR 0.50 or remain at the same level.

386 In that connection, it should be noted, first of all, that the line of argument that the Commission exercised undue influence over Chiquita during the administrative procedure has already been rejected in paragraphs 106 to 172 above. In addition, although the statement that any person familiar with the banana industry could understand Mr C1's general descriptions (Chiquita's statement of 22 May 2008) is indeed subsequent to the statement admitting that Mr C1 had given such general descriptions (Chiquita's statement of 15 February 2008), the two statements were made before Chiquita was given the opportunity to access the Commission's file following the adoption of the statement of objections on 10 December 2009 (see paragraph 11 above) and are therefore particularly credible (see paragraphs 380 and 381 above).

387 Next, it was admitted, from the first of the two statements at issue (Chiquita's statement of 15 February 2008), that Mr C1 may have described general market trends in terms such as 'the market is soft', 'there is not much fruit around', 'I don't think the market will collapse' or 'no reason for me to change'. Such comments can be understood as indications concerning future price changes, in that an indication that 'the market is soft' would mean that prices were expected to go down, an indication that 'there is not much fruit around' would mean that prices were expected to go up and an indication that 'no reason for me to change' would mean that prices would remain at the same level. Accordingly, the applicants' argument that Mr P1 was not an experienced player in the banana industry, with the result that it cannot be assumed that he would have understood the general descriptions as referring to price changes, must also be rejected.

388 It should be noted in that respect that the Court has already held that weather conditions, both in producer countries and in those to which the fruit is shipped for consumption, the size of stocks at ports and ripeners' stocks, the sales situation at retail level and at ripener level, and the existence of promotional campaigns are clearly very important factors in the determination of the level of supply in relation to demand, and reference to them during bilateral discussions between well-informed traders necessarily results in a sharing of understanding of the market and of its evolution in terms of prices (see, to that effect, Case T-587/08 *Fresh Del Monte Produce* v *Commission* [2013] ECR, paragraph 360).

389 Lastly, as regards the exact scale of those price changes, the applicants claim that Chiquita's statement that it was common knowledge that prices vary by a range of EUR 0.50, with the result that Mr C1's indication could be understood as meaning that the prices would increase or decrease by EUR 0.50 or stay at the same level is not grounded in reality since an analysis of the actual weekly price movements show that the prices did not increase or decrease only by EUR 0.50 and that there was certainly no trend in prices moving in bands of EUR 0.50. The applicants thus submit that the actual pricing data of PFCI and Chiquita show, on the contrary, that the prices could fluctuate on a weekly basis by as much as EUR 1 or 2 or as little as EUR 0.25 or less and produce, in support of that claim, price tables of Chiquita and of Pacific.

390 That line of argument must be rejected. As the Commission rightly emphasises, whether or not the prices fluctuated by exactly EUR 0.50 is irrelevant if the parties exchanged price intentions for the following week in such a way that both understood whether the prices would go up, go down or stay the same, since such discussions on price trends reduced each party's uncertainty about their conduct on the market.

391 Thus, the fixing of a price, even one which merely sets a target, affects competition because it enables all the cartel participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be. More generally, such cartels involve direct interference with the essential parameters of competition on the market in question. By expressing the common intention to apply a given price level to their products, the producers concerned do not independently determine their policy in the market, thus undermining the concept inherent in the provisions of the Treaty relating to competition (see *BPB* v *Commission*, paragraph 324 above, paragraph 310 and the case-law cited). Moreover, it must be recalled, without prejudice to the examination of the remainder of the applicants' line of argument, that agreements and concerted practices are prohibited by Article 101 TFEU, regardless of their effect, when they have an anti-competitive object (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 122 and 123).

392 Fourthly, the applicants cite, without further comment, extracts from Chiquita's statement of 22 May 2008 summarising Mr C1's explanations relating to the number of calls between him and Mr P1.

393 In so far as the applicants' reference to that statement, in the context of their line of argument seeking to demonstrate that no anti-competitive conduct can be inferred from Chiquita's statements, may be understood as meaning that the applicants claim that, according to that statement, there were only a small number of calls containing price discussions during the period covered, it suffices to note that it has already been indicated in paragraphs 362 to 374 above that the Commission acknowledged that the statements of Chiquita and of Mr C1 are less explicit than its conclusions drawn from all of the evidence, that it provided a credible explanation for Mr C1's reluctance to admit his participation in the alleged infringement, and that the applicants have not been able to call into question that explanation.

394 Fifthly, as regards the extract from Mr C1's statement cited by the applicants in order to allege that Mr P1's notes on the lunch of 28 July 2004 should be seen as reflecting the manner in which he reported the meeting to his colleagues at PFCI, it suffices to note that it can be seen from that statement that Mr C1 did not contest the Commission's conclusions in relation to those notes, that he confirmed that the discussion at the lunch had concerned some of the matters mentioned in those notes, and to refer, as to the remainder, to the conclusions above concerning Mr C1's reluctance to reveal the full extent of his anti-competitive conduct (see paragraphs 362 to 374 above).

395 Sixthly, the applicants quote, partially and out of context, certain extracts from Chiquita's statement of 13 October 2009 in order to suggest that Chiquita stated that it was not aware of any evidence of infringing conduct during the telephone conversations between Mr P1 and Mr C1 and that the latter stated that there were legitimate reasons for him to have conversations with Mr P1 and that he recalled no discussions about price trends around the date of the e-mail sent by Mr P1 to Mr P2 on 11 April 2005 at 9:57 a.m. The applicants fail, however, to indicate that Chiquita's statement was made in response to the state-of-play letter on the situation of its immunity application, in which the Commission had indicated that, as a result of the e-mail sent on 11 April 2005 at 9:57 a.m., it had reasons to believe that Chiquita had not ceased its infringing conduct at the date of its application for immunity, namely 8 April 2005. Accordingly, the extracts quoted by the applicants in their entirety indicate only that Mr C1 had no collusive exchanges with Mr P1 after 8 April 2005, which is also supported by Chiquita's statement of 5 March 2009.

396 Likewise, the applicants distort extracts from that latter statement, according to which Mr C1 always maintained his position on the facts and asserted that Mr P1's information could have come from other sources and that, during the interviews with all the employees working with Mr C1, each interviewee had made a plausible statement that no illegal communications or cooperation between competitors had taken place. Those extracts are taken from Chiquta's assertions that the infringement ceased on 8 April 2005 and that it had already questioned Mr C1 and his colleagues soon after 8 April 2005 and, at that time, no one had admitted that unlawful contacts between competitors had taken

place in southern Europe. It is undisputed that Mr C1 admitted to having discussed price trends with Mr P1 for the first time during the Commission inspections in November 2007, after realising that an investigation in relation to southern Europe was going to be carried out, and when he had not reported his anti-competitive conduct within the period specified for Chiquita's employees to do so by Chiquita's chief executive officer after Chiquita's immunity application on 8 April 2005 (see inter alia paragraph 365 above). Previous statements submitted before the beginning of the procedure in relation to southern Europe cannot therefore be presented as contradicting the Commission's conclusions in that procedure.

397 Lastly, in the same vein, the applicants claim that not only did Mr C1 dispute the Commission's interpretation of the evidence adduced once he had access to it, his explanations were also consistent with previous statements made before the investigation in the present case even started. The applicants cite, in that respect, Chiquita's submissions in Case COMP/39188 — Bananas, in which Chiquita indicated that '[p]rices for UK/Ireland, Southern Europe and France were not communicated to competitors'.

398 In that regard, it suffices to point out that it has already been noted in paragraph 159 above that Chiquita's statements that '[p]rices for UK/Ireland, Southern Europe and France were not communicated to competitors' describes the manner in which Chiquita, on Thursday mornings, communicated its quotation prices to its competitors and that the case relating to southern Europe did not concern quotation prices, with the result that the statements made by Chiquita in relation to northern Europe cannot contradict the Commission's conclusions in the present case.

399 In the third place, in the context of their submission that the Commission must carry out an objective investigation and cannot ignore exculpatory evidence, the applicants state that, despite their request for access to a redacted non-confidential version of the customers' replies to the Commission's information requests, PFCI was only given access to summaries of those replies, which prevented it from obtaining details about potentially exculpatory information given by the customers.

400 In accordance with the case-law, access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 179 above, paragraph 68, and *Groupe Danone* v *Commission*, paragraph 111 above, paragraph 33 and the case-law cited).

401 The Commission is thus under a duty to make available to the undertakings involved in proceedings under Article 101(1) TFEU all documents, incriminating or exculpatory, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the institution or other confidential information are involved (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 179 above, paragraph 68, and *Groupe Danone* v *Commission*, paragraph 111 above, paragraph 34).

402 In addition, it is clear from the case-law that, with regard to answers by third parties to requests by the Commission for information, the Commission must take into account the risk that an undertaking holding a dominant position might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission. Faced with such a risk, third parties who submit documents to the Commission in the course of its investigations, and who consider that reprisals might be taken against them as a result, are entitled to expect that their request for confidentiality will be complied with (see Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 98 and the case-law cited).

403 In the present case, the Commission responded to the criticism expressed by Pacific in its response to the statement of objections — according to which it should have obtained access to more than mere summaries of the replies given by the customers of various banana importers to the requests for information sent by the Commission — in recital 253 of the contested decision, where the Commission stated that it was legitimate to refuse to reveal to undertakings which are able to place considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers certain letters received from their customers or from the customers of other suppliers. Since the applicants do not attempt to contradict that explanation provided by the Commission, it must be held that they have not demonstrated that restricting access to certain material in the file was not legitimate in the present case.

404 Lastly, the applicants claim that the Commission never took up the offer to hold additional interviews with Mr C1, which seriously undermined the Commission's ability to accurately and fully assess the facts of the case. Thus, an additional interview would have allowed the Commission to understand if the statements indeed exhibited an 'attenuating trend' or if the Commission had simply misunderstood and misinterpreted the single sentence on which it relied.

405 It is settled case-law that the rights guaranteed by the EU legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and *Bavaria* v *Commission*, paragraph 342 above, paragraph 222).

406 Next, it must be noted that Article 10(3) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18) provides that undertakings and associations of undertakings forming the subject of a proceeding pursuant to Regulation No 1/2003 'may propose that the Commission hear persons who may corroborate the facts set out in their submission'. In such a case, it appears from Article 13 of Regulation No 773/2004 that the Commission has a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry. The guarantee of the rights of the defence does not require the Commission to hear witnesses put forward by the parties concerned, where it considers that the investigation of the case has been sufficient (see, by analogy, in relation to Regulation No 17, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 383 and the case-law cited).

407 In the present case, the Commission indicated, in recitals 250 and 251 of the contested decision, the reasons for which it considered that there were no elements to support the claim that a further interview with Mr C1 was necessary. Not only have the applicants failed to refute, in concrete terms, the evidence put forward by the Commission in that respect, but they have also failed to provide a valid explanation as to why Pacific itself did not take the opportunity to question Mr C1 during the oral hearing. The applicants' reference, at the hearing in the present proceedings, to Chiquita's decision to comment, at the oral hearing of 18 June 2010, only on the period subsequent to 8 April 2005, the date of its immunity application, is unconvincing in that respect. Although it can be seen from its statements at that oral hearing that Chiquita wished to use its time to defend itself against the possibility that the Commission would remove its immunity in the present case, with the result that it did not want to use that time to comment on the period prior to its immunity application, in respect of which it did not contest the Commission's conclusions, it cannot be seen from those statements that Chiquita opposed Pacific putting questions to Mr C1 in relation to that prior period. Chiquita, on the contrary, even expressly confirmed that its offer to allow Mr C1 be questioned was still valid.

408 In those circumstances, it must be held that the applicants' arguments seeking to criticise the Commission for failing to conduct an additional interview with Mr C1 must be rejected.

409 It follows from all of the foregoing that the applicants' line of argument seeking to call into question the probative value of the statements of Chiquita and of Mr C1 and, accordingly, the first part of the third plea in law in its entirety, must be rejected.

2. The second part, alleging that the evidence adduced does not support the finding of an infringement

410 The applicants claim that the Commission has not proved the existence of an agreement between the parties or a concerted practice. First, they argue, the Commission has not succeeded in proving that the applicants were involved in an agreement and/or concerted practice; secondly, it has not established that their conduct had an anti-competitive object or effect; and, thirdly, it has not shown that that conduct constituted a single and continuous infringement.

a) Preliminary observations

411 It must be recalled that Article 101 TFEU prohibits all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

412 An agreement within the meaning of Article 101(1) TFEU arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way (see, by analogy, in relation to Article 81(1) EC, *Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 130; see also, by analogy, in relation to Article 65(1) CS, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 262).

413 The concept of an agreement within the meaning of Article 101(1) TFEU, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 69, and Case T-18/05 *IMI and Others* v *Commission* [2010] ECR II-1769, paragraph 88).

414 The concept of a concerted practice within the meaning of Article 101(1) TFEU refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (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; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 176 above, paragraph 63; *Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 115; and *Hüls* v *Commission*, paragraph 185 above, paragraph 158).

415 The Court of Justice has added that the criteria of coordination and cooperation must 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 internal market (*Suiker Unie and Others* v *Commission*, paragraph 414 above, paragraph 173; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 176 above, paragraph 63; *Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 116; and Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 106).

416 While 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 (*Suiker Unie and Others* v *Commission*, paragraph 414 above, paragraph 174; *Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 117; *Hüls* v *Commission*, paragraph 185 above, paragraph 160; and *Corus UK* v *Commission*, paragraph 415 above, paragraph 107).

417 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 respect, subject to proof to the contrary, which the operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when 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 (*Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 121; *Hüls* v *Commission*, paragraph 185 above, paragraphs 161 to 163; and *T-Mobile Netherlands and Others*, paragraph 328 above, paragraph 51).

418 Lastly, it must be recalled that a comparison between the concepts of agreement and concerted practice shows that, from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves (*Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 131).

419 It follows that, whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible. The Commission is therefore not required to categorise either as an agreement or as a concerted practice each form of conduct found but is entitled to characterise some of those forms of conduct as principally 'agreements' and others as 'concerted practices' (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 132, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 264).

420 For the purposes of the application of Article 101(1) TFEU, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition within the internal market (*Aalborg Portland and Others* v *Commission*, paragraph 179 above, paragraph 261).

421 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 101(1) TFEU 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 101(1)(a) TFEU 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 328 above, paragraphs 36 and 37).

422 In any event, Article 101 TFEU, 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 328 above, paragraphs 38 and 39).

423 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 an anti-competitive effect are not cumulative but alternative conditions in determining whether a

practice falls within the prohibition in Article 101(1) TFEU. It has, since the judgment of 30 June 1966 in *LTM* (Case 56/65, ECR 235, at 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 object 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 effects 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 328 above, paragraph 28).

424 In deciding whether a concerted practice is prohibited by Article 101(1) TFEU, there is 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 internal market (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at 342; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 49 above, paragraph 125; and *Beef Industry Development Society and Barry Brothers*, paragraph 423 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 423 above, paragraph 17, and *T-Mobile Netherlands and Others*, paragraph 328 above, paragraph 29).

425 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 internal 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 328 above, paragraph 31).

426 In that respect, it must again be noted that it is apparent from the case-law of the Court of Justice 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 (see Case C-67/13 P *CB* v *Commission* [2014] ECR, paragraph 49 and the case-law cited).

427 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 (see *CB* v *Commission*, paragraph 426 above, paragraph 50 and the case-law cited).

428 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 101(1) TFEU, 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 (*CB* v *Commission*, paragraph 426 above, paragraph 51).

429 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 it to be caught by the prohibition, 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 *CB* v *Commission*, paragraph 426 above, paragraph 52 and the case-law cited).

430 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of 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 101(1) TFEU, regard must be had to the content of its provisions, 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 *CB* v *Commission*, paragraph 426 above, paragraph 53 and the case-law cited).

431 In addition, although the parties' intention is not a necessary factor in determining whether an agreement 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 *CB* v *Commission*, paragraph 426 above, paragraph 54 and the case-law cited).

432 Those are the principles to be borne in mind when examining the applicants' arguments.

b) Contested decision

433 In recital 187 of the contested decision, the Commission states that the facts described in Chapter 4 of that decision show that the addressees thereof were involved in collusive activities concerning the banana business in the southern European region, in particular:

— coordinating their price strategy regarding future prices, price levels, price movements and/or price trends;

— exchanging information on future market conduct regarding prices.

434 The Commission added that those facts and that behaviour clearly constituted an agreement within the meaning of Article 101(1) TFEU in the sense that the undertakings concerned had explicitly agreed on certain conduct on the market. Those activities presented a form of coordination and cooperation whereby the parties knowingly substituted practical cooperation between them for the risks of competition. The Commission stated that, even if it were eventually not demonstrated that the parties had explicitly subscribed to a common plan that constituted an agreement, the conduct in question or parts of it would nevertheless form a concerted practice within the meaning of Article 101(1) TFEU (recital 188 of the contested decision).

435 According to the Commission, the facts described in Chapter 4 of the contested decision showed that bilateral collusion had taken place over a period of time, systematically (or at least regularly) and in a repetitive way, the bilateral arrangements having taken place according to an established pattern, which was consistent throughout the relevant time period, even though the intensity and specific contents of communications may have varied over time (recital 191 of the contested decision).

436 The Commission also stated that not only were there no indications that the undertakings concerned had not taken account of the information exchanged when determining their conduct on the market, but, moreover, the facts described in Chapter 4 of the contested decision showed that the parties had at least partially taken account of the price information exchanged and acted accordingly. Accordingly, the Commission concluded that the bilateral arrangements between the parties had influenced the conduct of the parties in setting banana prices for Italy, Greece and Portugal (recitals 192 to 194 of the contested decision).

c) The existence of an agreement or a concerted practice

437 The applicants claim that the Commission failed to establish that they had participated in an agreement or a concerted practice and that it infringed the principle of non-discrimination.

438 In the first place, the applicants claim that, in order to establish the existence of an agreement between Chiquita and PFCI, the Commission must prove that the parties expressed their joint intention to conduct themselves on the market in a specific way and that, in the present case, none of the documentary evidence adduced by the Commission can support the firm conviction that this was the case. It is only possible to infer from the notes relating to the lunch of 28 July 2004 that Mr C1 and Mr P1 had legitimate discussions touching on, inter alia, the future of the professional association ANIPO and the possibility of co-sourcing and co-shipping arrangements; Mr P1's notes are quite simply his personal reflections on the content of those discussions and not the expression of any joint intention of Chiquita and the applicants to behave in a particular anti-competitive way.

439 According to the applicants, only the phrase 'we both agreed that we should remain with prices unchanged', contained in the e-mail sent on 11 April 2005 at 9:57 a.m., could possibly be interpreted as an expression of joint intention. However, that e-mail does not establish to the requisite legal standard that an agreement had been entered into and, even if it did, it relates only to a single day, or at the very most to a single week, but can in no way support the allegation of a pricing coordination agreement over a period of 8 months and 12 days. The Commission, they submit, has thus not proven to the requisite legal standard that Chiquita and the applicants entered into an agreement to restrict competition, nor has it adduced sufficient evidence to prove that such an agreement was implemented between the parties.

440 First of all, it must be noted that the applicants repeat certain arguments that have already been rejected in the examination of the evidence adduced by the Commission in the context of the entirety of the first part of the present plea in law.

441 Next, as the Commission rightly noted in recital 177 of the contested decision, an agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. Moreover, the agreement may be express or implicit in the behaviour of the parties.

442 Lastly, contrary to what is claimed by the applicants, the phrase 'we both agreed that we should remain with prices unchanged' in the e-mail sent on 11 April 2005 at 9:57 a.m. is not the only piece of evidence showing an expression of the parties' joint intention. Several other items in Mr P1's notes of 28 July 2004 (including, inter alia, the phrases 'cooperation [weekly] basis to hold price', 'Local agreement' or 'Action Plan; 1.- talk next week for Portugal: price decision: stay, up, Down. [Mr P1]/[Mr C1]', see recital 105 of the contested decision) and in the e-mail sent on 11 April 2005 at 9:57 a.m. (which includes the phrases 'we both agreed that we should remain with prices unchanged' and 'He call[ed] to ask that we share our strategy for next week and try to remain unchanged', see paragraph 292 above) show that the parties expressed their joint intention to conduct themselves on the market in a specific way.

443 In that respect, it must be recalled that the applicants' argument that Mr P1's notes and the e-mail sent on 11 April 2005 at 9:57 a.m. reflect solely Mr P1's personal ideas on the unilateral statements of Mr C1 has been rejected in the context of the examination of the third plea in law and that it has been found that those documents reflect, on the contrary, bilateral decisions between the parties (see, inter alia, paragraphs 221 to 223, 232 to 235, 252, 255, 309 to 311 and 317 above).

444 In the second place, the applicants claim that the Commission failed to establish that they had taken part in a concerted practice.

445 First, the applicants assert that, in order to establish that Chiquita and Pacific participated in a concerted practice, the Commission must demonstrate that the parties concerted with one another, that the concerted action resulted in subsequent conduct on the market and that there is a link of cause and effect between the two. The Commission relied in that respect on the *T-Mobile* case-law (paragraph 328 above, paragraphs 60 to 62), which is not, however, applicable in the present case, where the Commission should have proved that numerous and frequent contacts took place between the applicants and Chiquita and that those meetings went beyond purely legitimate business contacts, which it failed to do, inter alia, since there is no evidence of any contact between Chiquita and PFCI between 28 July 2004 and 8 April 2005 apart from two very brief telephone calls.

446 It must be pointed out that, irrespective of the relevance of the reference to certain case-law in the contested decision, the Court must examine whether, in the circumstances of the present case, the Commission was entitled to conclude that the behaviour of the parties constituted a concerted practice with the object or effect of restricting competition.

447 It must also be recalled that, in *T-Mobile Netherlands and Others* (paragraph 328 above), the Court of Justice held 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 328 above, paragraph 60).

448 The Court of Justice added that, in those circumstances, 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 328 above, paragraph 60).

449 Contrary to what is alleged by the applicants, that case-law is applicable in the present case, since the Commission showed precisely that the exchanges on future prices that took place between the parties allowed them to take account of the information exchanged in order to determine their conduct on the market, which is attested to by, inter alia, the existence of the regularly updated table of Chiquita's prices found in a folder in the office of Mr P2 of Pacific (see paragraphs 290 to 293 above).

450 The applicants' argument that there is no evidence of any contact between Chiquita and PFCI between 28 July 2004 and 8 April 2005 must be rejected since they have failed to refute the evidence on which the Commission relied in order to show contacts between the parties between 28 July 2004 and 8 April 2005, namely the two notes of August 2004, the two telephone contacts of January and April 2005, the table of Chiquita's prices from week 6 of 2005 and the e-mail with Chiquita's prices from week 9 of 2005, found in a folder in the office of Mr P2 of Pacific, and the statements of Chiquita and of Mr C1 (see paragraphs 265 to 287, 288 to 335 and 336 to 409 above).

451 Although the applicants' line of argument may have some relevance in the examination of the existence of a single and continuous infringement in the present case, it must be rejected in the context of the examination of the existence of a concerted practice, since it was held in the examination of the third plea in law that the applicants have failed to refute the body of consistent evidence on which the Commission relied — namely the notes of the meeting of 28 July 2004, the notes of August 2004, the telephone call records, the e-mail sent on 11 April 2005 at 9:57 a.m., the undated table and Chiquita's statements — in order to conclude that there was an agreement and/or concerted practice between the parties. Thus, irrespective of whether that infringement may be characterised as single and continuous because of the regularity of the contacts (see in that regard paragraph 475 et seq. below), it must be found that the evidence adduced by the Commission shows contacts between the parties which 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. That is all the more the case here, where the concertation concerned only one aspect of the parties behaviour, namely prices, with the result that, in the context of the system of exchanges set up at the lunch of 28 July 2004, sporadic concertations on price trends could suffice to implement the anti-competitive object which the parties aimed to achieve.

452 Secondly, according to the applicants, the Commission relied, in a contradictory manner, on the case-law relating to complex infringements in order to avoid having to characterise the alleged conduct either as an agreement or as a concerted practice. The applicants submit that, since there are only two undertakings involved in the case at hand, one of which is a small undertaking, and the alleged infringement took place over a period of only 8 months and 12 days, the Commission cannot rely on that case-law and must establish exactly how and when PFCI and Chiquita allegedly entered into an agreement or engaged in concerted practices.

453 That line of argument must be rejected, since the applicants cannot claim that the Commission wrongly relied on the case-law relating to complex infringements (see paragraphs 418 and 419 above) in the present case. The fact that the infringement in the present case involved only two undertakings, one of which was a small undertaking, and that it lasted only 8 months and 12 days does not change the fact that the Commission is not required to categorise either as an agreement or as a concerted practice each form of conduct found, but may characterise some of those forms of conduct as 'agreements' and others as 'concerted practices'. In that respect, and since the Commission established to the requisite legal standard the occurrence of contacts between the parties, the Commission cannot be required, as the applicants suggest, to determine exactly each individual occasion that the parties concerted.

454 Thirdly, the applicants submit that the Commission failed to demonstrate that they had participated in a concerted practice, since it did not establish that a concertation had taken place or that such concertation had resulted in subsequent conduct on the market. The presumption that an undertaking which takes part in a concertation takes account of the information exchanged in its subsequent conduct on the market can be refuted if it is established that the concertation did not have any influence whatsoever on the undertaking's own market conduct. The prices for weeks 13 and 15 in Italy, on which Mr C1 and Mr P1 allegedly concerted, did not remain unchanged and thus did not follow Mr P1's analysis. The Commission has also not been able to prove that Chiquita and PFCI set their prices in a coordinated manner for the other weeks during the period of the alleged infringement.

455 It must be noted that it can be seen from the foregoing considerations that the Commission showed that a concertation had taken place between the parties and that the applicants' line of argument is not capable of refuting the presumption that they took account of information exchanged in their subsequent conduct on the market.

456 As already noted in paragraphs 328, 329 and 330 above, even if the actual prices charged subsequently did not correspond to the price intentions exchanged by the parties, 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, *Dansk Rørindustri* v *Commission*, paragraph 329 above, paragraph 140, and *Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 546).

457 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 (*Dole Food and Dole Germany* v *Commission*, paragraph 282 above, paragraph 547).

458 Thus, setting a price, even one that is merely indicative, affects competition because it allows all the participants in the cartel to foresee with a reasonable degree of certainty what pricing policy will be pursued by their competitors. More generally, such cartels entail direct interference with the essential parameters of competition on the relevant market. By expressing the common intention to apply a given price level to their products, the producers concerned do not independently determine their policy in the market, thus undermining the concept inherent in the provisions of the Treaty relating to competition (see *BPB* v *Commission*, paragraph 324 above, paragraph 310 and the case-law cited). Furthermore, it must be noted, without prejudice to the examination of the rest of the applicants' line of argument, that agreements and concerted practices are prohibited under Article 101 TFEU, regardless of their effect, when they have an anti-competitive object (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraphs 122 and 123).

459 Fourthly, and lastly, it must be found that, by their line of argument claiming that the Commission's allegations relating to the concertation were constantly denied by Chiquita and Mr C1, the applicants merely repeat the arguments already rejected in the context of the examination of the third plea in law (see paragraphs 332 to 409 above).

460 In the third place, the applicants submit that the Commission's file also contains clear documentary evidence of specific price discussions between competitors not involving PFCI, against which the Commission has, however, raised no allegations of anti-competitive conduct, which constitutes an infringement of the principle of non-discrimination guaranteed by Article 20 of the Charter of Fundamental Rights.

461 That claim must be rejected. The applicants cannot find any support in the fact that proceedings were not brought against other undertakings. It follows from the foregoing considerations that the Commission has gathered sufficient evidence justifying the proceedings brought against the applicants. Even on the assumption that the situation of some traders against which proceedings were not brought was comparable to that of the applicants, it is settled case-law that the fact that a trader who was in a position similar to that of an applicant was not found by the Commission to have committed any infringement cannot constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established (*Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 176 above, paragraph 146; Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647, paragraph 101; and judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 397), the circumstances of that trader not even being the subject of proceedings before the Court (see Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 62 and the case-law cited).

462 It is clear from the foregoing that the applicants' line of argument claiming that the Commission failed to establish that they had taken part in an agreement and/or a concerted practice must be rejected.

d) The existence of an anti-competitive object or effect

463 The applicants claim that the Commission failed to establish that their conduct had an anti-competitive object or effect.

464 In the first place, the applicants submit that the Commission must establish to the requisite legal standard that the agreement or concerted practice had as its object or effect the prevention, restriction or distortion of competition. According to the applicants, it cannot be inferred from the facts and circumstances of the alleged infringement that the parties concluded a horizontal price-fixing arrangement having as its object the restriction of competition, with the result that the alleged infringement cannot be categorised as a restriction of competition by object.

465 The applicants claim that, because the Commission considered that the practices engaged in by the parties had the object of fixing prices, it concluded that, in the present case, the infringement had the object of restricting competition. However, according to the applicants, it cannot be concluded from the facts and circumstances of that infringement that the parties concluded a horizontal price-fixing arrangement; their behaviour can at most be regarded as a free-standing exchange of vague and sporadic information that only related to general market trends and cannot, therefore, be considered to be an infringement by object.

466 That claim must be rejected. In view of the case-law referred to in paragraphs 411 to 431 above and the facts examined in the context of the third plea in law, it is apparent that, in the present case, the Commission was entitled to conclude that the parties' behaviour had the object of preventing, restricting or distorting competition in the internal market.

467 Thus, contrary to what is claimed by the applicants — who again repeat, in the context of the legal classification of the infringement, certain arguments that have already been refuted in the context of the examination of the facts of the case and of the evidence put forward by the Commission — the infringement in the present case must be characterised as restrictive of competition by object since, as the Commission stated in recital 226 of the contested decision, that conduct shows the general characteristics of horizontal arrangements for the purpose of Article 101(1) TFEU, since prices are the main instrument of competition and, in the present case, the parties explicitly coordinated price movements, with the ultimate aim of inflating prices to their benefit.

468 In that regard, it must be borne in mind that the first example of a cartel given in Article 101(1)(a) TFEU, expressly declared incompatible with the internal market, is precisely one which 'directly or indirectly [fixes] purchase or selling prices or any other trading conditions'. The practice that was the object of the cartel is thus expressly prohibited by Article 101(1) TFEU, as it involves inherent restrictions on competition in the internal market (see, to that effect, *Fresh Del Monte Produce* v *Commission*, paragraph 388 above, paragraph 768).

469 Thus, it can be seen from the case-law cited in paragraphs 426 to 428 above that the type of coordination at issue in the present case, namely coordination on prices, consisting in contacts between operators with the object of orientating, and ultimately inflating, prices, reveals a sufficient degree of harm to competition that it may be found that there is no need to examine its effects, since a cartel on prices may be regarded, by its very nature, as being harmful to the proper functioning of normal competition.

470 In the second place, the applicants submit that, inasmuch as their conduct cannot be regarded as a restriction on competition by object, the Commission should have proved that it had the effect of restricting competition in the market, which it was also unable to do.

471 Since that argument is based on the erroneous premiss that the conduct in question cannot be regarded as a restriction on competition by object, it has to be rejected. It follows from the very wording of Article 101(1) TFEU that agreements between undertakings are prohibited, regardless of their effect, where they have an anti-competitive object. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved (see Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission* [2011] ECR II-793, paragraph 75 and the case-law cited).

472 For the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. That applies in particular in the case of obvious restrictions of competition such as price fixing and market sharing (Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 75).

473 Accordingly, it is clear that the Commission was right to indicate, in paragraphs 222 to 234 of the contested decision, that the infringement at issue in the present case could be categorised as a restriction of competition by object and that it was not necessary to examine its effects.

474 It follows that the applicants' line of argument alleging that their conduct had no anti-competitive object or effect must be rejected.

e) The existence of a single and continuous infringement

475 The applicants claim that the Commission failed to establish to the requisite legal standard the duration of the alleged infringement, because it did not demonstrate that it was continuous.

476 In that respect, the applicants submit that it can be seen from the case-law that, where there is no evidence directly establishing the duration of the infringement, the Commission must adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two specific dates, and that whether or not the period between two facts is long enough to constitute an interruption should be assessed in the context of the functioning of the cartel in question.

477 In the present case, according to the applicants, the Commission has not adduced any evidence of any contact whatsoever between Mr P1 and Mr C1 during the entire period of the alleged infringement, apart from two very brief telephone calls which took place after 20 January 2005. Given that price negotiations in the banana business occur every week, this means that there is no evidence of any activity in relation to more than 30 negotiation cycles. Consequently, since the Commission clearly cannot establish any link between the notes of 28 July 2004 and the e-mail sent on 11 April 2005 at 9:57 a.m., the Commission has failed to prove that the alleged practices constituted a single and continuous infringement. In support of their allegations, the applications again refer to Mr C1's statements which supposedly repudiate the existence of an overall plan pursuing a common objective.

478 It should be recalled that an infringement of Article 101(1) TFEU may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. When the different actions form part of an overall plan because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Commission* v *Anic Partecipazioni*, paragraph 391 above, paragraph 81; *Aalborg Portland and Others* v *Commission*, paragraph 179 above, paragraph 258; and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 90).

479 It must also be recalled that the notion of a single infringement covers a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition, and also individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object) (*BPB* v *Commission*, paragraph 324 above, paragraph 257, and *Amann & Söhne and Cousin Filterie* v *Commission*, paragraph 478 above, paragraph 89).

480 Furthermore, according to settled case-law, the concept of a single infringement can be applied to the legal characterisation of anti-competitive conduct consisting in agreements, in concerted practices and in decisions of associations of undertakings (see, to that effect, judgment of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 181 above, paragraphs 696 to 698; *HFB and Others* v *Commission*, paragraph 406 above, paragraph 186; and *BASF* v *Commission*, paragraph 111 above, paragraph 159).

481 As regards a continuing infringement, it must be borne in mind that the notion of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking. In that case, it will be able to impose a fine in respect of the whole of the period of infringement, including the period in respect of which it does not have evidence of the participation of the undertaking concerned (Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie and Trelleborg* v *Commission* [2013] ECR, paragraph 87).

482 However, the principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79; Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 188; Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 114 and 153; and *IMI and Others* v *Commission*, paragraph 413 above, paragraph 88).

483 Although the period separating two manifestations of infringing conduct is a relevant criterion in order to establish the continuous nature of an infringement, the fact remains that the question whether or not that period is long enough to constitute an interruption of the infringement cannot be examined in the abstract. On the contrary, it needs to be assessed in the context of the functioning of the cartel in question (*IMI and Others* v *Commission*, paragraph 413 above, paragraph 89).

484 Lastly, if the participation of an undertaking in the infringement may be regarded as having been interrupted and the undertaking may be regarded as having participated in the infringement prior to and after that interruption, that infringement may be categorised as repeated if — as in the case of a continuing infringement (see paragraph 479 above) — there is a single objective which it pursued both before and after the interruption, a circumstance which may be deduced from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices. The infringement is then single and repeated and, although the Commission may impose a fine in respect of the whole of the period of the infringement, it may not do so for the period during which the infringement was interrupted (*Trelleborg Industrie and Trelleborg* v *Commission*, paragraph 481 above, paragraph 88).

485 In the present case, the Commission considers that the conduct adopted by the parties constitutes a single and continuous infringement of Article 101 TFEU. The agreements and/or concerted practices found to exist form, in its view, part of an overall scheme which laid down the lines of their action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that subject (recitals 209 to 213 to the contested decision).

486 In addition, the Commission indicated, in recitals 214 to 221 of the contested decision, that the applicants' arguments calling into question the continuous nature of the infringement could not be accepted, since the finding that Pacific and Chiquita engaged in the coordination of prices and exchanges of information on future market conduct regarding prices was based on contemporaneous documents and the corporate statements of Chiquita examined in Chapter 4 of the contested decision.

487 In recital 216 of the contested decision, the Commission explained that the starting point of the infringement was the meeting between Pacific and Chiquita on 28 July 2004, the collusive character of which was evidenced by the notes of Mr P1, and that the nature of the collusive scheme set up during that meeting (namely a structured and regular price-fixing scheme covering Greece, Italy and Portugal), as it emerged from Mr P1's notes, was also consistent with the conduct described by Chiquita in its corporate statements.

488 The Commission continued, in recital 217 of the contested decision, by noting that the contemporaneous evidence in the file showed that, following the meeting of 28 July 2004, Chiquita and Pacific had continued their collusive contacts, with a first contact taking place on 6 August 2004 and another contact on 11 August 2004, and that during those contacts, the parties had discussed prices in Greece and market development in Portugal. The Commission emphasised that the nature and substance of these contacts were consistent with Chiquita's corporate statements and with its statements at the oral hearing, namely that in the period following the meeting of 28 July 2004 Mr C1 and Mr P1 had started calling each other and had discussed, inter alia, general market trends and specific price trends and intentions for the following week and that, according to Chiquita, calls between the two men became more frequent towards the end of 2004 and the beginning of 2005.

489 The Commission also noted, in recital 218 of the contested decision, that the continuation of the regular bilateral contacts in which Pacific and Chiquita had coordinated prices was further confirmed by the internal Pacific e-mail of 11 April 2005 and the undated table entitled 'Chiquita Prices — 2005' which together showed the almost weekly occurrence of such contacts between February and April 2005 (weeks 6/2005 to 15/2005), and that, in particular, the undated excel table entitled 'Chiquita Prices — 2005' indicated that Mr P1 of Pacific updated a table containing Chiquita's prices on a weekly basis and added notes of the content of his discussions with Mr C1 of Chiquita.

490 Lastly, the Commission stated, in recitals 219 to 221 of the contested decision, that, contrary to Pacific's arguments, the body of evidence relied upon did not allow for the conclusion that there was a gap of seven months in the evidence, but rather that, when considering the body of evidence as a whole, it was established that the collusive conduct which was evidenced by the e-mail of 11 April 2005 and the undated table entitled 'Chiquita Prices — 2005' constituted a continuation of the price coordination scheme as set up at the meeting of 28 July 2004, which was also confirmed by Chiquita, which submitted that in the period from 28 July 2004 until 8 April 2005 it had engaged in an infringement comprising of occasional illicit contacts with Pacific in relation to the exchange of each party's individual 'price trend data' for the following week. The Commission concluded, in recital 221 of the contested decision, that it followed from the foregoing that the bilateral collusion between Chiquita and Pacific had occurred regularly and in a repetitive way over a period of time and that the bilateral arrangements had taken place according to an established pattern which was consistent over the relevant time period, even though the intensity and specific contents of communications may have varied over time. Various bilateral contacts between the parties which had occurred at and after the

meeting of 28 July 2004 served to coordinate the parties' conduct on the market and to exchange commercially sensitive information. All those actions formed part of an overall plan as they had been carried out in pursuit of a single and common anti-competitive objective, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that parameter.

491 In the first place, inasmuch as the applicants' assertions in paragraph 65 of the reply can be understood as contesting the single nature of the infringement at issue in the present case, that line of argument cannot succeed. It is clear from the case-law referred to in paragraphs 479, 480 and 484 above and from the facts examined in the context of the first part of the present plea in law that the conduct at issue in the present case must be categorised as a single infringement given that the various manifestations of the infringement concerned the same object and the same subjects. Moreover, Mr C1's statement, quoted by the applicants, according to which he was unaware that he was infringing EU law during his contacts with Mr P1 does not prove that the parties had not subscribed to a common plan intended to restrict competition since, as the Commission rightly notes, awareness of breaching EU competition law is not a requirement for the existence of a plan pursuing a common anti-competitive object.

492 In the second place, as regards the continuous nature of the infringement, it must be noted that it can be seen from the examination of the evidence in the context of the first part of the present plea in law that the applicants are not justified in maintaining that there is no evidence of any contact between the parties between August 2004 and April 2005, a period of over seven months, apart from two very brief telephone calls. That evidence shows that the parties set up a system of collusion at the lunch of 28 July 2004 (see Mr P1's notes on the lunch of 28 July 2004), that they were in contact on 6 and 11 August 2004 (see the two notes of Mr P1 of August 2004) and that Mr P1 called Mr C1 on 20 January and 7 April 2005 (see the two telephone calls from Mr P1 to Mr C1 on 20 January and 7 April 2005). In addition, the e-mail of 11 April 2005 with the table of Chiquita's prices for weeks 9 to 15 of 2005 and the undated table found in a folder in the office of Mr P2 with Chiquita's prices for weeks 6 to 13 of 2005 show contacts between the parties as from 7 February 2005 (week 6/2005) until 8 April 2005 (end of week 14/2005). Lastly, it can be seen from Chiquita's statements that, in the period from 28 July 2004 to 8 April 2005, it participated in an infringement consisting in occasional unlawful contacts with Pacific concerning the exchange of information on price trends for the following week (Chiquita's statement at the oral hearing), that, after a meeting on 28 July 2004, Mr C1 of Chiquita and Mr P1 of Pacific started calling each other regularly, with a total of around 15-20 calls, from September 2004 until June 2006 approximately (Chiquita's statement of 22 May 2008), and that those calls became more frequent at the end of 2004 and at the beginning of 2005 (Chiquita's statement of 15 February 2008).

493 In the third place, it must be observed that it can be seen from all the aforementioned evidence that the Commission has not adduced documentary evidence of a contact between the parties for the period from 12 August 2004 until 19 January 2005. It is clear from the recitals of the contested decision summarised in paragraphs 485 to 490 above and from the Commission's line of argument in the defence that, in order to find that the infringement continued during that period, the Commission relied on the body of evidence as a whole and on Chiquita's statements covering all of the infringement period as found by the Commission.

494 In that regard, it must however be emphasised that although the evidence must be assessed in its entirety in order to assess whether the Commission discharged the burden of proof in accordance with the case-law cited in paragraphs 175 to 185 above so as to establish to the requisite legal standard the existence of the infringement, the examination carried out in order to establish the continuous nature of that infringement is not intended to analyse whether the body of evidence as a whole is such that it is reasonable to accept that the infringement continued uninterruptedly during the entire period concerned by that evidence, but rather whether the Commission has adduced

evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (*IMI and Others* v *Commission*, paragraph 413 above, paragraphs 88 to 97).

495 In addition, although Chiquita's statements may be regarded as evidence relating to the period not covered by the documentary evidence showing contacts between competitors, and although it is clear from the case-law that the statements of an immunity applicant have a particularly high probative value (see the case-law cited in paragraphs 151 to 153, 339 to 341, 380 and 381 above), it is also settled case-law that corporate statements must be supported by other evidence if they are disputed by other undertakings which are also alleged to have agreed upon the common understanding (see the case-law cited in paragraph 342 above).

496 Lastly, the Commission's argument that 'when considering the body of evidence as a whole, it is established that the collusive conduct which is evidenced by the e-mail of 11 April 2005 and the undated table constitutes a continuation of the price coordination scheme as set up at the meeting of 28 July 2004', cannot be accepted. First, the finding that there is no evidence to suggest that the infringement was interrupted as regards the applicants cannot become relevant until the Commission has discharged its burden of proof, namely it has presented evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see *IMI and Others* v *Commission*, paragraph 413 above, paragraph 86 and the case-law cited). Secondly, and in any event, the participation of an undertaking in a cartel cannot be inferred from speculation based on imprecise evidence (see Case T-68/09 *Soliver* v *Commission* [2014] ECR, paragraph 58 and the case-law cited).

497 In those circumstances, the absence of evidence supporting Chiquita's statements and showing contact between Chiquita and Pacific during a period of approximately five months (from 12 August 2004 until 19 January 2005) of a total infringement period of a little over eight months must be regarded as an interruption of the infringement, all the more so because, as the applicants submit without being contradicted by the Commission, price negotiations in the banana business occur every week, which is confirmed, moreover, by the table of Chiquita's prices for weeks 6 to 13 and 9 to 15/2005 drawn up by Mr P1, and there is therefore no explicit evidence of contact between Chiquita and Pacific for approximately 20 negotiation cycles.

498 Having regard to the fact that the applicants resumed and repeated, after that period of approximately five months, their participation in an infringement which they do not dispute was a manifestation of the same cartel in which they had participated before the interruption, the infringement must be characterised as single and repeated and must be regarded as having lasted from 28 July 2004 until 11 August 2004 and from 20 January 2005 until 8 April 2005 (see, to that effect, *IMI and Others* v *Commission*, paragraph 413 above, paragraph 97, and *Trelleborg Industrie and Trelleborg* v *Commission*, paragraph 481 above, paragraph 95).

499 It follows from the foregoing that the third plea in law must be upheld in part, in that the Commission erred in concluding that the infringement continued between 12 August 2004 and 19 January 2005, and rejected as to the remainder.

500 In conclusion, the application for annulment of the contested decision must be upheld in part, in so far as the Commission concluded, in Article 1 of that decision, that the applicants had participated in the infringement between 12 August 2004 and 19 January 2005, and in so far as the Commission, in Article 2 of that decision, set the fine imposed on the applicants by taking into account the duration of the infringement initially found. The consequences of that partial annulment of the contested decision will be examined in paragraphs 560 to 564 below.

II – *The alternative head of claim, seeking the cancellation or reduction of the fine*

501 In support of their alternative head of claim, the applicants put forward a plea alleging infringement of Article 23(3) of Regulation No 1/2003 and the 2006 Guidelines, as a result of the incorrect assessment of the gravity and duration of the alleged infringement, the incorrect assessment of the mitigating circumstances and the breach of the principle of non-discrimination.

A – *Preliminary observations*

502 It should be observed that it is settled case-law that the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the 2006 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23(2) of Regulation No 1/2003 (see, to that effect, and by analogy, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 112 and the case-law cited).

503 The gravity of infringements of EU competition law must be determined by reference to numerous factors such as, in particular, the specific circumstances and context of the case and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 72, and Case C-534/07 P *Prym and Prym Consumer* v *Commission*, paragraph 48 above, paragraph 54).

504 As has been stated in paragraph 26 above, the Commission determined the amounts of the fines by applying the method laid down in the 2006 Guidelines.

505 Although the 2006 Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraph 209 and the case-law cited, and *Carbone-Lorraine* v *Commission*, paragraph 142 above, paragraph 70).

506 In adopting such rules of conduct and announcing through their publication that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraph 211 and the case-law cited, and *Carbone-Lorraine* v *Commission*, paragraph 142 above, paragraph 71).

507 Furthermore, the 2006 Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraphs 211 and 213).

508 The 2006 Guidelines lay down a two-step methodology for setting fines (paragraph 9 of the 2006 Guidelines), and 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. They include, in that regard, the following:

‘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 in point 22.'

509 The 2006 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 of the 2006 Guidelines).

510 In respect of those circumstances, point 29 of the 2006 Guidelines states:

'The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation.'

511 Lastly, as the Court recalled in its judgments of 8 December 2011 in Case C-389/10 P *KME Germany* v *Commission* (paragraph 472 above, paragraph 129) and Case C-272/09 P *KME Germany and Others* v *Commission* ([2011] ECR I-12789, paragraph 102), the Courts of the European Union must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

B – *Contested decision*

512 In the contested decision, the Commission noted that, in accordance with the 2006 Guidelines, the basic amount consists of an amount of up to 30% of the value of a company's sales of goods or services to which the infringement related in a given year, depending on the degree of gravity of the infringement and multiplied by the number of years of the company's participation in the infringement, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of the duration of its participation in the infringement. That basic amount can then be increased or reduced, for each undertaking, if aggravating or mitigating circumstances are present (recitals 313 and 319 of the contested decision).

513 The Commission then indicated that the basic amount of the fine is normally set by reference to the value of the undertakings' sales of goods or services to which the infringement directly related in the relevant geographic area during the last full business year of its participation in the infringement. The Commission observed however, that in the instant case, in view of the short duration of the infringement and the fact that it covered parts of two calendar years, it was appropriate to deviate from that principle, and to use an estimate of the annual value of sales based on the actual value of sales made by the undertakings during the eight months of their participation in the infringement as the basis for the calculation of the basic amount of the fine (recital 314 of the contested decision).

514 The Commission also stated that, in the present case, the infringement related to bananas (fresh fruit), both unripened (green) and ripened (yellow), and that the relevant geographic area covers the three southern European countries of Greece, Italy and Portugal (recitals 315 and 316 of the contested decision).

515 The Commission then indicated that the gravity of the infringement determines the level of the value of sales taken into account in setting the fine and that, in order to determine the specific percentage of the basic amount of the fine, it has 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 (recital 320 of the contested decision).

516 According to the Commission, in the present case, the addressees of the contested decision had participated in a single and continuous infringement of Article 101 TFEU, with a single and common anti-competitive objective, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that parameter, and the infringement involved the coordination of price strategy, including future prices, price levels, price movements and/or price trends and the exchange of information on future market conduct regarding prices, being therefore, by its very nature, among the most harmful restrictions of competition (recitals 321 and 325 of the contested decision).

517 The Commission then indicated, in recitals 326 to 328 of the contested decision, that, in 2004, the estimated overall combined market share for Chiquita and Pacific was 50% in Italy, 30% in Portugal and 65-70% in Greece, whereas in 2005, the estimated overall market share for Chiquita and Pacific was 50% in Italy, 40% in Portugal and 60% in Greece. The Commission also indicated that the cartel covered three Member States, namely Greece, Italy and Portugal, and that the arrangements had been implemented.

518 The Commission concluded that, in the present case, in view of the criteria discussed in recitals 321 to 325 of the contested decision, the proportion of the value of sales to be taken into account should be 15% for all the undertakings concerned (recital 329 of the contested decision).

519 As regards the duration of the infringement, the Commission indicated that it would take into account the actual duration of participation in the infringement of the undertakings involved in this case, namely 8 months and 12 days, rounded down to 8 months, which leads to a multiplier for duration of 0.66 (2/3 of a full year) for each undertaking concerned (recitals 330 and 331 of the contested decision).

520 As regards the additional amount of 15 to 25% of the value of sales included in the basic amount for the purpose of deterrence, the Commission concluded that an additional amount corresponding to 15% of the annual value of sales should be taken into account for all the undertakings concerned (recitals 332 and 333 of the contested decision).

521 Lastly, as regards the adjustment of the basic amount of the fine, the Commission indicated that no aggravating circumstances had been found. As regards mitigating circumstances, the Commission noted that, in the case relating to northern Europe, a reduction of 60% had been applied to the basic amount on the basis that the banana sector was subject to a very specific regulatory regime and that the type of coordination established in that decision related to quotation prices. Since that combination of circumstances did not arise in the present case, the Commission decided that it was appropriate to apply only a reduction of 20% to the basic amount for all the undertakings concerned. Thus, the Commission indicated that, despite the largely identical nature of the regulatory regime applicable at the time of the infringement in Case COMP/39188 — Bananas and in the present case, the price fixing in the present case did not concern quotation prices, which did not exist in southern

Europe, and that there was even evidence that the the collusion in the present case had included the coordination of prices which were at levels of actual prices (recitals 336 to 340 of the contested decision).

C – *The gravity of the infringement*

522 The applicants claim that the Commission clearly failed to assess the gravity of the alleged infringement correctly.

523 In the first place, the applicants criticise the Commission's allegation that Pacific and Chiquita had participated in 'an institutionalised and systemic price-fixing cartel', when the alleged infringement is far removed from a hard-core price-fixing cartel and the behaviour of the parties could, at most, be regarded as a free-standing exchange of unspecified and vague information relating only to general market trends, sporadically taking place during contacts with a legitimate purpose. Consequently, the Commission clearly failed to assess the gravity of the alleged infringement correctly since, by its very nature, it could, under no circumstances, be considered as a restriction of competition by object.

524 That line of argument cannot succeed, since the applicants merely reiterate claims made in contesting the finding of an infringement. It has already been established in the context of the examination of the third plea in law that the applicants have failed to demonstrate that the Commission was not justified in finding that they participated in an institutionalised and systemic price-fixing cartel and that the infringement at issue in the present case constituted a restriction of competition by object.

525 Since point 23 of the 2006 Guidelines states clearly that the proportion of the value of sales taken into account for horizontal price-fixing and market-sharing agreements will generally be set 'at the higher end of the scale', and it is clear from that point that, for the most harmful restrictions, the rate should, at the very least, be above 15%, the Commission was therefore entitled, in the present case, to apply a rate of 15%, which is the minimum of the 'higher end of the scale' (see, to that effect, Joined Cases T-204/08 and T-212/08 *Team Relocations and Others* v *Commission* [2011] ECR II-3569, paragraph 94; Case T-199/08 *Ziegler* v *Commission* [2011] ECR II-3507, paragraph 141; and Joined Cases T-208/08 and T-209/08 *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission* [2011] ECR II-3639, paragraph 131). It must be emphasised that, by setting an amount of 15% of the value of the parties' sales, the Commission applied a proportion which was half of the 30% which may be generally applied in horizontal agreements or concerted practices fixing prices (see, to that effect, *Fresh Del Monte Produce* v *Commission*, paragraph 388 above, paragraph 776).

526 In the second place, the applicants claim that the limited combined market shares and the very limited geographical scope of the infringement, which covered only three Member States, representing only 15% of the overall banana market during the relevant period, should also be taken into account when setting the basic amount of the fine.

527 That line of argument must be rejected.

528 As regards the proportion of the value of sales taken into account in order to set the variable part of the basic amount in accordance with points 19 to 24 of the 206 Guidelines, namely, in the present case, 15% (see paragraph 518 above), it must be recalled that the 2006 Guidelines expressly state, in point 20, that '[t]he 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'. The 2006 Guidelines have also brought about a fundamental change in the methodology for calculating fines. In particular, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') has been abolished, and a scale from 0% to 30% introduced in order to enable finer distinctions to be made. Under point 19 of the 2006 Guidelines, the basic amount of the fine must be 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement'. 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', in accordance with point 21 of the 2006 Guidelines (*Ziegler* v *Commission*, paragraph 525 above, paragraph 139, and *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission*, paragraph 525 above, paragraph 129).

529 Therefore, the Commission cannot use its margin of discretion in the imposition of fines, and thereby determine the precise level from 0% to 30%, without also taking into account the particular circumstances of the case. Thus, point 22 of the 2006 Guidelines provides that, '[i]n 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' (*Ziegler* v *Commission*, paragraph 525 above, paragraph 140, and *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission*, paragraph 525 above, paragraph 130).

530 That difficulty in determining an exact percentage is reduced to a certain extent in the case of secret horizontal price-fixing and market-sharing agreements in which, under point 23 of the 2006 Guidelines, the proportion of the value of sales taken into account will generally be set 'at the higher end of the scale'. It is clear from that point that, for the most harmful restrictions, the rate should, at the very least, be above 15% (*Ziegler* v *Commission*, paragraph 525 above, paragraph 141, and *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission*, paragraph 525 above, paragraph 131).

531 In the present case, it can be seen from recital 329 of the contested decision that the rate of 15% was set on the basis of the nature of the infringement alone, whereas the other factors referred to in recitals 326 to 328 of the contested decision — namely the combined market share, the geographic scope and the implementation of the infringement — had no effect on the degree of gravity taken into account in order to determine the basic amount.

532 Where the Commission simply applies a rate equal or almost equal to the minimum rate laid down for the most serious restrictions, it is not necessary to take into account additional factors or circumstances. That would be required only if a higher rate had to be established (*Ziegler* v *Commission*, paragraph 525 above, paragraph 142, and *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission*, paragraph 525 above, paragraph 132).

533 Furthermore, as the Commission notes, the value of sales taken into account in order to set the basic amount of the fine, namely the sales in Portugal, Italy and Greece, already reflects the limited geographic scope of the cartel.

534 In the third place, the applicants claim that the Commission has not demonstrated that the alleged infringement had any effect on the market, nor even carried out any analysis of the actual impact of the alleged infringement, whereas, in the present case, it certainly cannot be assumed that an exchange of information on general market trends between two suppliers, one of which was only a small supplier, in an extremely regulated and transparent market, could have had any effect on the market and, moreover, the actual prices and price movements in the relevant period were not in line with what could have been expected had a price-fixing cartel been implemented.

535 That line of argument cannot be accepted either.

536 It must be borne in mind, in that respect, that the first example of a cartel given in Article 101(1)(a) TFEU, expressly declared incompatible with the internal market, is precisely that which 'directly or indirectly [fixes] purchase or selling prices or any other trading conditions'. The practice that was the

object of the cartel is expressly prohibited by Article 101(1) TFEU, as it involves inherent restrictions on competition in the internal market (*Fresh Del Monte Produce* v *Commission*, paragraph 388 above, paragraph 768).

537 Article 101 TFEU, 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 328 above, paragraphs 38 and 39).

538 The system of penalties for infringement of the competition rules, as established by Regulations No 17 and No 1/2003 and interpreted by the case-law, shows that, by reason of their very nature, cartels merit the severest fines. The effect of an anti-competitive practice is not in itself a decisive factor for determining the level of fines (judgment of 12 November 2009 in Case C-554/08 P *Carbone-Lorraine* v *Commission*, not published in the ECR, paragraph 44, and *Fresh Del Monte Produce* v *Commission*, paragraph 388 above, paragraph 770).

539 It must also be noted that, unlike the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3), the 2006 Guidelines no longer mention the need to take account of 'the effective economic capacity of offenders to cause significant damage to other operators' in order to assess gravity, nor the 'actual impact [of the infringement] on the market, where this can be measured' (*Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission*, paragraph 525 above, paragraph 128, and *Fresh Del Monte Produce* v *Commission*, paragraph 388 above, paragraph 772). Accordingly, the Commission was not required to consider the effect of the infringement in order to determine the proportion of the value of sales to be taken into account on the basis of the gravity of the infringement in accordance with points 19 to 24 of the 2006 Guidelines.

540 It does not appear from the applicants' line of argument that they call into question the lawfulness of the 2006 Guidelines.

541 It follows from the foregoing that the applicants' line of argument relating to the incorrect assessment of the gravity of the infringement must be rejected.

D – *The duration of the infringement*

542 The applicants claim that the Commission failed to assess correctly the duration of the infringement. They submit that the Commission did not prove to the requisite legal standard that the infringement started on 28 July 2004 and lasted until 8 April 2005, with the result that the duration of the alleged infringement must be reduced to a single week at most.

543 It must be pointed out that the applicants reiterate the claims made in contesting the evidence relied on by the Commission, which have already been examined and rejected in the context of the third plea in law. However, it must be recalled that it has been found in that examination that the Commission erred in concluding that the infringement continued between 28 July 2004 and 8 April 2005 (see paragraphs 497 and 499 above). Accordingly, the Commission wrongly asserted, in recital 306 of the contested decision, that the duration of the infringement committed by the applicants was 8 months and 12 days. Since it was found in the examination of the third plea in law (see paragraph 498 above) that the infringement lasted from 28 July 2004 to 11 August 2004 and from 20 January 2005 to 8 April 2005, it must be concluded that the duration of the infringement was 3 months and 11 days.

E – *The mitigating circumstances*

544 The applicants submit that, in the decision adopted in Case COMP/39188 — Bananas, the Commission reduced the basic amount of the fine by 60% for all the parties on the basis that the banana sector was subject to a very specific regulatory regime and that the type of coordination established in that decision related to quotation prices (recital 336 of the contested decision).

545 The applicants submit that, while the Commission explicitly recognised that the regulatory regime which applied at the time of the infringement in the Commission decision in Case COMP/39188 — Bananas and that in the present case operated according to rules which were to a large extent identical, it nevertheless refused to grant the same reduction as in Case COMP/39188 — Bananas in the present case, on the ground that the type of quotation prices established in Case COMP/39188 — Bananas did not exist in southern Europe and that the alleged infringement in southern Europe involved coordination of prices which were at levels of actual prices, with the result that the basic amount of the fine was reduced by only 20% (recitals 338 and 339 of the contested decision).

546 According to the applicants, PFCI and Chiquita did not enter into any form of price-fixing arrangement or coordination on pricing, let alone coordinated at the level of actual prices, and the very sporadic exchange of vague market trend information in the course of contacts with a legitimate purpose was much less potentially harmful than the weekly organised discussions on quotation prices which were the subject-matter of Case COMP/39188 — Bananas. Accordingly, they submit, it is appropriate to apply a reduction of at least 60% to any fine imposed on Pacific in the present case.

547 That argument must be rejected.

548 As a preliminary, it must be recalled, as already indicated in paragraph 510 above, that paragraph 29 of the 2006 Guidelines provides for the basic amount of fines to be varied in accordance with certain aggravating and mitigating circumstances and establishes, for that purpose, a non-exhaustive list of mitigating circumstances which, under certain conditions, may lead to a reduction in the basic amount of a fine (see, to that effect, Case T-348/08 *Aragonesas Industrias y Energía* v *Commission* [2011] ECR II-7583, paragraphs 279 and 280).

549 In the absence of any binding indication in the 2006 Guidelines regarding the mitigating circumstances that may be taken into account, it must be concluded that the Commission has retained a degree of latitude in making a global assessment of the extent to which a reduction of fines may be made in respect of mitigating circumstances (judgment of 15 September 2011 in Case T-216/06 *Lucite International and Lucite International UK* v *Commission*, not published in the ECR, paragraph 92).

550 First of all, it is again necessary to reject the applicants' assertion that PFCI and Chiquita did not enter into any form of price-fixing arrangement or coordination on pricing, or coordinate at the level of actual prices, since it was established in the examination of the third plea in law that the Commission was entitled to find that the parties had taken part in an institutionalised and systematic price-fixing cartel, which also included the coordination of prices which were at the level of actual prices.

551 Next, as the Commission notes (recital 339 of the contested decision), the reduction granted in the case relating to northern Europe was justified by mutually reinforcing factors, namely the existence of the specific regulatory regime and the coordination of quotation prices only, whereas the second of those two factors was not established in the infringement found in the present case, with the result that that part of a body of mutually reinforcing factors justifying a mitigating factor of 60% in the case relating to northern Europe was missing in the present case.

552 Lastly, 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). The Commission enjoys a wide discretion in setting the amount of fines and is not bound by assessments made by it in the past. It follows that the applicants cannot invoke the Commission's decision-making policy as an argument before the Courts of the European Union (*Archer Daniels Midland* v *Commission*, paragraph 503 above, paragraph 82, and *Erste Group Bank and Others* v *Commission*, paragraph 112 above, paragraph 123).

553 The same conclusion must be drawn in relation to the claim for a reduction of the fine on the basis that the Commission has granted reductions in other decisions on account of 'exceptional circumstances'. The mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure. In fixing the amount of fines, the Commission has a discretion which allows it to raise the general level of fines at any time, within the limits set out in Regulation No 1/2003, if that is necessary to ensure the implementation of the European Union competition policy (*Dansk Rørindustri and Others* v *Commission*, paragraph 124 above, paragraphs 190 and 191).

554 It follows from the foregoing that the applicants' claim alleging that the reduction granted on the basis of mitigating circumstances was insufficient must be rejected.

F – *Respect for the principle of non-discrimination in the calculation of the fine*

555 The applicants claim that the Commission's file contains clear documentary evidence of specific price discussions between competitors which did not involve PFCI and cites in that regard an internal e-mail of [*confidential*] of 2 March 2005, which reads as follows: 'I spoke to [*confidential*] who confirmed that they attempt to increase by 0.5 EUR, positioning at 17.00 everywhere'. Given that the Commission decided not to fine [*confidential*] or [*confidential*], notwithstanding the evidence in the file, fining PFCI constitutes a clear breach of the principle of non-discrimination, as enshrined in Article 20 of the Charter of Fundamental Rights.

556 That argument cannot be accepted, since the fact that other undertakings were not penalised may not be used as an argument by the applicants in order themselves to escape a penalty imposed for breach of Article 101 TFEU when the circumstances of the other undertakings are not even the subject of proceedings before the Court (*Hoek Loos* v *Commission*, paragraph 461 above, paragraph 62 and the case-law cited).

557 Thus, even if the situation of other economic operators to which the decision was not addressed were comparable to that of the applicants, it is settled case-law that that could not constitute a ground for setting aside the finding of an infringement by the applicants, provided that that infringement was properly established (*Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 176 above, paragraph 146; *KE KELIT* v *Commission*, paragraph 461 above, paragraph 101; and *Tokai Carbon and Others* v *Commission*, paragraph 461 above, paragraph 397).

558 Lastly, even if the Commission wrongfully omitted to penalise [*confidential*] and [*confidential*], it must be observed that the principle of equal treatment must be reconciled with the principle of legality, according to which no person may rely, in support of his claim, on an unlawful act committed in favour of another (Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 160, confirmed on appeal in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 367).

559 It follows from the foregoing that the claim alleging breach of the principle of non-discrimination in the calculation of the fine must be rejected, as must the plea in law in its entirety.

III – *The determination of the final amount of the fine*

560 In the first place, it must be recalled that the Commission indicated, in recital 314 of the contested decision, that the basic amount of the fine to be imposed on the undertakings concerned was to be set by reference to the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA. The Commission then indicated that, while it would normally use the sales made by the undertakings during the last full year of their participation in the infringement, in this case, in view of the short duration of the infringement and the fact that it covered parts of two calendar years, it was appropriate to deviate from that principle. Accordingly, the Commission used an estimate of the annual value of sales based on the actual value of sales made by the undertakings during the eight months of their participation in the infringement, namely from August 2004 to March 2005, as the basis for the calculation of the basic amount of the fine. As regards Pacific, that estimate of the annual value of sales amounted to EUR 44 599 308 (recital 318 of the contested decision).

561 It must be noted that the single and repeated infringement imputed to the applicants in the present case began on 28 July 2004 and ended on 8 April 2005. It must also be noted that the applicants do not contest the Commission's calculation set out in paragraph 560 above and the method used in order to determine the estimate of the annual value of sales on the basis of the actual value of sales made during the approximately eight months between the beginning of the single and repeated infringement and its end, used for the purpose of calculating the basic amount of the fine.

562 In the second place, it must be recalled, as the Commission notes (recital 313 of the contested decision) and in accordance with the points set out in paragraph 508 above, that, under the 2006 Guidelines, the basic amount of the fine included, for each party, an 'entry fee' and a variable amount. The 'entry fee' corresponds to a proportion of the value of sales, whereas the variable amount corresponds to a proportion of that value of sales multiplied by the number of years of the company's participation in the infringement.

563 In the present case, the Commission set the 'entry fee' at 15% of the value of sales (recital 333 of the contested decision). As regards the variable amount, the Commission set the proportion of the value of sales to be taken into account for the variable amount at 15% (recital 329 of the contested decision) and then indicated that, rather than rounding up the periods as suggested in point 24 of the 2006 Guidelines, it would take into account the actual duration of participation in the infringement of the undertakings involved in the infringement on a rounded down monthly and pro rata basis in order to take fully into account the duration of the participation of each undertaking (recital 331 of the contested decision). In the present case, as the duration found by the Commission was 8 months and 12 days, the calculation was based on 8 months, which leads to a multiplier for duration of 0.66 (two thirds of a full year).

564 Since it has been held in paragraphs 498 and 543 above that the duration of the single and repeated infringement was not 8 months and 12 days, but rather 3 months and 11 days, the multiplier to be applied for the duration of the infringement is not 0.66 (two thirds of a full year), but 0.25 (a quarter of a full year). However, the proportion of the value of sales used by the Commission to calculate the two parts of the basic amount remains the same, namely 15%. The basic amount of the fine is therefore calculated as follows: the variable part of the basic amount is obtained by multiplying 15% of the value of sales (EUR 6 689 896.20) by 0.25 (EUR 1 672 474.05), whereas the fixed part of the basic amount (the 'entry fee') remains the same as that calculated by the Commission, namely 15% of the value of sales (EUR 6 689 896.20), with the result that the final basic amount, rounded down, amounts to EUR 8 362 000. In accordance with what is indicated in recital 340 of the contested decision, that basic amount must then be reduced by 20% on the basis of mitigating circumstances, which leaves EUR 6 689 600. Finally, that amount must be rounded down to EUR 6 689 000.

Costs

565 Pursuant to Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

566 In the present case, since the applicants have obtained partial annulment of the contested decision, the Commission must be ordered to bear two thirds of the applicants' costs and half of its own costs. The applicants are to bear a third of their own costs and half of the Commission's costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision C(2011) 7273 final of 12 October 2011 relating to a proceeding under Article 101 [TFEU] (Case COMP/39482 — Exotic Fruit (Bananas)) in so far as it refers to the period from 11 August 2004 to 19 January 2005, to the extent that it concerns FSL Holdings, Firma Léon Van Parys and Pacific Fruit Company Italy SpA;**

2. **Annuls Article 2 of Decision C(2011) 7273 final in so far as it sets the amount of the fine imposed on FSL Holdings, Firma Léon Van Parys and Pacific Fruit Company Italy SpA at EUR 8 919 000;**

3. **Sets the amount of the fine imposed on FSL Holdings, Firma Léon Van Parys and Pacific Fruit Company Italy in Article 2 of Decision C(2011) 7273 final at EUR 6 689 000;**

4. **Dismisses the action as to the remainder;**

5. **Orders FSL Holdings, Firma Léon Van Parys and Pacific Fruit Company Italy to bear a third of their own costs and half of the European Commission's costs;**

6. **Orders the Commission to bear half of its own costs and two thirds of the costs of FSL Holdings, of Firma Léon Van Parys and of Pacific Fruit Company Italy.**

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 16 June 2015.

[Signatures]

Table of contents