Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 11 December 2014[1]

Joined Cases C-293/13 P and C-294/13 P

Fresh Del Monte Produce Inc. and Others
v

European Commission and Others

(Appeals — Competition — Cartels — Concerted practices — European banana market — Economic unit between a parent company and its subsidiary — Voluntary nature of the responses to simple requests for information from the Commission — Reduction of the fine for cooperation with the Commission during the administrative procedure — Restriction of competition by object — Single and continuous infringement)

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1 — Original language: German.

I – **Introduction**

1. The present appeal proceedings present the Court with the opportunity to adopt a position on two problem areas which are of tremendous significance for the future administrative practice of the European Commission in its role as competition authority.

2. First, it is necessary to clarify the legal conditions under which a parent company may be held jointly and severally liable for the cartel offences committed by its subsidiary where that subsidiary is *not* a 100% or virtually 100% subsidiary.

3. Secondly, it is necessary to clarify whether, when calculating a fine, a mitigating circumstance must always be found to exist simply where, in the course of the administrative procedure, an undertaking duly responds to requests for information from the Commission, or only where the undertaking provides the Commission with information on its own initiative, that is to say not just *voluntarily* but also *spontaneously*.

4. In addition, the present appeal proceedings also raise a number of detailed questions in connection with the concepts of 'concerted practices', 'restrictions of competition by object' and 'single and continuous infringements' used in European competition law.

5. All those questions are raised in the context of a 'banana cartel', the members of which have been found guilty of anti-competitive concerted practices in several Member States of the European Union. By decision of 15 October 2008,[2] the European Commission imposed fines amounting to millions of euros on certain participants in the cartel for infringement of Article 81 EC (now Article 101 TFEU). By judgment of 14 March 2013 (Case T-587/08),[3] the General Court of the European Union significantly reduced the fine imposed by the Commission on Fresh Del Monte Produce following an action brought by that undertaking. It appears that that judgment at first instance was unable to meet with general satisfaction, and it is now being challenged by the various parties to the proceedings, in some cases by means of appeals and in others by means of cross-appeals, upon which the Court of Justice will have to rule jointly in the present proceedings.

6. The present proceedings in Joined Cases C-293/13 P and C-294/13 P are closely connected with the appeal proceedings in Case C-286/13 P, in which I am likewise delivering my Opinion today. However, with the exception of the issue of the restriction of competition by object, the legal questions raised in that case differ considerably from those to be settled in the present proceedings.

II – **Background to the legal dispute**

A – *The legal relationships between Del Monte and Weichert*

7. The Fresh Del Monte Produce group[4] is one of the world's leading vertically integrated producers, marketers and distributors of fresh and fresh-cut fruit and vegetables, as well as a leading producer and distributor of prepared fruits and vegetables, juices, beverages, snacks and desserts in Europe, the United States of America, the Middle East and Africa. It markets its products, including bananas, worldwide under the Del Monte brand.

2 — Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39.188 — Bananas, summarised in OJ 2009 C 189, p. 12), 'the contested decision'.

3 — *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, 'the judgment under appeal' or 'the judgment of the General Court'.

4 — 'The Del Monte group'.

8. Internationale Fruchtimport Gesellschaft Weichert & Co. KG [5] was, at the material time, a German limited liability partnership company, primarily involved in the marketing of bananas, pineapples and other exotic fruits in Northern Europe. From 24 June 1994 until 31 December 2002 Del Monte held an indirect 80% shareholding in Weichert as a limited partner, through its wholly owned subsidiary Westeuropa-Amerika-Linie GmbH, which Del Monte had purchased in 1994 through its subsidiary Global Reefer Carriers Ltd. [6] Weichert was until 31 December 2002 the exclusive distributor for Northern Europe of Del-Monte-branded bananas.

B – *The administrative procedure and the contested decision*

9. The subject-matter of the administrative procedure before the Commission was a concerted practice involving several undertakings active in the banana trade ('the undertakings involved') — including Weichert and, through Weichert, Del Monte too — by which they coordinated their quotation prices for bananas marketed in Northern Europe in the years 2000, 2001 and 2002.

10. According to the findings of the General Court, bananas are normally transported green by ship from Latin American ports to Northern Europe, where they usually arrive once a week.

11. The bananas are either delivered green directly to their European buyers or ripened and then delivered approximately one week later as yellow bananas. Ripening can be carried out by the importer or on his behalf or be organised by the buyer himself. Importers' customers are generally ripeners or retail chains.

12. During the relevant period, the prices of those bananas were fixed in Northern Europe at weekly intervals on the basis of quotation prices for green bananas. The quotation price for yellow bananas was normally calculated on the basis of the quotation price for green bananas plus a ripening fee. The prices paid by retailers and distributors (known as 'actual prices' or 'transaction prices') were then based either on negotiations taking place on a weekly basis, normally on the Thursday afternoon or Friday, or on supply contracts with pre-established pricing formulae.

13. The undertakings engaged, first, in bilateral pre-pricing communications during which factors relevant to the weekly setting of quotation prices were discussed, price trends were discussed or disclosed, or indications of expected quotation prices for the weeks ahead were given. Those communications took place before the undertakings involved set their quotation prices, usually on Wednesdays, and all related to future quotation prices. The aforesaid bilateral communications were designed to reduce uncertainty as to the conduct of the undertakings with respect to the quotation prices to be set by them on Thursday mornings.

14. In addition, after setting their quotation prices on Thursday mornings, the undertakings involved exchanged their quotation prices bilaterally. That exchange of information enabled them to monitor the individual pricing decisions in the light of the previous pre-pricing communications and reinforced their cooperation.

15. The quotation prices in question served at least as market signals, market trends and/or indications as to the intended development of banana prices. In some transactions, moreover, prices were directly linked to quotation prices on the basis of contractually agreed pricing formulae.

5 — 'Weichert'.

6 — For reasons of simplification, I will refer to Del Monte in the remainder of this Opinion, including where one of the abovementioned subsidiaries is meant.

16. The information received from competitors was necessarily taken into account by the undertakings involved when determining their conduct on the market; Chiquita and Dole even expressly admitted to having done so.

17. On 8 April 2005, relying on the Leniency Notice of 2002,[7] Chiquita submitted an application for leniency to the Commission. After carrying out inspections at various undertakings, inter alia at the premises of Del Monte and Weichert, and sending several requests for information, on 20 July 2007 the Commission sent a statement of objections to numerous undertakings active on the market for bananas. In the further course of the administrative procedure, the undertakings concerned were granted access to the Commission's file, and the submissions of those undertakings were heard from 4 to 6 February 2008. On 15 October 2008, the Commission finally adopted the contested decision.

18. In the contested decision, the Commission held that several undertakings, including Del Monte and Weichert, had infringed Article 81 EC by participating in a concerted practice by which they coordinated quotation prices for bananas. From a geographical perspective, that infringement covered Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.[8] The Commission found Del Monte and Weichert to have participated in the infringement over the period from 1 January 2000 to 31 December 2002.[9]

19. In the view of the Commission, the effects of the concerted practice upon trade between Member States were appreciable, since the volume of the cross-border banana trade in Northern Europe is substantial and the anti-competitive practices covered a significant part of the Community.

20. The Commission concluded that the pre-pricing communications between Dole and Chiquita and between Dole and Weichert were capable of influencing the fixing of prices by economic operators, in so far as they related to the fixing of prices and constituted a concerted practice, which had as its object the restriction of competition within the meaning of Article 81 EC.

21. All the anti-competitive arrangements described in the contested decision were regarded by the Commission as a single and continuous infringement, the purpose of which was to restrict competition in the Community within the meaning of Article 81 EC. The Commission held Chiquita and Dole to be responsible for the whole infringement, while it held Weichert responsible only for the part of the infringement in which it had participated, that is for the part which concerned the collusive exchanges with Dole.

22. For their participation in the infringement, in the contested decision the Commission imposed fines on several undertakings involved. The Commission imposed on Weichert and Del Monte, jointly and severally, a fine in the amount of EUR 14.7 million.[10] In the view of the Commission, a key factor in the ordering of that joint and several liability was the fact that Del Monte was able — jointly with the general partners of Weichert — to exercise decisive influence on the way Weichert ran its business, and did in fact also exercise such influence during the period of the infringement, with the result that Weichert was unable to determine independently its own conduct on the market and formed an economic unit with Del Monte.

23. Several of the addressees of the contested decision sought legal protection at first instance by way of actions for annulment before the General Court. Del Monte brought an action on 31 December 2008 and was supported in its form of order sought by Weichert as an intervener. Del Monte's action was successful in so far as, by its judgment of 14 March 2013, the General Court reduced the fine

7 — Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), 'the Leniency Notice'.

8 — Article 1 of the contested decision.

9 — Article 1(g) and (h) of the contested decision.

10 — Article 2(c) of the contested decision.

imposed by the Commission on Del Monte and Weichert jointly and severally to EUR 8.82 million. The General Court dismissed the action as to the remainder and ordered Del Monte to bear its own costs and to pay three quarters of the costs incurred by the Commission; Weichert was ordered to bear its own costs and the Commission one quarter of its own costs.

III – **Procedure before the Court and forms of order sought by the parties**

24. Appeals and cross-appeals have been lodged against the judgment of the General Court by various parties: in Case C-293/13 P, an appeal by Del Monte by written pleading of 24 May 2013 and a cross-appeal by Weichert by written pleading of 7 August 2013; in Case C-294/13 P, an appeal by the Commission by written pleading of 27 May 2013, a cross-appeal by Del Monte by written pleading of 1 August 2013 and a further cross-appeal by Weichert by written pleading of 7 August 2013.

A – *Forms of order sought in Case C-293/13 P*

25. By its appeal in Case C-293/13 P, Del Monte, as the appellant, claims that the Court should:

— set aside the judgment under appeal;

— annul the contested decision so far as it pertains to the appellant; and

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

26. The Commission, for its part, contends that the Court should:

— dismiss the appeal, and

— order the appellant to pay the costs.

27. Weichert claims that the Court should:

— dismiss the appeal brought by Del Monte in relation to the liability of the parent company;

— allow the appeal brought by Del Monte with regard to the question of the single and continuous infringement;

— set aside the judgment under appeal and annul the contested decision in its entirety;

— in the alternative, set aside the judgment under appeal in so far as it upholds the contested decision in relation to the question of the single and continuous infringement, and reduce the fine imposed on Del Monte and Weichert accordingly; and,

in addition,

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

28. By its cross-appeal in Case C-293/13 P, Weichert claims that the Court should:

— set aside the judgment under appeal;

— annul the contested decision; and

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

29. In its response to the cross-appeal, Del Monte concurs, in essence, with the form of order sought by Weichert,[11] whereas the Commission contends that the Court should dismiss the cross-appeal and order that the costs be borne by the cross-appellant.

B – *Forms of order sought in Case C-294/13 P*

30. By its appeal in Case C-294/13 P, the Commission, as the appellant, claims that the Court should:

— set aside point 1 of the operative part of the judgment under appeal;

— give final judgment by setting the amount of the fine for Del Monte Produce at EUR 9 800 000; and

— order Del Monte to pay the costs of the appeal and such proportion of the costs of the proceedings before the General Court as the Court of Justice considers appropriate.

31. Del Monte contends, for its part, that the Court should:

— dismiss the Commission's appeal, and

— order the Commission to pay the costs.

32. For its part, Weichert contends that the Court should:

— dismiss the Commission's appeal in its entirety, and

— order the Commission to pay the costs of the proceedings both at first instance and on appeal.

33. Furthermore, in its cross-appeal in Case C-294/13 P, Weichert claims that the Court should also:

— set aside the judgment under appeal in so far as it finds that Weichert cannot rely on the protection against self-incrimination;

— reduce the fine imposed jointly and severally on Del Monte and Weichert, so as to take into account the fact that Weichert cooperated with the Commission beyond its legal obligation by responding to the requests for information;

— annul the contested decision; and

— order the Commission to pay the costs of the proceedings both at first instance and on appeal.

34. In its response to that cross-appeal, Del Monte contends, in the event that the Commission's appeal were to be successful, that the Court should:

— set aside the judgment under appeal in so far as it holds in paragraph 839 thereof that the right to remain silent does not apply to situations where the Commission issues a simple information request;

11 — However, Del Monte claims that the Court should annul the contested decision only in so far as it concerns the appellant.

— refer the case back to the General Court so that the General Court may examine whether the information requested by the Commission was self-incriminatory in nature and the fine imposed on Weichert and Del Monte should have been reduced as a result; and

— order the Commission to pay the costs.

35. Del Monte also seeks that same form of order by its own cross appeal in Case C-294/13 P.

36. For its part, the Commission contends that the Court should dismiss both cross-appeals and order that the costs be borne by the cross-appellants.

C – *Joining of the cases and the hearing*

37. By order of 22 July 2014, the President of the Second Chamber of the Court joined Cases C-293/13 P and C-294/13 P for the purposes of the oral procedure and the judgment. The hearing before the Court took place on 9 October 2014.

IV – **Assessment of the appeal**

A – *Preliminary questions concerning whether Weichert may participate in the proceedings*

38. Before I consider in detail the grounds of appeal put forward by the various parties to the proceedings in their principal appeals and cross-appeals, it is necessary to clarify whether Weichert is in fact entitled to participate in the two sets of appeal proceedings in Cases C-293/13 P and C-294/13 P. Its participation has been called into question by the Commission.

39. The Commission's plea of admissibility must be considered in light of the fact that Weichert, as an addressee of the contested decision, failed to meet the deadline to lodge its own action for annulment of that decision. [12] The contested decision has therefore become final with regard to Weichert. [13]

40. Weichert was able to participate in the proceedings at first instance before the General Court only because the General Court granted it leave to intervene in support of Del Monte. Although considerable doubts as to the validity of that approach are permitted, the legality of Weichert's intervention in the proceedings at first instance does not, as such, form the subject-matter of the present appeal proceedings.

41. On the basis of its standing as an intervener at first instance, Weichert has participated in the present appeal proceedings by the submission of a response in both Case C-293/13 P and Case C-294/13 P and, in addition, by the submission of a cross-appeal in each case. These two forms of participation in proceedings must be carefully distinguished from one another.

12 — The action for annulment brought by Weichert was dismissed as manifestly inadmissible by the General Court with final effect because of the failure to comply with the prescribed time-limit (see *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, T-2/09, EU:T:2009:478, and *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, C-73/10 P, EU:C:2010:684).

13 — *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraphs 52 to 57. In this regard, the present case differs fundamentally from *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, in which the parent company and the subsidiary had each brought separate actions for annulment against a decision of the Commission.

1. Weichert's ability to submit a response

42. It should be recalled that, in accordance with Article 172 of the Rules of Procedure of the Court of Justice, any party to the relevant case before the General Court 'having an interest in the appeal being allowed or dismissed' may submit a response within two months after service on him of the appeal.

43. Accordingly, interveners at first instance such as Weichert may also, in principle, participate in appeal proceedings by submitting a response to the appeal, provided that they have an interest in the success or failure of the appeal lodged by another party to the proceedings.

44. The interest in taking part in such appeal proceedings does not necessarily coincide with the interest which must be established for leave to be granted to intervene in proceedings at first instance (second paragraph of Article 40 of the Statute of the Court of Justice). Accordingly, if leave is granted to a party to intervene before the General Court, this does not automatically mean that that party may participate in the appeal proceedings before the Court of Justice. The interest in being a party to any of these proceedings must rather always be assessed having regard to the particular subject-matter of the proceedings. Whilst the contested decision and its legality form the subject-matter of the proceedings before the General Court, the proceedings before the Court of Justice are concerned with the judgment under appeal and whether it should be upheld or set aside on legal grounds.

45. In accordance with the settled case-law on the interest in bringing proceedings, a party should also always be found to have an interest in participating in appeal proceedings where those proceedings are likely, if successful, to procure an advantage to the party submitting the response.[14] Such an advantage does not necessarily have to be of a legal nature. Depending on the particular case, an economic or moral interest may justify participation in the appeal proceedings.

46. Contrary to what the Commission appears to assume, in the present case Weichert quite clearly has an interest in the outcome of the two sets of appeal proceedings in Cases C-293/13 P and C-294/13 P. Indeed, in both cases, the success or failure of the principal appeals lodged by Del Monte (C-293/13 P) and by the Commission (C-294/13 P) and of the cross-appeal lodged by Del Monte (C-293/13 P) has considerable legal and economic implications for Weichert.

47. It is true that Weichert can no longer, in principle, call into question its own involvement in the infringement or its obligation to pay a fine, since it did not itself bring an action against the contested decision in good time and that decision has thus become final with regard to it. All claims and arguments advanced in the responses and in Weichert's oral submissions seeking the annulment of the contested decision as such are therefore inadmissible.

48. However, depending on how the Court rules in Case C-293/13 P, Weichert must pay the fine set either alone or jointly and severally with Del Monte; in the event of the joint and several liability of Del Monte, Weichert may eventually be able to obtain redress, in whole or in part, from Del Monte. In addition, depending on how the Court rules in Case C-294/13 P, the amount of the fine which Weichert is jointly and severally liable to pay may be increased or reduced. Weichert has a legitimate interest in submitting its observations on all associated questions of law, and thus its appearance before the Court is justified.

49. In this respect, pursuant to Article 172 of the Rules of Procedure, Weichert was therefore entitled to submit a response in both cases and, in that way, to participate in the appeal proceedings, albeit solely in relation to the aspects just mentioned in point 48.

14 — *Rendo and Others* v *Commission*, C-19/93 P, EU:C:1995:339, paragraph 13; *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraph 23; and *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 43.

2. Weichert's entitlement to submit cross-appeals

50. The situation is not the same with regard to Weichert's two cross-appeals in Cases C-293/13 P and C-294/13 P.

51. It is true that, in accordance with Article 172 in conjunction with Article 176(1) of the Rules of Procedure of the Court of Justice, in order to submit a cross-appeal, the cross-appellant must also have been a party to the relevant case before the General Court and have an 'interest in the appeal being allowed or dismissed'.

52. But that is not sufficient: Under the second sentence of the second paragraph of Article 56 of the Statute of the Court of Justice, a non-privileged intervener at first instance may bring an appeal only where, in addition, the contested decision of the General Court 'directly affects' it. That provision of the Statute, a provision enshrined in primary law and therefore ranking above the Rules of Procedure, would be rendered meaningless if, without further ado, it were to be ascribed the same content as the requirement of an 'interest in the appeal being allowed or dismissed', which — in accordance with Article 172 of the Rules of Procedure — already applies in any case.

53. In other words, if it wishes to bring an appeal against the judgment of the General Court, a non-privileged intervener at first instance must thus satisfy an additional condition of admissibility.[15] The strictness of this approach can be explained by the procedural status of an appellant, who is ultimately involved in determining the subject-matter of the proceedings before the Court of Justice by means of the pleas in law and legal arguments advanced by it. Such an opportunity is not afforded to the other parties to the proceedings, who simply respond to an appeal which has already been brought.

54. Similarly, a non-privileged intervener at first instance who wishes to submit a *cross-appeal* likewise has to be directly affected by the contested decision of the General Court. This is because, firstly, there is nothing in the Rules of Procedure to suggest that less strict conditions of admissibility would apply specifically to cross-appeals, and, secondly, the second sentence of the second paragraph of Article 56 of the Statute applies indiscriminately to all types of appeals — to principal appeals and cross-appeals equally.

55. It is true that a cross-appeal is ancillary to the principal appeal;[16] however, it allows the cross-appellant, in a manner wholly comparable to the principal appellant, to be involved in determining the subject-matter of the proceedings before the Court by means of its own pleas in law and legal arguments, particularly since the arguments advanced in its cross-appeal must be separate from the pleas in law and arguments relied on in its response (Article 178(3) of the Rules of Procedure). The requirement of being 'directly affected', which goes beyond the mere requirement of an interest in the outcome of the proceedings (Article 172 in conjunction with Article 176(1) of the Rules of Procedure), is therefore likewise justified as an additional condition of admissibility applicable to cross-appeals.

56. However, what precisely does that condition of admissibility mean?

57. An appellant or cross-appellant is *directly affected* within the meaning of the second sentence of the second paragraph of Article 56 of the Statute where the judgment under appeal brings about a detrimental change in that party's own legal position or adversely affects its own economic or moral interests. That judgment must thus entail a *material adverse effect* for the appellant or cross-appellant.

15 — See, to the same effect, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 55.

16 — See Article 183 of the Rules of Procedure.

58. This is not the case here as far as Weichert is concerned.

59. The judgment under appeal brought about a significant reduction in the fine imposed jointly and severally on Del Monte and Weichert. That reduction did not adversely affect Weichert but was rather of benefit to it.

60. Admittedly, Weichert is and remains adversely affected to the extent that it has been found to have participated in an infringement of Article 81 EC in the first place and is required to pay a fine, albeit a significantly reduced one. However, that adverse effect on Weichert does *not* follow *directly* from the judgment under appeal, but rather from the contested decision.

61. By contrast, Del Monte's liability for the infringement alone forms the subject-matter of the present proceedings. By its action for annulment brought before the General Court, Del Monte claimed only that the General Court should annul Articles 1 to 4 of the contested decision *in so far as they concern the applicant* (i.e. Del Monte).[17] Accordingly, the judgment under appeal is likewise concerned solely with the liability borne by Del Monte. The General Court examines the conduct of Weichert at most in so far as it is relevant to the assessment of Del Monte's liability.

62. If Weichert had wanted to contest its own liability for the infringement before the General Court, it would undoubtedly have been itself entitled — unlike the interveners in the cases relating to such matters on which the Court of Justice has already given a ruling[18] — to bring an application for annulment before the General Court as an addressee of the contested decision (first scenario envisaged under the fourth paragraph of Article 263 TFEU). Weichert did not, however, exercise its right to bring proceedings in good time, with the result that the contested decision has become final with regard to it. As I have already mentioned,[19] Weichert cannot circumvent the final nature of that decision by submitting cross-appeals in the judicial proceedings initiated by other addressees of the contested decision relating to their own liability.

63. The possibility available to a non-privileged intervener of being a party to the proceedings at first instance, and its right to challenge the judgment of the General Court at first instance by means of its own appeal, must not be abused to compensate for the fact that that party has failed to exercise its right to bring its own action for annulment. The legal remedy offered by a cross-appeal is not available to free-riders.

64. The present case offers the Court a rare opportunity to clarify this subtlety of procedural law, a subtlety which is likely to continue to be not without significance for future competition cases and, more generally, for appeal proceedings.

65. Thus, since the judgment under appeal does not directly affect Weichert for the purposes of procedural law, its two cross-appeals in Cases C-293/13 P and C-294/13 P do not satisfy the conditions of admissibility under the second sentence of the second paragraph of Article 56 of the Statute. They are inadmissible.

17 — Paragraph 46 of the judgment under appeal.

18 — *Falck and Acciaierie di Bolzano* v *Commission*, EU:C:2002:524, paragraphs 55 to 58, and *International Power and Others* v *NALOO*, C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, EU:C:2003:534, paragraphs 51 to 53.

19 — See above, point 47 of this Opinion.

3. Interim conclusion

66. All in all, Weichert's participation in the proceedings is permissible only to the extent that it is responding to the appeals brought in Cases C-293/13 P and C-294/13 P with a view to protecting its legitimate interests in relation to its joint and several liability with Del Monte. On the other hand, since it is not directly affected within the meaning of the second sentence of the second paragraph of Article 56 of the Statute, Weichert is not entitled to advance its own pleas in law, which go beyond the subject-matter of the two principal appeals in Cases C-293/13 P and C-294/13 P, by means of cross-appeals lodged against the judgment under appeal.

B – *The principal appeal brought by Del Monte in Case C-293/13 P*

67. The appeal brought by Del Monte in Case C-293/13 P, which is based on no fewer than five grounds of appeal, is essentially devoted to the relationships between Del Monte and Weichert. In my view the individual grounds of appeal are best examined in a slightly different order.

1. First, third and fourth grounds of appeal: no economic unit between Del Monte and Weichert, burden of proof, presumption of innocence

68. Del Monte complains the General Court wrongly found it to be jointly and severally liable for the cartel offences committed by Weichert. In the context of the first ground of appeal, the initial complaint is that that finding constitutes an infringement of Article 81 EC (now Article 101 TFEU) and Article 23(2)(a) of Regulation No 1/2003.[20] The third and fourth grounds of appeal in Case C-293/13 P are also devoted to this same issue, but view the matter of Del Monte's joint liability from the angles of the burden of proof (third ground of appeal) and the presumption of innocence — the principle of *in dubio pro reo* — (fourth ground of appeal). In view of the overlaps between these grounds of appeal in substantive terms, I will consider all three in connection with one another.

a) First ground of appeal: criteria for the assumption of an economic unit

69. In the context of its first ground of appeal, Del Monte submits that the General Court incorrectly assumed that Del Monte and Weichert formed an economic unit. Del Monte bases that submission largely on a series of arguments concerning the specific facts of this case and relating, in essence, to Weichert's structure as a limited liability partnership company under German law, the distribution agreement concluded between Del Monte and Weichert, the discussions between Weichert and Del Monte, and Weichert's pricing policy.

i) Admissibility

70. Both the Commission and, interestingly, Weichert dispute that line of argument, taking the view that it constitutes an inadmissible questioning of the General Court's assessment of the facts and evidence.

71. This first ground of appeal advanced by Del Monte in fact treads a very fine line between questions connected with the assessment of the facts and evidence, on the one hand, and issues relating to the legal characterisation of the facts, on the other hand. Whilst the Court of Justice, in its capacity as court of appeal, does not have jurisdiction in respect of the assessment of the facts and evidence, save

20 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

where any complaint of distortion is made, the legal characterisation of the facts is subject to review by the Court of Justice in appeal proceedings. [21] The Court of Justice is most certainly competent to verify whether the General Court applied appropriate legal criteria when examining the legality of the contested decision and whether it drew appropriate legal conclusions from the facts established. [22]

72. Accordingly, Del Monte's first ground of appeal is admissible only in so far as it alleges that the General Court failed to have regard to the legal criteria applicable under European competition law for the purposes of determining whether two or more companies form an economic unit. However, when examining Del Monte's arguments, the Court of Justice should resist the temptation to substitute its own assessment of facts or evidence for that of the General Court; such assessment falls outside its jurisdiction. Thus, if the Court of Justice does not wish to see the appeal on a point of law descend into an appeal on the facts, it must remain strictly within the factual framework established by the General Court.

ii) Merits

73. It is settled case-law that infringement of the competition rules by a subsidiary may be imputed to the parent company in particular where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links existing between those two legal entities. [23]

74. In other words, the parent company may thus be held jointly liable for the cartel offences committed by its subsidiary if, at the time of the infringement, decisive influence was exercised over the subsidiary by its parent company. [24] It is of secondary importance in that connection whether the parent company exercised such influence over the subsidiary alone or together with other companies.

75. It is true that the relationship between Del Monte and Weichert cannot be said to be a parent company-subsidiary relationship in the traditional sense, but must rather be regarded as a partnership between Del Monte and the W. family. [25] However, the abovementioned criteria can also easily be applied to the case of a partnership. All the parties to the proceedings were in agreement on this point, and the General Court likewise rightly took that premiss as its starting point. [26]

21 — *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 49; *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 55; and *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 74.

22 — *Sumitomo Metal Industries and Nippon Steel* v *Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 40; *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 117; *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 51; and *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 59.

23 — See the leading cases in this regard: *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraphs 132 to 135; *Geigy* v *Commission*, 52/69, EU:C:1972:73, paragraph 44; and *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 15. For more recent judgments, see, inter alia, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 39 in conjunction with paragraph 49; *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 58; *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 43; and *Areva* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 30.

24 — See, to this effect, *Akzo Nobel and Others* v *Commission*, EU:C:2009:536, paragraphs 60 and 61; *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 56, 63 and 95; *Commission* v *Stichting Administratiekantoor Portielje*, EU:C:2013:514, in particular paragraphs 40 and 41; and *Areva* v *Commission*, EU:C:2014:257, paragraphs 32 and 33.

25 — Paragraph 72 of the judgment under appeal and recitals 382 and 383 of the contested decision.

26 — See, in particular, paragraphs 50 to 56 and paragraphs 87 and 88 of the judgment under appeal.

76. In the present case, since Del Monte does not hold a 100% or virtually 100% stake in Weichert, the rebuttable presumption that Del Monte exercised a decisive influence over Weichert could not be made;[27] the exercise of such influence had to be positively proven by the Commission.[28]

77. Following intensive consideration of the evidence adduced, the General Court takes the view in the judgment under appeal that the Commission had done so.[29] The General Court bases that view on an overview of various facts in the present case, namely on:

— the links between Del Monte and the W. family in the form of a limited partnership under German law, whereby, although Del Monte assumed the role merely of a limited partner, it had an 80% shareholding in the partnership and held certain rights of veto;

— the distribution agreement between Del Monte and Weichert, the practical effect of which was that Del Monte was the sole supplier of bananas to Weichert and, in return, Weichert was the exclusive distributor of Del Monte-branded bananas in Northern Europe;

— the flow of information between Weichert and Del Monte, as part of which Weichert provided Del Monte with regular and detailed reports on its day-to-day business; and

— the discussions regarding pricing policy and Weichert's supplies, in the course of which Del Monte and Weichert intensively — and, at times, also at variance — exchanged information about the marketing and pricing of bananas by Weichert.

78. As I have already mentioned, it would be glaringly inconsistent with the purpose of appeal proceedings if the Court of Justice were now to revisit all the evidence adduced and substitute its assessment of that evidence for the assessment made by the General Court. The only possible focus at the appeal stage is a review of whether, on the basis of the findings of fact made in the judgment under appeal, the General Court applied the correct criteria *from a legal standpoint*.

79. It must be pointed out that the existence of an economic unit may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit.[30] It is therefore necessary to take into account all facts relevant to the individual case in question and the conclusions drawn from those facts by the General Court, without — as Del Monte attempts to do — focussing selectively on certain individual facts.

80. Furthermore, since any case may have its own peculiarities, the issue of whether precedents exist in the case-law of the Court of Justice or of the General Court, the circumstances of which are identical or similar to those of the present case, likewise cannot be a determining factor.

81. That being the case, I will now turn to the two objections raised by Del Monte by which, firstly, it disputes the exercise of decisive influence over Weichert and, secondly, it seeks in any event to cast doubt over the success of any such influence.

27 — With regard to the rebuttable presumption of the actual exercise of decisive influence, see, for example, the case-law cited above in footnote 24.

28 — See, to that effect, in particular, *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:479, paragraphs 102, 104 and 105; in a similar vein (although in a different context), see *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, paragraph 46 et seq.

29 — Paragraph 276 of the judgment under appeal.

30 — *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 65.

– Del Monte's influence over Weichert (second part of the first ground of appeal)

82. First, Del Monte disputes having exercised any decisive influence over Weichert at all. In Del Monte's view, the facts on the basis of which the Commission — with the approbation of the General Court — concluded that decisive influence had been exercised in the present case did not satisfy the legal requirements for the joint liability of one company for the cartel offences committed by another company. In this regard, Del Monte accuses the General Court of a 'misinterpretation of the parental liability test'.

83. The arguments upon which Del Monte bases that allegation may essentially be divided into two separate issues: first, the question whether Del Monte was able to exercise decisive influence and, secondly, that of whether such influence was in fact exercised.

84. As far as the *opportunities to exercise decisive influence* are concerned, Del Monte points out that in the partnership with the W. family, which had been established in the legal form of a limited partnership under German law, it merely assumed the role of a limited partner, was excluded from the management of the business and had otherwise only minimal rights of co-determination. In this regard, Del Monte cites extracts from the German Commercial Code (Handelsgesetzbuch) and the partnership agreement applicable to Weichert.

85. In this connection, it must be noted that, from a legal perspective, the question whether one company can determine its conduct on the market autonomously or is exposed to the decisive influence of another company cannot be assessed solely on the basis of the relevant company law (both statutory provisions and terms agreed under partnership or shareholder agreements). Although the powers of the company's organs and of the partners and shareholders must certainly be taken into account, the decisive factor is ultimately economic reality, since competition law is guided not by technicalities, but by the actual conduct of undertakings. [31]

86. Viewed in isolation, the status — for the purposes of company law — of a limited partner who is excluded from the management of the business is certainly not a sufficient basis for the assumption that decisive influence may be exercised. However, it is perfectly conceivable that there may be other factors of an economic, organisational or legal nature that afford even a mere limited partner so much power that it may exercise *de facto* decisive influence over the company concerned.

87. The General Court found there to be precisely such factors in the present case.

88. First, the General Court pointed to the rights of veto held by Del Monte within Weichert's corporate structure. Taken in isolation, such rights of veto did not, admittedly, establish *de jure* that Del Monte exercised sole control over Weichert. However, it cannot be ruled out that those rights, in connection with other factors, resulted *de facto* in Del Monte having sole control. [32] In any event, they may be regarded as the basis of joint control shared between Del Monte and the W. family, which — in accordance with more recent case-law — may on its own suffice for liability to be imputed under antitrust law. [33]

31 — See, in this regard, the recent judgment in *Commission* v *Stichting Administratiekantoor Portielje*, EU:C:2013:514, in particular paragraphs 66 to 68, and my Opinion in that case, EU:C:2012:763, points 71 and 72.

32 — See, to that effect, *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:479, paragraphs 102 to 105, and *Sasol and Others* v *Commission*, T-541/08, EU:T:2014:628, paragraphs 53 and 54.

33 — *Dow Chemical* v *Commission*, C-179/12 P, EU:C:2013:605; *EI du Pont de Nemours* v *Commission*, C-172/12 P, EU:C:2013:601; and *Avebe* v *Commission*, T-314/01, EU:T:2006:266.

89. Furthermore, it is not necessary by law for such rights of veto to relate to measures connected with the day-to-day management of the business or, specifically, with the company's conduct on the market; it is enough for those rights of veto to afford the partner concerned, in very general terms, a sufficient influence over the company's commercial policy in the broadest sense. [34]

90. According to the findings of the General Court, Del Monte's rights of veto related inter alia to important decisions taken by the partners' meeting on financial, investment and staffing plans. [35] Rights of veto of that kind normally afford a partner considerable practical influence over commercial policy, although — from a purely legal perspective — they do not allow him to be involved in decisions pertaining to the company's day-to-day business.

91. Secondly, the General Court pointed out that, in its capacity as limited partner, Del Monte holds an 80% shareholding in Weichert. The General Court concluded from this that Del Monte had a major economic incentive to exert influence over Weichert. [36]

92. Thirdly, the General Court referred to the distribution agreement between Del Monte and Weichert, the practical effect of which was that Del Monte was the sole supplier of bananas to Weichert and, in return, Weichert was the exclusive distributor of Del Monte-branded bananas in Northern Europe. [37]

93. In normal circumstances, such an exclusive relationship is perfectly capable of creating a situation of economic and organisational dependence and allowing decisive influence to be exercised over commercial policy, particularly where the supplier is also by far the largest shareholder in the distributor concerned.

94. The question whether such dependence actually exists between Del Monte and Weichert in the present case is purely a question of fact and, accordingly, its assessment is a matter for the General Court alone. In any event, from a legal standpoint, there was nothing to prevent the General Court from assuming that, in view of all the links of an economic and company law nature found to exist at first instance between Del Monte and Weichert, Del Monte was able — despite its status as a limited partner — to exercise decisive influence over Weichert.

95. Ultimately, there is, however, no need to address the questions of whether, from a legal perspective, Del Monte had sufficient opportunities to exert decisive influence over Weichert, and whether Del Monte enjoyed *de jure* sole control over Weichert or had to share that control with the W. family, provided merely that it is proven that Del Monte exercised *de facto* decisive influence. [38]

34 — See, to that effect, *Akzo Nobel and Others* v *Commission*, EU:C:2009:536, paragraphs 73 and 74, and my Opinion in that case, EU:C:2009:262, points 89 to 93. See also *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, in particular paragraph 112.

35 — Paragraph 99 of the judgment under appeal and recital 387 of the contested decision.

36 — Paragraphs 122, 125 and 130 of the judgment under appeal and recitals 387 and 404 of the contested decision.

37 — Paragraph 135 of the judgment under appeal and recital 383 of the contested decision.

38 — See, in this regard, my Opinion in *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:11, points 144, 145 and 154.

96. Next, as far as such *de facto exercise of decisive influence* is concerned, according to the findings of the General Court, Del Monte was constantly provided with detailed information by Weichert about the latter's day-to-day business on the banana market, and that information went far beyond what would have been consistent with the rights enjoyed by Del Monte under the partnership agreement and under the distribution agreement.[39] In particular, again according to the findings of the General Court,[40] in several cases Del Monte issued explicit and direct instructions concerning the marketing and pricing of bananas distributed by Weichert under the Del Monte brand.[41]

97. Accordingly, a number of pieces of evidence had been submitted to the General Court on the basis of which it could conclude, without erring in law, that Del Monte did in fact exercise decisive influence over Weichert's commercial policy, and even directly interfered in Weichert's conduct on the market. In that connection, the General Court was therefore entitled to regard the existence of specific instructions from Del Monte concerning the marketing of its bananas and their associated pricing as a particularly clear indication of the existence of that company's decisive influence over Weichert.[42]

98. It may well be the case that the body of evidence could also perhaps have been interpreted in a manner different from the General Court's interpretation. However, it is not the role of the Court of Justice, in its appellate jurisdiction, to substitute its own assessment of the evidence for the sovereign and legally unobjectionable assessment of that evidence by the General Court.

– Weichert's alleged non-compliance with instructions (first part of the first ground of appeal)

99. Del Monte further disputes that its influence over Weichert was successful. Del Monte essentially claims that Weichert did not in practice carry out all instructions given by Del Monte and was even involved in (judicial and extrajudicial) disputes with Del Monte. In such circumstances, Del Monte submits that the General Court should not have taken the view that Del Monte and Weichert formed an economic unit or found that Del Monte exercised decisive influence over Weichert.

100. As I have already mentioned, two companies may be assumed to form an economic unit only if one of the companies does not decide independently upon its own conduct on the market but carries out, in all material aspects, the instructions given to it by the other.[43]

101. This criterion must not, however, be misconstrued to mean that one company must follow *all* instructions given by the other without exception or that there must be no differences of opinion whatsoever between them. What is required is in fact simply that the instructions in question are carried out *in all material respects*. Nor must one company nip in the bud any objection to the influence exerted or any judicial challenge initiated by the other in order for its influence and, thereby, the existence of the economic unit to be demonstrated.

102. Internal differences of opinion are not rare even in the case of traditional group structures. Some instructions given by parent companies to their 100% or virtually 100% subsidiaries are not carried out, and sometimes even very important instructions are disobeyed. For instance, it is common practice, as part of compliance programmes, for parent companies to issue compliance instructions to all their

39 — Paragraphs 156 to 158 of the judgment under appeal and recitals 388 and 393 of the contested decision.

40 — Paragraphs 204, 220 and, additionally, paragraphs 171, 175, 176 and 185 of the judgment under appeal and recitals 389 and 390 of the contested decision.

41 — The question of whether those instructions were followed by Weichert to a sufficient degree, and whether they were therefore 'successful', forms the subject-matter of a separate part of the first ground of appeal, to which I will turn shortly (see below, points 99 to 110 of this Opinion).

42 — See my Opinion in *Akzo Nobel and Others* v *Commission*, EU:C:2009:262, point 89.

43 — In this regard, see once again the case-law cited in footnote 23.

subsidiaries which oblige those subsidiaries not to engage in anti-competitive business practices. In accordance with case-law, any failure to adhere to such compliance instructions — the significance of which to both commercial life and competition law is indisputable — by no means prevents the liability for the cartel offences committed by one company from being imputed to the other.[44]

103. Accordingly, in the present case, the General Court was not prevented by law from finding that Del Monte and Weichert formed an economic unit, even though Weichert did not carry out all Del Monte's instructions and may also otherwise have legally challenged Del Monte's authority in relation to certain matters.

104. That said, decisive influence and an economic unit can no longer be said to exist where there are serious indications that one company's failure to comply with instructions given by the other was the norm and meant that the former behaved independently on the market.

105. The General Court therefore quite rightly examined the body of evidence before it in the present case to determine whether Weichert *generally did not follow* the instructions of Del Monte and behaved independently on the market.[45] In that connection, it gave particularly in-depth consideration to Del Monte's arguments that, first, by aligning its price level with that of Dole Weichert pursued a different pricing policy from that desired by Del Monte, and, secondly, that Weichert did not adopt Del Monte's new marketing approach, by which Del Monte allegedly sought to position its bananas in the premium segment in order to achieve prices close to those of Chiquita.

106. Circumstances of this kind, provided that they had been proven, would indeed constitute significant evidence against the (successful) exercise by Del Monte of decisive influence over Weichert, and thus also against the existence of an economic unit formed by the two companies.

107. Thus, in its written and oral submissions in the present appeal proceedings, Del Monte attempted throughout to give the impression that Weichert's alleged failure to comply with its price specifications and its new marketing approach over the period of the infringement in the years 2000 to 2002 was a proven fact.

108. However, a reading not just of the section cited by Del Monte[46] but of the whole passage of the judgment under appeal devoted to this topic[47] reveals that the General Court by no means considered the statements made by Del Monte to have been proven. For example, the General Court points out that that Del Monte has not produced 'evidence of a clear expression of its expectations in regard to Weichert'.[48] In addition, the General Court finds that the statements of other importers, upon which Del Monte attempted to rely, in reality contradicted Del Monte's own statements.[49]

109. In accordance with those findings of fact made by the General Court, which, save in the case of any distortion,[50] are the only findings relevant to the examination of the first ground of appeal, the statements made by the appellant regarding Weichert's alleged autonomous pricing policy and its failure to adopt Del Monte's new marketing approach are simply assertions,[51] assertions which proved to be wholly unconvincing to the General Court on consideration of other evidence.

44 — *Schindler Holding and Others* v *Commission*, EU:C:2013:522, in particular paragraph 144.

45 — Paragraph 208 of the judgment under appeal.

46 — Del Monte relies on several occasions on paragraph 208 of the judgment under appeal.

47 — See, in particular, paragraphs 208 to 215 of the judgment under appeal.

48 — Paragraph 210 of the judgment under appeal.

49 — Paragraph 211 of the judgment under appeal.

50 — With regard to the objection raised by Del Monte alleging the distortion of evidence, see my comments in connection with the second ground of appeal in points 122 to 165 of this Opinion.

51 — Even in response to my direct question at the hearing before the Court, Del Monte was unable to indicate where in the judgment under appeal there was supposed to be a finding of fact which supported its claim, or which evidence the General Court was meant to have disregarded in this respect.

110. In the light of the foregoing, on this point the General Court cannot be accused of having made a legally inaccurate characterisation of facts. In view of the findings of fact made during the proceedings at first instance, the General Court was by no means required by law to take the view that Del Monte and Weichert did not form a single economic unit.

b) Third and fourth grounds of appeal: burden of proof and presumption of innocence

111. By the third ground of appeal, Del Monte complains that the General Court reversed the burden of proof; the fourth ground of appeal is based on the presumption of innocence (principle of *in dubio pro reo*). Common to those two grounds of appeal is the assertion that the body of evidence in the present judicial proceedings does not allow a finding of decisive influence on the part of Del Monte over Weichert to be made, with the result that the view may not be taken that Del Monte is jointly liable for the cartel offences committed by Weichert.

112. It appears to me that the purpose of this argument is to persuade the Court of Justice, under the guise of legal objections, to conduct a re-assessment of the facts and evidence. The Court of Justice has no jurisdiction to do so in appeal proceedings. These two grounds of appeal should therefore be declared inadmissible. [52]

113. Solely for the sake of completeness, I would also point out that Del Monte's argument is likewise unconvincing in terms of its substance.

i) Third ground of appeal: burden of proof

114. In the context of the third ground of appeal, Del Monte asserts that the General Court erred in law by reversing the burden of proof in so far as it found that certain pieces of evidence produced by Del Monte were incapable of proving Weichert's independence from Del Monte.

115. More specifically, at issue here are rights of veto within the Weichert company, [53] Weichert's pricing, [54] submissions made by Weichert in a dispute before a national court [55] and the non-consolidation of the results of Del Monte and Weichert. [56]

116. It is true that the General Court found that Del Monte's line of argument in this regard lacked the evidential value to prove Weichert's independence from Del Monte. However, contrary to the view taken by Del Monte, this is not a manifestation of a reversal of the burden of proof; rather the General Court quite rightly takes the view that the burden of proof vis-à-vis Del Monte's joint liability for the infringement rests with the Commission. [57]

52 — *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 23; *Ziegler* v *Commission*, EU:C:2013:513, paragraphs 75 and 76; and *FLSmidth* v *Commission*, C-238/12 P, EU:C:2014:284, paragraph 31.

53 — Paragraph 113 of the judgment under appeal.

54 — Paragraph 208 of the judgment under appeal.

55 — Paragraphs 237 and 238 of the judgment under appeal.

56 — Paragraphs 259 and 260 of the judgment under appeal.

57 — Paragraphs 104 and 221 of the judgment under appeal.

117. It was on the basis of that allocation of the burden of proof that the General Court examined the probative force of all the evidence submitted to it. It came to the conclusion, firstly, that there was sufficient proof of a decisive influence exercised by Del Monte over Weichert and, secondly, that Del Monte's counterargument was incapable of weakening the arguments advanced by the Commission. This approach cannot be criticised from a legal standpoint.[58] It does not involve any reversal of the burden of proof, but is rather based on the normal interplay between the respective burdens of adducing proof, prior to consideration of the objective burden of proof.[59]

ii) Fourth ground of appeal: presumption of innocence

118. In the context of the fourth ground of appeal, Del Monte claims that the General Court infringed the principle of the presumption of innocence (principle of *in dubio pro reo*)[60] by finding Del Monte to be jointly liable for the cartel offences committed by Weichert despite the questionable nature of the evidence adduced.

119. The same answer must be given on the merits of this fourth ground of appeal as was given to the first. As I have stated above,[61] the General Court was able to conclude, without erring in law, on the basis of all the evidence before it, that during the period of the infringement Del Monte exercised decisive influence over Weichert, and that, at that time, those two companies therefore formed an economic unit.

120. If sufficient evidence exists for the finding of joint liability, there can be no question of an infringement of the principle of the presumption of innocence.

iii) Interim conclusion

121. The third ground of appeal is therefore as unfounded as the fourth.

2. Second ground of appeal: distortion of evidence

122. Since, as I have stated above, the first ground of appeal is as unsuccessful as the third and fourth, I will now consider the second, which is advanced solely in the alternative. By that ground of appeal, Del Monte accuses the General Court of having distorted evidence in several respects, in all cases in connection with the opportunities available to Del Monte to exercise influence over Weichert.

a) The individual allegations of distortion

123. It is settled case-law that a finding of a distortion of facts or evidence is subject to strict requirements. Such distortion exists only where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect.[62] I will state straight away that none of the allegations of distortion made by Del Monte satisfies those stringent requirements even at a most basic level.

58 — See also *Knauf Gips* v *Commission*, EU:C:2010:389, paragraph 80.

59 — See, to this effect, *Aalborg Portland and Others* v *Commission*, 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, EU:C:2004:6, paragraphs 79 and 132, and — in connection with Article 86 of the EEC Treaty — *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25. With regard to the interplay between the respective burdens of adducing proof in a wide variety of contexts, see, in addition, my Opinions in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2005:751, point 73; in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, point 89; in *Akzo Nobel and Others* v *Commission*, EU:C:2009:262, point 74; and in *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:11, point 170.

60 — In this connection, Del Monte relies on Article 48 of the Charter of Fundamental Rights and on Article 6(2) ECHR.

61 — See above, points 82 to 110 of this Opinion.

62 — *PKK and KNK* v *Council*, C-229/05 P, EU:C:2007:32, paragraph 37; *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 37; and *Lafarge* v *Commission*, EU:C:2010:346, paragraph 17.

124. Like the Commission and Weichert, it is also my impression that Del Monte is simply dissatisfied with the General Court's assessment of the evidence and now wishes to suggest an alternative — and wholly uncompelling — reading of the evidence to the Court of Justice.

i) The allegation of the distortion of the partnership agreement

125. Del Monte begins by making a series of allegations of distortion relating to the partnership agreement by which Weichert was established in the legal form of a limited partnership under German law.

– The rights of veto of the limited partner

126. First, Del Monte refers to clause 7(3) of the partnership agreement, which provides that the general partners were required to ask for the prior written consent of all partners for a number of legal acts. It is Del Monte's view that the General Court distorted that clause by finding in paragraph 101 of the judgment under appeal that '[a] range of important acts necessarily having an — even indirect — impact on the management of Weichert' could 'not be carried out without the limited partner's consent'.

127. That allegation is unfounded.

128. The legal acts which required the consent of all partners under clause 7(3) of the partnership agreement comprised the purchase and sale of any immovable property and of any shareholding or other investments in other undertakings, investments exceeding 100 000 German marks (DEM), loans to employees of amounts exceeding DEM 10 000, loans for Weichert outside the scope of the ordinary course of business, the issuing of guarantees by Weichert, remuneration of any kind for the managing partner, and any agreement concluded by the managing partner(s) establishing regular payment obligations on the part of Weichert for an amount exceeding DEM 10 000 per month, with the exception of employment contracts, where they provide for annual remuneration of less than DEM 60 000.

129. It is perfectly justifiable — and in any event not manifestly incorrect — to regard such transactions as 'a range of important acts' and to take the view that Del Monte's right of veto in this regard 'necessarily [had] an — even indirect — impact on the *management* of Weichert'.[63] Contrary to Del Monte's assumption, no special reference is made in the passage of the judgment concerned to the impact on Weichert's *conduct on the market*. Moreover, in accordance with case-law, the finding of such an impact would likewise have been wholly unnecessary.[64]

– The rights of veto of the general partner

130. Secondly, Del Monte objects to paragraph 114 of the judgment under appeal, in which the General Court finds that it is 'not apparent from the terms of the partnership agreement' that 'the general partner held a right of veto over "any" decisions of the company'. Del Monte takes the opposing view, claiming that there were no decisions which it could have imposed on the company against the general partner's veto.

63 — Paragraph 101 of the judgment under appeal (emphasis added).

64 — In this regard, see once again *Akzo Nobel and Others* v *Commission*, EU:C:2009:536, paragraphs 73 and 74, and my Opinion in that case, EU:C:2009:262, points 89 to 93. See also *Schindler Holding and Others* v *Commission*, EU:C:2013:522, in particular paragraph 112.

131. The contested findings of the General Court must be considered in connection with the immediately preceding paragraphs of the judgment under appeal and are a response to an argument put forward by Del Monte regarding the second sentence of clause 9(2) of the partnership agreement.[65] That clause relates exclusively to certain decisions *of the partners' meeting* defined in clause 9(4) of the same agreement. The consent of the general partner was an essential requirement under the clause in question only in relation to the decisions mentioned in clause 9(4).

132. In the light of the foregoing, the General Court's conclusion that a right of veto on the part of the general partner 'over "any" decisions of the company' is not apparent from the terms of the partnership agreement is completely justifiable and, in any event, cannot be regarded as being manifestly incorrect.

133. In addition, it should also be borne in mind that any distortion of evidence can lead to the judgment under appeal being set aside only if the distortion may have affected the operative part of that judgment.[66] In this connection, it is relevant that even a general right of veto on the part of the general partner 'over "any" decisions of the company' would not as such on its own reveal anything about the opportunities to exercise influence as a matter of law or of fact available to the limited partner within the company. Del Monte has not made any submission which would have forced the General Court to conclude that the general partner was at liberty to act *alone* and as it saw fit with regard to the company, including in the face of resistance from the limited partner.

134. In any event, as I have already mentioned, the limited partner does not necessarily have to have exercised sole control for it to be held to be jointly liable for cartel offences committed by the company, since a situation in which control is shared with the general partner(s) can likewise give rise to an assignment of liability under antitrust law.[67]

– The appointment and replacement of the company's managers

135. Thirdly, the appellant objects to paragraph 117 of the judgment under appeal, in which the General Court rejects Del Monte's argument that it did not have the necessary powers to appoint, replace or even veto the appointment of the Weichert company's managers. Del Monte regards the General Court's rejection of its argument as a 'distortion of the evidence'.

136. It should be noted that, where an appellant alleges distortion of the evidence by the General Court, it must indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in its view, led to such distortion.[68]

137. No such submissions have been made in the present case. Del Monte has not referred to a specific item of evidence in the file or demonstrated and substantiated the extent to which the General Court is meant to have distorted that item of evidence. This part of the second ground of appeal is therefore inadmissible

138. Besides that, it can only be assumed that Del Monte considers there to have been a distortion of clause 9(3) of the partnership agreement, since it is to that provision that the passage of the judgment in question relates. However, the provisions of that clause of the agreement are reproduced word for word by the General Court in paragraph 117 of the judgment under appeal, namely that any amendment of the partnership agreement required the unanimity of the partners.

65 — See paragraphs 111 to 114 of the judgment under appeal.

66 — *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, C-442/03 P and C-471/03 P, EU:C:2006:356, paragraphs 67 to 69; *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraphs 70 to 72; and *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 112.

67 — See above, point 88 of this Opinion.

68 — *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraphs 50 and 159; *Lafarge* v *Commission*, EU:C:2010:346, paragraph 16; and *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 152.

139. Since the position of the partner with personal liability as manager of the company was expressly laid down in clause 7(1) of the partnership agreement, that position could be established or changed only by amending that agreement, and thus not without the consent of Del Monte. For this reason, the argument advanced by Del Monte that it did not have any right of veto as regards the appointment or replacement of managers was inaccurate, at the least in those general terms.

140. There can therefore be no question of a distortion of evidence. It rather appears to me that, by this allegation, Del Monte is simply attempting to persuade the Court to re-assess the facts under the guise of a complaint of distortion; this is not allowed in appeal proceedings. [69]

– The arbitration process

141. Fourthly, Del Monte accuses the General Court of distorting clause 9(5) of the partnership agreement, which provided for the establishment of an advisory council for the purposes of arbitration in the event of deadlock situations at the partners' meeting. [70]

142. More specifically, Del Monte objects to the following two statements made by the General Court in paragraph 116 of the judgment under appeal:

— First, the General Court takes the view that 'the claim that decisions were adopted by simple majority within that council and were thus inevitably favourable to [the W.] family … has not been substantiated'.

— Secondly, the General Court finds that, 'in any event', 'the scope of the advantage in question must be placed in context in the light of the specific powers of the partners' meeting'.

143. After reading clause 9(5) of the partnership agreement, neither of those two statements made by the General Court appears to me to be manifestly incorrect. On the contrary:

— It should be noted in relation to the first statement that clause 9(5) of the partnership agreement contains no mention whatsoever of the majority requirements applicable to the decisions of the advisory council. It may be the case that a requirement for decisions to be adopted by simple majority can be inferred from other clauses of the partnership agreement. Del Monte has not, however, claimed here that those clauses have been distorted. Furthermore, the statement made by the General Court relates to the majorities by which decisions of the advisory council actually *were adopted*. It goes without saying that a mere clause in the partnership agreement cannot as such provide any information about its practical application in the day-to-day life of the business.

— The only thing following from the second statement is that the General Court assessed and placed the scope of the advantages for the W. family under the arbitration process in the overall context of the partnership agreement. It is unclear, and the appellant does not advance any argument in this regard, to what extent such a consideration of the overall context in which the evidence is embedded is supposed to have been manifestly incorrect.

144. I would add that the mere existence of an arbitration process in the form of an advisory council offers anything but conclusive evidence to support Del Monte's claim that 'the W. family alone ultimately decided how Weichert's business was to be managed'. This is because even if Del Monte is correct in its submission that the W. family held three of the six votes in that advisory council, it thus clearly did *not* have a majority (not even a simple majority).

69 — *Lafarge* v *Commission*, EU:C:2010:346, paragraph 23; *Ziegler* v *Commission*, EU:C:2013:513, paragraphs 75 and 76; and *FLSmidth* v *Commission*, EU:C:2014:284, paragraph 31.

70 — Paragraph 115 of the judgment under appeal provides a summary of how this arbitration process operates.

ii) The allegation of the distortion of a number of other documents

145. It is Del Monte's view that, aside from the partnership agreement, the General Court also distorted the probative value of a number of other documents included in the file. I will now consider those documents briefly.

– The 'balance of power'

146. Firstly, Del Monte complains of an 'obvious distortion' of its own submissions contained in its application at first instance,[71] in which it had made reference to a 'balance of power' between limited and general partners. In the appellant's view, the General Court wrongly concluded in paragraph 118 of the judgment under appeal, on the basis of the appellant's submissions on the 'balance of power', that the W. family and Del Monte exercised joint control over Weichert, and wrongly found this to be indicative of Del Monte's ability to exercise decisive influence over Weichert.

147. Drawing upon the case-law on the distortion of facts and evidence, a distortion of a party's submission at first instance by the General Court must be found to exist where that submission was clearly misunderstood by the General Court or reproduced by it in such a way as to misrepresent its meaning.[72]

148. Such a situation does not arise in the present case. It is true that in paragraph 118 of the judgment under appeal the General Court addressed the concept of the 'balance of power' as defined by Del Monte. However, it by no means reproduced the substance of Del Monte's submission in the passage of the judgment in question. Rather, the General Court referred back to its own immediately preceding findings on particular clauses of the partnership agreement[73] and concluded on the basis of those findings that Del Monte was able to exercise decisive influence over Weichert.

– The submissions of other importers about the formation of prices

149. Secondly, Del Monte criticises the General Court for having found in paragraphs 211 to 215 of the judgment under appeal, on the basis of replies from other importers (Chiquita and Dole) to requests for information from the Commission, that the alignment of Weichert's quotation prices with those of Dole 'was also in line with Del Monte's expectations'. Del Monte takes the view that, by making that finding, the General Court distorted the submissions of those importers.

150. This allegation is based on an inaccurate — and indeed distorted — reading of the judgment under appeal. There is no mention or even suggestion in the passage of the judgment in question of the fact that the alignment of Weichert's quotation prices with those of Dole 'was also in line with Del Monte's expectations'. Del Monte therefore attributes a statement to the General Court that the General Court did not make at all in that form, and links that statement to the serious allegation of a distortion of evidence.

71 — Specifically, paragraph 63 of the application at first instance.

72 — See, to that effect, my Opinions in *Solvay* v *Commission*, C-110/10 P, EU:C:2011:257, points 126 and 131, and in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:21, point 134.

73 — See the opening words of paragraph 118 of the judgment under appeal: '[i]t follows from the foregoing considerations that the partnership agreement reflects …'.

151. In the passage of the judgment in question, the General Court in fact addresses Del Monte's claims that Weichert was fully independent, that Del Monte itself wanted quotation prices that were closer to those of Chiquita and that Del Monte's related expectations in regard to Weichert were clearly expressed.[74] In that passage, the General Court simply comes to the *interim conclusion* that the submissions from Chiquita and Dole cited by Del Monte contradict Del Monte's own claims.[75] The General Court does *not* draw a *final* conclusion regarding Weichert's independence from Del Monte in the paragraphs at issue, that is paragraphs 211 to 215 of the judgment under appeal.

152. Furthermore, it should be noted that the submissions in question from Chiquita and Dole were by no means as unequivocal as Del Monte claims. On the contrary, they were fully open to interpretation. This is true in particular of Dole's statement that Del Monte was 'dissatisfied with Weichert's marketing results' and 'apparently broke off relations with Weichert to undertake an aggressive own-marketing approach'.[76]

153. First, and as I have already intimated above,[77] it is *not* clear from those statements whether Dole was dissatisfied with Weichert solely from a financial perspective or also in connection with the marketing approach. Nor, secondly, is it at all apparent from the evidence in question whether and when Weichert's management is meant to have been instructed to implement that new marketing approach of Del Monte. Thirdly, it is similarly unclear whether that marketing approach in fact failed because of resistance from Weichert's management or simply could not be implemented on the market, as Weichert submits. From the evidence that Del Monte alleges was distorted by the General Court it is not even clear when Del Monte in fact developed its 'aggressive own-marketing approach' and continued to attempt to implement it in practice: during the period of the infringement in the years 2000 to 2002 or only in 2003, that is after the infringement had ended.

154. If the evidential position reasonably allows different assessments and if the General Court adopts one of them, it cannot seriously be alleged to have distorted the evidence. This is the situation as far as the evidence cited in paragraphs 211 to 215 of the judgment under appeal is concerned.

– The letter from an external lawyer to Del Monte

155. Thirdly, Del Monte alleges that evidence was distorted in relation to the letter from an external lawyer to Del Monte dating back to 1997: whereas in paragraph 236 of the judgment under appeal the General Court gives the impression that that letter was sent on behalf of *one of* Weichert's *partners*, *the company* itself was in fact behind the letter sent.

156. In this connection, it must be pointed out straightaway that, at that stage of the judgment under appeal, the General Court is not at all concerned with the authorship of the letter at issue, but is simply making general observations on the question whether the fact that one partner calls on a lawyer allows conclusions to be drawn about the other partner's control over the company. Del Monte's allegation of distortion therefore appears to me to be rather far-fetched.

74 — See paragraphs 209 and 210 of the judgment under appeal.

75 — Paragraph 211 of the judgment under appeal.

76 — Paragraph 214 of the judgment under appeal.

77 — See above, points 107 to 109 of this Opinion.

157. In addition, it is clear from a careful reading of the letter in question that — contrary to Del Monte's view — it was written in a most ambiguous manner and that it by no means makes clear in whose name and on whose behalf it comments upon particular matters. The introductory section does suggest that the letter presents comments on behalf of the company.[78] However, the remainder of the letter is written at least partly also in the name of Mr W. and, in parts, even expressly in the name of Mr W. and the company jointly.[79]

158. This is therefore another item of evidence which leaves considerable scope for different interpretations. In the light of these circumstances, the General Court cannot be alleged to have distorted evidence where it refers in paragraph 236 of the judgment under appeal to the fact 'that a partner calls on a lawyer to assert his rights and defend himself against someone he suspects of infringing them'.

159. It should be noted as a supplementary point that Del Monte has given no indication of the extent to which the distortion of the evidential value of the letter in question alleged by it affected the judgment of the General Court. A distortion of evidence can lead to the judgment under appeal being set aside only if the distortion may have affected the operative part of that judgment.[80] There are no specific indications that this is the case here.

– A document lodged in national judicial proceedings

160. Fourthly, Del Monte submits, with regard to paragraphs 237 and 238 of the judgment under appeal, that the General Court distorted the evidential value of a document lodged in national judicial proceedings. In that document, Weichert offers its defence to an action brought by Del Monte, claiming that all of Weichert's economic value added, that is acquisition, marketing and logistics, was exclusively attributable to the general partners, and that the role of Del Monte within the partnership was limited to financial participation.

161. In that connection, the General Court observed — quite correctly from a factual perspective — that the proceedings were issued by Del Monte, not by Weichert, that those proceedings were brought against a background of the termination of the distribution agreement and that Del Monte's initiation of legal proceedings relating to the economic value of the undertaking does not preclude the exercise of decisive influence on the part of Del Monte.[81]

162. I cannot see how the General Court is meant to have distorted the document in question by those findings. The General Court merely put the document in its procedural and economic context and drew from those findings wholly justifiable — or in any event not manifestly incorrect — conclusions concerning the evidential value of that document in the present antitrust proceedings.

– The non-consolidation of the financial results

163. Fifthly, with reference to paragraph 259 of the judgment under appeal, Del Monte criticises the General Court for having wrongly dismissed the non-consolidation of the results of Del Monte and Weichert as 'entirely irrelevant'. Del Monte takes the view that this constitutes a distortion of evidence.

78 — The opening paragraph of the letter reads: 'We were retained by Interfrucht as legal counsel … Interfrucht wishes to stress the following …'; Interfrucht is used here as an abbreviation for Weichert's company name.

79 — See phrases such as 'Mr. [W.] instructed us', 'Mr. [W.] never consented', 'Mr. [W.] further wishes to remind you' as well as 'Mr. [W.] and Interfrucht' and 'he and Interfrucht'.

80 — *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, EU:C:2006:356, paragraphs 67 to 69; *Sison* v *Council*, EU:C:2007:75, paragraphs 70 to 72; and *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:625, paragraph 112.

81 — Paragraph 238 of the judgment under appeal.

164. That argument misses the point. Del Monte may be of the view that the General Court erred in law in the conclusions it drew from the fact that the results were not consolidated and disregarded previous relevant case-law. However, there is not the slightest connection between that view and a distortion of evidence.

iii) Interim conclusion

165. In summary, none of the individual allegations of the distortion of evidence made by Del Monte is even marginally successful.

b) The duty of the General Court to carry out an in-depth assessment of the evidence

166. Finally, in the context of this second ground of appeal, Del Monte claims that the General Court failed to carry out an in-depth assessment of the evidence before it. In Del Monte's view, the General Court distorted the evidence by considering each item of evidence only individually without assessing whether all the evidence adduced militated against the finding of a decisive influence exercised by Del Monte over Weichert or — in the alternative — whether the body of evidence is unclear in that regard (*non liquet*).

167. This allegation likewise appears to me to be based on a very selective reading of the judgment under appeal. A cursory reading of paragraph 266 of that judgment is enough to establish that the General Court did not consider the documentary evidence put forward by Del Monte, 'whether taken individually or collectively', to be capable of casting doubt upon the imputation of the cartel offences committed by Weichert to Del Monte. The General Court thus in no way failed to conduct an overall assessment of the evidence.

168. Despite its designation as an objection of distortion, the allegation made by Del Monte turns out in fact to be an objection of legally incorrect characterisation of facts. In Del Monte's view, the General Court, on the basis of the evidence before it, taken as a whole, drew incorrect legal conclusions regarding the existence of an economic unit formed by Del Monte and Weichert. To that extent, there is an overlap between this final complaint under the second ground of appeal and the first ground of appeal; for the reasons already set out in connection with the first ground of appeal,[82] this plea must be rejected.

3. Fifth ground of appeal: single and continuous infringement

169. By its fifth and final ground of appeal, Del Monte claims that the General Court should have annulled the contested decision because, in that decision, there is held to be a single and continuous infringement involving Dole, Chiquita and Del Monte/Weichert, even though it is established that Weichert was unaware of the exchange of information between Dole and Chiquita.

170. Del Monte claims that the General Court erred in law by regarding Weichert's unawareness of the exchange of information between Dole and Chiquita merely as a mitigating circumstance and, by so doing, failed to have regard to the relevant case-law of the Court.

171. This ground of appeal appears to me to be based on an incorrect reading of both the judgment under appeal and the case-law of the Court.

82 — See once again above, points 82 to 110 of this Opinion.

172. The concept of a single and continuous infringement means that all the participants in a cartel can have imputed to them the participation in the offence by each of the other participants in the cartel — like co-perpetrators — even if they did not themselves participate actively in each individual element of the global cartel. [83]

173. The condition for such imputation is, indeed, that it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk. [84]

174. In other words, the reciprocal imputation of participation in an offence is possible if the respective participant in the cartel was aware or ought to have been aware that, through its own participation, it was joining in a global cartel and contributing by its own conduct to the anti-competitive objectives jointly pursued by all the participants. [85]

175. However, if it has not been proven that a participant in a cartel was aware or ought to have been aware of certain aspects of a single and continuous infringement, that participant cannot be held liable for those aspects. [86]

176. Admittedly, the fact that a participant in a cartel neither was aware nor ought to have been aware of all aspects in no way alters the *objective existence* of the single and continuous infringement. In particular, that fact cannot relieve the undertaking of liability for conduct in which it has undeniably taken part or for conduct for which it can undeniably be held responsible. [87] This is because the differences are only gradual in nature and do not alter the fact that the undertaking in question has infringed Article 81 EC, even if not all elements of the single and continuous infringement can be imputed to that undertaking. [88]

177. All in all, the extent and the gravity of the respective participation in the global cartel must therefore be taken into consideration individually in determining the fine for each participant in the cartel. [89]

178. The General Court applied those rules correctly in the present case.

179. The General Court acknowledged that Weichert neither was aware nor ought to have been aware of the exchange of information between Dole and Chiquita. Quite rightly, the General Court did not take that fact as an opportunity to question the existence of a single and continuous infringement as such. Rather, the judgment under appeal rightly focussed solely on the legal consequences for Weichert and held that Weichert — unlike Dole and Chiquita — could *not* be attributed responsibility for the infringement as a whole, and therefore a reduced fine had to be imposed on it. [90]

83 — See my Opinion in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:317, point 34.

84 — *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 83, 87 and 203; *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraph 83; and *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraphs 43 and 44. See also, to similar effect, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 143, in which reference is made to the 'tacit approval of an unlawful initiative', which gives rise to 'complicity' and a 'passive mode of participation in the infringement'.

85 — See my Opinion in *Commission* v *Verhuizingen Coppens*, EU:C:2012:317, point 36; see also, to the same effect, *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraph 87.

86 — See, to that effect, *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph 44.

87 — *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph 45.

88 — See, to that effect, my Opinion in *Commission* v *Verhuizingen Coppens*, EU:C:2012:317, point 33.

89 — *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraph 90; *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraph 86; and *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph 45.

90 — Paragraphs 646 and 649 of the judgment under appeal; see also recitals 258 and 476 of the contested decision.

180. It admittedly seems somewhat surprising that, in this connection, the General Court — probably relying on the Commission's choice of words in the contested decision — makes reference to 'mitigating circumstances' in relation to Weichert. After all, in reality, it is simply Weichert's lesser participation in the infringement which justifies a reduced penalty. It is, ultimately, precisely that fact that the General Court likewise takes as a basis where it finds that the basic amount of the fine was lower in the case of Weichert because it had not been aware of pre-pricing communications between Chiquita and Dole or could not reasonably have foreseen them.

181. In those circumstances, the fifth ground of appeal must be dismissed.

C – *Weichert's cross-appeal in Case C-293/13 P*

182. As I have stated above,[91] the cross-appeal submitted by Weichert in Case C-293/13 P is inadmissible because it does not satisfy the requirements laid down in the second sentence of the second paragraph of Article 56 of the Statute of the Court of Justice. I will therefore now comment on the merits of that cross-appeal solely in the alternative.

1. First ground of appeal: existence of a concerted practice

183. By its cross-appeal in Case C-293/13 P, Weichert objects firstly to the General Court's findings regarding the existence of a concerted practice between Weichert and Dole. In Weichert's view, there cannot be said to be a concerted practice between those two undertakings because Weichert was merely a price follower who constantly aligned its quotation prices with those of Dole on a unilateral basis.

184. In this connection, Weichert puts forward a total of three objections regarding the judgment under appeal. I will now consider each of those objections individually.

a) The objection alleging a contradictory statement of grounds

185. First, Weichert considers the judgment under appeal to be founded on contradictory grounds since, on the one hand, in paragraph 580, the General Court finds there to be no indications that Weichert followed prices and, on the other hand, in paragraph 847, it considers just such a 'follow-my-leader' approach to be possible.

186. The question whether the grounds of a judgment of the General Court are contradictory or inadequate is a question of law which is amenable, as such, to review on appeal.[92]

187. In the present case, the General Court finds in the final sentence of paragraph 580 of the judgment under appeal that a particular statement made by Chiquita in the administrative procedure — a statement discussed in greater detail in that paragraph — does not suffice to sustain the claim 'that Weichert waited every week to find out what Dole's price was before setting its own quotation price at the same level'.

188. By contrast, the General Court states in paragraph 847 of the judgment under appeal that the same statement by Chiquita 'might also suggest that Weichert merely adopted a 'follow-my-leader' approach in relation to Dole's pricing policy'.

91 — See above, points 50 to 65 of this Opinion.

92 — *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 90; *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 76; and *Melli Bank* v *Council*, C-380/09 P, EU:C:2012:137, paragraph 41. See, to the same effect, *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraphs 190 and 202.

189. Although, at first glance, there appears to be some degree of conflict between those two paragraphs of the judgment under appeal, on closer examination they are not in fact inherently contradictory. This is because, in both passages of the judgment, the General Court is considering — albeit in completely different contexts — the evidential value of one and the same statement made by Chiquita during the administrative procedure. In addition, in both cases, the General Court ultimately takes the view that that statement has relatively low inherent probative value.

190. It is precisely on account of its low probative value that the General Court did not attribute any great evidential value overall to the statement in question by Chiquita as regards the existence or non-existence of a collusive practice between Dole and Weichert. On the one hand, in paragraphs 580 and 581 of the judgment under appeal, the General Court refused to view the statement by Chiquita as *exculpatory evidence* that Weichert was merely a price follower in its relationship with Dole. However, on the other hand, in paragraphs 847 to 853 of the judgment under appeal, nor does the General Court deem the statement in question to be suitable as *inculpatory evidence* in relation to the anti-competitive nature of the bilateral contacts between Weichert and Dole.

191. No infringement of the duty to state reasons pursuant to Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice can thus be found.

192. In any event, the very general observation must be made that the requirement on the General Court to state reasons applies less to its consideration of individual pieces of evidence than to *its judgment*. Even if — contrary to my findings above — the wording of paragraphs 580 and 847 of the judgment under appeal were to be regarded as not being entirely consistent, clear and non-contradictory reasons were nevertheless stated for the actual ruling of the General Court on the proceedings pending before it: a concerted practice having an anti-competitive object was found to exist and Weichert was held to be involved in that practice.[93]

193. Weichert's objection relating to the statement of reasons is therefore unsuccessful.

b) The objection alleging the distortion of evidence

194. Second, Weichert alleges that the General Court distorted evidence. In its view, the finding in paragraph 580 of the judgment under appeal — that the statement by Chiquita does not suffice as evidence for the assumption that Weichert was merely a price follower — distorts the clear sense of the evidence adduced. Weichert seeks to infer that distortion from a comparison with paragraph 847 of the judgment under appeal, in which the General Court — as I have already mentioned — finds that the statement in question by Chiquita 'might also suggest that Weichert merely adopted a 'follow-my-leader' approach in relation to Dole's pricing policy'.

195. As I have previously stated, a finding of a distortion of facts or evidence is subject to strict requirements. Such distortion exists only where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect.[94] By contrast, there is no distortion where the factual and evidential position reasonably allows different assessments and the General Court has adopted one of them.

196. The latter situation is the case here. It could not be clearly inferred from the statement in question, made by Chiquita in the administrative procedure, whether Weichert adopted Dole's quotation prices unilaterally merely as a price follower or whether it was involved with Dole in a concerted practice having an anti-competitive object. The General Court concluded that the statement

93 — See, in particular, paragraphs 583 to 585 and 788 of the judgment under appeal.

94 — *PKK and KNK* v *Council*, EU:C:2007:32, paragraph 37; *Sniace* v *Commission*, EU:C:2007:700, paragraph 37; and *Lafarge* v *Commission*, EU:C:2010:346, paragraph 17.

by Chiquita was incapable of supporting the claim of mere price following.[95] Such a conclusion was perfectly justifiable in view of the low probative value of that statement on the relationship between Weichert and Dole, and under no circumstances was that conclusion of the General Court *manifestly incorrect*.

197. The allegation of the distortion of evidence is thus unfounded.

c) The objection concerning the absence of any forward-looking exchange of information

198. Finally, Weichert claims that, in the present case, at no point was there found to be an exchange of information between Dole and Weichert about their own *future* conduct on the market. In Weichert's view, this is a further reason why the view cannot be taken that there was an anti-competitive concerted practice between the two undertakings.

199. It should be borne in mind in this regard that the assessment of the facts and evidence is a matter for the General Court alone and that the Court of Justice, in its capacity as court of appeal, does not have jurisdiction to carry out such an assessment, save in the case of any complaint of distortion.[96] Weichert's argument amounts to seeking to persuade the Court of Justice to re-assess the facts and must therefore be dismissed as inadmissible.

200. Solely for the sake of completeness, I would point out that, contrary to the argument advanced by Weichert, in several passages of the judgment under appeal the General Court indeed finds that information was exchanged between Dole and Weichert about their future conduct on the market.[97]

201. Furthermore, it is likewise irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour or whether all participating undertakings inform each other of their respective deliberations and intentions. Simply when one undertaking alone breaks cover and reveals to its competitors confidential information concerning its future commercial policy, that reduces for all participants uncertainty as to the future operation of the market and introduces the risk of a diminution in competition and of collusive behaviour between them.[98]

202. There is therefore no need to establish whether, as part of their pre-pricing communications, Dole and Weichert provided each other with information about their respective future conduct on the market, or whether Dole alone unilaterally disclosed such information to Weichert without receiving information from Weichert in return. This would in no way affect the existence of a concerted practice having an anti-competitive object prohibited under Article 81 EC (Article 101 TFEU).

d) Interim conclusion

203. Accordingly, taken as a whole, the first ground of appeal put forward by Weichert in the context of its cross-appeal in Case C-293/13 P is unfounded.

95 — Paragraphs 850 and 851 of the judgment under appeal.

96 — *San Marco* v *Commission*, C-19/95 P, EU:C:1996:331, paragraphs 39 and 40; *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 103; and *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 84. See, similarly, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 60.

97 — See, in particular, paragraphs 583 to 585 and paragraph 362 of the judgment under appeal.

98 — See my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, point 54.

2. Second ground of appeal: the restriction of competition by object

204. By its cross-appeal in Case C-293/13 P, Weichert complains secondly that, in the present case, the General Court wrongly took the view that there was a restriction of competition by object. In Weichert's opinion, the General Court 'simply asserted' that, by their very nature, the pre-pricing communications were anti-competitive, and did not assess their actual ability to restrict competition in the legal and economic context in question.

205. At first sight the conclusion might be drawn that, by this submission, Weichert seeks to prompt the Court of Justice, in its appellate jurisdiction, to take the improper step of substituting its own assessment of the facts and evidence for that of the General Court. In reality, the Court of Justice is being asked here to examine whether the General Court applied the correct criteria and standards in its assessment of the facts and evidence. That is a question of law amenable to review by the Court of Justice in its appellate jurisdiction [99] and of particular interest, in the light of the recent judgment in *CB* v *Commission*. [100]

206. I note at the outset that the General Court gave extremely detailed consideration to the market conditions and the arguments advanced relating to those conditions, and set out very clearly the reasons why the exchange of information between the undertakings involved had to be regarded, by its very nature, as being harmful to the proper functioning of normal competition. The present case differs fundamentally in this regard from the abovementioned case of *CB* v *Commission*.

a) The relevant legal criteria

207. Within the scope of Article 81 EC (now Article 101 TFEU), the anti-competitive nature of an undertaking's conduct may follow not just from the effects of that conduct but also from its object. This applies equally to agreements, decisions and concerted practices. [101]

208. Not every exchange of information between competitors necessarily has as its object the prevention, restriction or distortion of competition within the common market within the meaning of Article 81(1) EC. [102]

209. The question whether, by its very nature, such an exchange of information reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object within the meaning of Article 81(1) EC must be assessed having regard to the subject-matter of the information exchanged, the objectives of the exchange, and the economic and legal context in which that exchange takes place. [103] 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. [104] The parties' intentions may likewise be taken into account, even though they are not a factor which must necessarily be considered. [105]

99 — *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraph 125; *Bertelsmann and Sony Corporation of America* v *Impala*, EU:C:2008:392, paragraph 117; and *Commission* v *Stichting Administratiekantoor Portielje*, EU:C:2013:514, paragraph 59.

100 — C-67/13 P, EU:C:2014:2204.

101 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 24.

102 — See, in this regard, my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, point 37.

103 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 27. See, to the same effect, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 37, and *CB* v *Commission*, EU:C:2014:2204, paragraph 53.

104 — *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 36, and *CB* v *Commission*, EU:C:2014:2204, paragraph 53.

105 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 27; *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 37; and *CB* v *Commission*, EU:C:2014:2204, paragraph 54.

210. If, on the basis of the criteria set out above, it appears that an exchange of information between competitors can be regarded, by its very nature, as being harmful to the proper functioning of normal competition, that is to say, in other words, that the exchange of information reveals in itself a sufficient degree of harm to competition, the actual effects of the exchange of information on competition need not be considered or taken into account.[106] The only requirement in those circumstances is that the exchange of information is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market.[107]

211. Furthermore, in accordance with the case-law of the Court, there is a rebuttable presumption that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market; it is for the undertakings concerned to prove the contrary.[108]

b) The application of the relevant legal criteria to the individual case

212. Contrary to the view taken by Weichert, I can see no indications whatsoever that, in the present case, the General Court might have ignored or incorrectly applied the legal criteria set out above.

213. In very general terms, Weichert appears to me to have blurred the requirements governing the finding of an anti-competitive object and the finding of an anti-competitive effect where it submits — as it had already done at first instance — that the General Court should have given consideration to the 'economic impact of the impugned conduct on the European banana market'. This is because, in the context of Article 81 EC (Article 101 TFEU), such consideration is essential to the assessment not of the object of particular conduct, but rather solely the assessment of the effect(s) of that conduct.[109]

– The nature of the exchange of information and its subject-matter

214. More specifically, Weichert claims first of all that an exchange of information about quotation prices cannot, by its nature, be regarded as anti-competitive.

215. It should be noted in this regard that an exchange of information is not vitiated by an anti-competitive object just where it relates directly to the prices applied on the market by the undertakings involved. This is because, as the Court has already ruled, Article 81 EC (Article 101 TFEU) protects the structure of the market and thus competition as such.[110] Accordingly, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link

106 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 29 and 30. See, to the same effect, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 135; *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 34; and *CB* v *Commission*, EU:C:2014:2204, paragraphs 49 to 52 and 57 *in fine*.

107 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 31 and 43. See, to the same effect, *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 38.

108 — *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraphs 121 and 126; *Hüls* v *Commission*, C-199/92 P, EU:C:1999:358, paragraphs 162 and 167; and *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 51. See also my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, point 75.

109 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 29 and 30. See, to the same effect, *Football Association Premier League and Others*, EU:C:2011:631, paragraph 135; *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 34; and *CB* v *Commission*, EU:C:2014:2204, paragraphs 49 to 52 and 57 *in fine*.

110 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 38, and *GlaxoSmithKline Services* v *Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 63.

between that practice and consumer prices.[111] Nor does there have to be a direct link between the information exchanged and the wholesale prices. It is in fact sufficient for a finding of an anti-competitive object that information is exchanged between competitors about factors relevant to their respective pricing policy or — more generally — to their conduct on the market.[112]

216. That is precisely the situation here.

217. According to the extremely detailed findings of the General Court, against which Weichert has made no allegation of distortion whatsoever, bilateral pre-pricing communications were exchanged in the present case between the undertakings involved; as part of those communications, the undertakings discussed their own quotation prices and certain price trends.[113] Weichert's wholly unsubstantiated claim that the exchange of information related solely to the general conditions prevailing on the market, and not to the individualised pricing intentions of the undertakings involved, is inconsistent with the facts as found by the General Court and therefore — in the absence of a complaint of distortion — is irrelevant for the purposes of the present appeal proceedings.

218. Once again according to the findings of the General Court, which — incidentally — can be traced back not least to Weichert's own submissions, the quotation prices were relevant to the market concerned.[114] In particular, in the present case, market signals, market trends and/or indications as to the intended development of banana prices could be inferred from those quotation prices of the banana importers; moreover, in some transactions, the prices were directly linked to the quotation prices on the basis of contractually agreed pricing formulae.[115]

219. I would add that, from a business perspective, it would make little sense to fix quotation prices in the first place and to exchange information about their continued development with competitors if the undertakings' own quotation prices and the information obtained about the quotation prices of competitors were not to be factored into the respective undertakings' future conduct on the market and the prices actually applied by them.

220. Following a very detailed discussion of the actual market conditions and the arguments advanced by Weichert, the General Court thus rightly concluded that the exchange of information conducted between the undertakings involved had an anti-competitive object.[116]

221. Indeed, such an exchange of information between competitors about price-relevant factors is blatantly contrary to the requirement of independence, which is a key feature of the market conduct of undertakings operating within a system of effective competition.[117] Consequently, and without this requiring any further explanations, the exchange of information alone reveals in itself a sufficient degree of harm to competition and can be regarded, by its very nature, as being harmful to the proper functioning of normal competition.[118]

111 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 36 to 39.

112 — See, to this effect, *Suiker Unie and Others* v *Commission*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 173; *Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraph 86; and *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 32.

113 — See, in particular, paragraphs 17 to 20, 583 to 585 and 788 of the judgment under appeal and recitals 51 and 57 of the contested decision.

114 — Paragraphs 450 to 562 of the judgment under appeal; see also paragraphs 850 to 852 of that judgment, in which reference is made to Weichert's own submissions.

115 — Paragraphs 21, 553 and 583 of the judgment under appeal and recital 115 of the contested decision.

116 — See, in particular, paragraph 585 of the judgment under appeal.

117 — With regard to the requirement of independence, see, inter alia, *Suiker Unie and Others* v *Commission*, EU:C:1975:174, paragraph 173; *Deere* v *Commission*, EU:C:1998:256, paragraphs 86 and 87; and *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 32 and 33.

118 — With regard to these criteria, see again the recent judgment in *CB* v *Commission*, EU:C:2014:2204, in particular paragraphs 50 and 57.

222. In this connection, the present case differs fundamentally from the case of *Asnef-Equifax*,[119] to which Weichert has referred and which related to the Spanish credit information exchange system. This is because the primary purpose of an exchange of information about the creditworthiness of borrowers, such as in the case of Asnef-Equifax, is to enhance the functioning of the market and to create equal conditions of competition for all credit providers, without one market operator in any way disclosing to its competitors the conditions which it intends to offer to its customers. The effect of an exchange of information such as that at issue here, which essentially relates to the factors relevant to the setting of expected quotation prices and price trends, is exactly the opposite: by means of that exchange, the undertakings involved disclose to their competitors — at least to some extent — their intended conduct on the market and sensitive information connected to their future price ideas. This is quite obviously capable of removing uncertainties concerning the intended conduct of the participating undertakings and allows conditions of competition to be created which do not correspond to the normal conditions of the market in question.

223. In the light of the foregoing, Weichert's criticism in connection with the nature and subject-matter of the exchange of information must be rejected.

– The frequency and regularity of the exchange of information

224. A further objection advanced by Weichert relates to the frequency and regularity of its exchange of information with Dole. Weichert points out that there were 'only' some 20 to 25 bilateral pre-pricing communications each year, whereas quotation prices were fixed every week. In addition, the 'possible future development of quotation prices in general' was discussed 'only on rare occasions'.

225. Although it seems to me to be difficult to dispute that an exchange of information taking place 20 to 25 times each year is of a remarkable frequency and regularity, the present appeal proceedings, which are concerned with questions of law alone, are hardly likely to form an appropriate context for numbers games, which ultimately would amount to a re-assessment of the facts.

226. In addition, in this connection, the argument advanced by Weichert that, although quotation prices were fixed on a weekly basis, an exchange of information about price-relevant factors did not take place each week is largely irrelevant. This is because, even if the claim that the rhythm of the quotation price fixing and the rhythm of the exchange of information were not in perfect synchronicity were to be accurate, this in no way affects the existence of an exchange of information having an anti-competitive object.

227. Indeed, contrary to what Weichert appears to believe, the finding of an exchange of information having an anti-competitive object is not dependent on the proof of a frequent or regular — or even a weekly — exchange of information between the undertakings involved. It is settled case-law that even a single exchange of information can form the basis for a finding of infringement and the imposition of a fine if the undertakings concerned remained active on the market after that exchange of information.[120]

228. Accordingly, Weichert's criticism of the General Court's allegedly insufficient investigation of the frequency and regularity of the exchange of information between Weichert and Dole misses the mark.

119 — *Asnef-Equifax and Administración del Estado*, C-238/05, EU:C:2006:734.

120 — *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 58 and 59. See also *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraph 121; *Hüls* v *Commission*, EU:C:1999:358, paragraph 162; and, additionally, my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, points 97 to 107.

c) Interim conclusion

229. All things considered, Weichert's arguments are incapable of invalidating the General Court's legal characterisation of the exchange of information at issue as a concerted practice having an anti-competitive object prohibited under Article 81 EC. The second ground of the cross-appeal in Case C-293/13 P is therefore likewise unsuccessful.

3. Summary relating to the cross-appeal in Case C-293/13 P

230. Since neither of the grounds of appeal advanced by Weichert is successful, its cross-appeal in Case C-293/13 P must be dismissed.

D – *The principal appeal brought by the Commission in Case C-294/13 P*

231. The Commission was likewise quite clearly not satisfied with the judgment under appeal. Its appeal in Case C-294/13 P concerns the circumstances in which there is a legal requirement to take an undertaking's cooperation with the Commission during the administrative procedure into consideration as a mitigating circumstance when calculating the amount of the fine.

1. First ground of appeal: responses to the Commission's requests for information as the basis for a reduction of the fine

232. By its first ground of appeal, the Commission objects to paragraphs 840 to 853 of the judgment under appeal. In that passage of the judgment, the General Court, based inter alia on the Leniency Notice of 2002, considers it necessary to reduce the fine imposed jointly and severally on Del Monte and Weichert, specifically as recognition of the information voluntarily provided by Weichert during the administrative procedure.[121] The Commission takes the view that that approach constitutes an error of law and argues, in essence, that Weichert merely complied with its duty to respond to requests for information. Del Monte and Weichert counter that no such duty existed and that the information supplied by Weichert was provided voluntarily.

233. It appears to me that part of the bitter dispute between the parties in the context of this first ground of appeal is due to a degree of terminological confusion surrounding the concepts of *voluntariness*, *cooperation* and protection against *self-incrimination* in connection with the provision of information during the administrative procedure. This terminological confusion has its origin partly in the judgment under appeal itself and is now perpetuated in the Commission's appeal.

234. It is clear, first of all, that the Commission is entitled to request that undertakings and associations of undertakings provide all necessary information in order to shed light on an alleged cartel offence. To that end, the Commission may proceed, at its own discretion, either by simple request for information or by formal decision (Article 18(1) of Regulation No 1/2003).

235. Only the provision of information which is required by formal decision is mandatory; responses to simple requests for information are voluntary.[122] This finding is confirmed by a consideration of the penalties for failing to provide information: provision is made for penalties only in respect of information requested by formal decision and not in respect of simple requests for information;[123] in

121 — See, in particular, paragraph 853 of the judgment under appeal.

122 — *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 279.

123 — Articles 23(1)(b) and 24(1)(d) of Regulation No 1/2003.

both cases, only the provision of incorrect or misleading information is punishable by a fine.[124] In this way, Regulation No 1/2003 guarantees the delicate balance between the efficiency of the Commission's investigations and the appropriate protection for the undertakings and associations of undertakings concerned.

236. It is entirely undisputed that, in the present case, Weichert was not required to supply information by formal decision within the meaning of Article 18(3) of Regulation No 1/2003 but was rather merely informally asked to provide information by simple request pursuant to Article 18(2) of that regulation.[125] Contrary to what the Commission appears to believe, it is thus established that by responding to the requests for information during the administrative procedure, Weichert did not comply with a legal obligation of any kind, but in fact that all the information supplied by it was provided *voluntarily*.

237. However, it by no means follows necessarily and automatically from that voluntary nature that the provisions of the Leniency Notice would have been applicable in the present case.

238. Indeed, even if it is assumed, as the General Court found, that the information provided by Weichert was not just voluntary but, in addition, was also particularly significant to the administrative procedure[126] and enabled the Commission to establish the existence of an infringement with less difficulty,[127] none of those factors gives any indication as to whether this was a genuine *act of cooperation* with the Commission for which Weichert, in accordance with the Leniency Notice, should have been rewarded with a reduction in the fine imposed on it.

239. It should rather be borne in mind that the reduction of a fine under the 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 with the Commission. In other words, the conduct of the undertaking concerned during the administrative procedure must reveal a genuine spirit of cooperation.[128]

240. It would be inappropriate to find there to be always such a spirit of cooperation where an undertaking duly responds to all the Commission's requests for information. By merely responding to specific enquiries from the Commission — even if those enquiries are made in the form of simple requests for information and thus legally non-binding — the undertaking is simply doing what is in any case expected of it in the administrative procedure and acting in a manner consistent with the normal conduct of a reasonable party to the proceedings.[129]

241. The fact that an undertaking does not obstruct the administrative procedure is not worthy of reward. This is because, by not being obstructive, an undertaking is merely preventing the occurrence of aggravating circumstances which could, where appropriate, justify an increase in the fine to be imposed on it.[130] The existence of mitigating factors can by no means be concluded from the absence of such aggravating circumstances. A party wishing to benefit from mitigating circumstances must do more than adopt the normal conduct which may be reasonably expected of any party to the proceedings. It must put all its cards on the table on its own initiative.

124 — Article 23(1)(a) and (b) of Regulation No 1/2003.

125 — Paragraph 838 of the judgment under appeal and recital 46 of the contested decision.

126 — Paragraph 852 of the judgment under appeal.

127 — Paragraph 855 of the judgment under appeal.

128 — *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 395 and 396, and *Schenker and Others*, C-681/11, EU:C:2013:404, paragraph 48.

129 — See also, to this effect, *AOI* v *Commission*, C-668/11 P, EU:C:2013:614, paragraph 78, in which admittedly — in my opinion incorrectly — reference is made to the *legal obligation*, found to exist at first instance, to respond to simple requests for information (see *Agroexpansión* v *Commission*, T-38/05, EU:T:2011:585, paragraph 268).

130 — See, with regard to this aggravating circumstance, the second indent of point 28 of the Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, 'the 2006 Guidelines').

242. In addition, as the Commission rightly points out, it is wholly inconsistent with the object and purpose of a leniency provision, as laid down in the Leniency Notice, for all participants in a cartel to be allowed a priori to benefit from a reduction in the fine imposed simply because they have provided the Commission, at its request, with evidence or other useful information with regard to the finding of an infringement.

243. The application of leniency provisions, which case-law makes expressly clear is to remain the exception,[131] would otherwise virtually become the rule, and there would be an inflationary increase in the grant of reductions in fines.

244. Furthermore, if the advantages offered by a reduction in the fine imposed were even available to an undertaking if it holds back information and evidence until the Commission asks for it by means of specific requests for information, this would considerably diminish the incentive effect of the leniency provisions. From the perspective of procedural tactics and, above all, from an economic standpoint, it would pay for the undertakings to adopt a 'wait-and-see' or even passive approach rather than returning to lawful behaviour and supplying the Commission, on their own initiative, and as quickly and as comprehensively as possible, with factual information and evidence. This would do a great disservice to the effective implementation of the European rules on competition, which is one of the key objectives of the Treaties.[132]

245. The fact that the adoption of a purely wait-and-see and passive approach by an undertaking during the administrative procedure is not intended to afford that undertaking the benefit of mitigating circumstances is likewise clear from a comparison with the 2006 Guidelines, in which *effective* cooperation with the Commission is required.[133] There are no indications that the requirements governing the quality of undertakings' cooperation with the Commission within the scope of a leniency provision, such as that laid down in the Leniency Notice, should be less stringent than within the scope of the general rules for the calculation of fines, as set out in the 2006 Guidelines.

246. In the light of the foregoing, a reduction of a fine, as provided for in the Leniency Notice, is justified only where an undertaking provides information to the Commission without being asked to do so. In other words, the cooperation with the Commission must be *not just voluntary but also spontaneous*.[134]

247. Consequently, the General Court erred in law where it found in paragraphs 840 to 853 of the judgment under appeal that merely voluntary responses to simple requests for information pursuant to Article 18(2) of Regulation No 1/2003 alone justify a reduction of the fine within the meaning of points 20 to 23 of the Leniency Notice of 2002.

131 — See, to this effect, although related to the immunity from or non-imposition of a fine, *Schenker and Others*, EU:C:2013:404, paragraph 49.

132 — For the significance of the rules on competition to the functioning of the internal market, see *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 36, and — in relation to the legal position following the entry into force of the Treaty of Lisbon — *TeliaSonera*, C-52/09, EU:C:2011:83, paragraph 20, and *Commission* v *Italy*, C-496/09, EU:C:2011:740, paragraph 60. The need for effective implementation of Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU) was made clear more recently in, for example, *X BV*, C-429/07, EU:C:2009:359, paragraphs 33 to 35; *VEBIC*, Case C-439/08, EU:C:2010:739, paragraph 59; *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 19; and *Schenker and Others*, C-681/11, EU:C:2013:404, paragraph 46.

133 — Fourth indent of point 29 of the 2006 Guidelines.

134 — Solely for the sake of completeness, I would point out that spontaneously provided information can also be found in a response to a request for information made by the Commission in so far as the information goes beyond the subject-matter of the questions put and documents requested therein.

248. Furthermore, the fact that a spirit of cooperation did not exactly prevail between the Commission and Weichert in the present case is clear not only from the absence of any spontaneous information provided to the Commission but also, in addition, from the finding of the General Court that Weichert's stance was to continuously deny any infringement throughout the administrative procedure.[135] Each of these two aspects taken individually — the absence of any spontaneous information on the one hand and the persistent denial of the infringement on the other — categorically precludes the application of points 20 to 23 of the Leniency Notice of 2002.

249. Admittedly, the mere fact that, in the grounds stated by it for the reduction of the fine granted to Del Monte and Weichert, the General Court relied on a legally incorrect interpretation of the Leniency Notice does not necessarily mean that the judgment under appeal must be set aside.[136] Indeed, it should be borne in mind that that notice simply sets out the administrative practice of the Commission as the competition authority at that time, a practice which, on its publication, the Commission committed itself to observe, without the notice thereby acquiring the status of a rule of law.[137] There is nothing to prevent the General Court, in the exercise of its own unlimited jurisdiction (Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003), from applying other criteria and, where appropriate, granting more generous reductions.[138]

250. The General Court's exercise of that power under Article 261 TFEU is reviewed by the Court of Justice solely to establish whether, in exercising that power, the General Court committed manifest errors.[139] Errors of that kind must be assumed, first, where the General Court has failed to take into account the extent of its powers under Article 261 TFEU,[140] secondly, where it did not fully consider all the material points,[141] and, thirdly, where it has applied incorrect legal criteria,[142] not least having regard to the principles of equal treatment[143] and proportionality.[144]

251. The present case falls into the second of those categories: in the exercise of its power under Article 261 TFEU, the General Court did not fully consider all the material points. First, as I have already noted, it failed to appreciate the difference between simply voluntary cooperation and spontaneous cooperation.[145] Secondly, it did not consider the negative impact which a practice established by the Union judicature of reducing fines in cases of voluntary but not spontaneous cooperation may have on the functioning of the leniency provisions and — more generally — on the effective implementation of the rules on competition.[146]

135 — Paragraph 855 of the judgment under appeal.

136 — See, to this effect, *Lestelle* v *Commission*, C-30/91 P, EU:C:1992:252, paragraph 28; *FIAMM and Others* v *Council and Commission*, EU:C:2008:476, paragraph 187; and *MasterCard and Others* v *Commission*, EU:C:2014:2201, paragraph 170.

137 — *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 209 to 211; *KME and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraph 100; and *Ziegler* v *Commission*, EU:C:2013:513, paragraph 60.

138 — *ThyssenKrupp* v *Commission*, C-65/02 P and C-73/02 P, EU:C:2005:454, paragraphs 51 and 54, may be understood to mean that there is potential for a fine to be reduced even where the undertaking concerned has simply not contested the main findings of fact upon which the Commission based its allegations. It must, however, be pointed out that, in those paragraphs, the Court merely gave its view on the interpretation of a predecessor provision to the Leniency Notice of 2002, and not, however, on what appears appropriate in the context of the exercise of unlimited jurisdiction pursuant to Article 261 TFEU.

139 — *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraph 365.

140 — See, in this regard, my Opinions in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, EU:C:2005:751, point 137, and in *Schindler Holding and Others* v *Commission*, EU:C:2013:248, point 190. See, to the same effect, *Schindler Holding and Others* v *Commission*, EU:C:2013:522, paragraphs 155 and 156, and *Kone and Others* v *Commission*, C-510/11 P, EU:C:2013:696, paragraphs 40 and 42.

141 — *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 128; *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 244 and 303; and *Papierfabrik August Koehler and Others* v *Commission*, C-322/07 P, C-327/07 P and C-388/07 P, EU:C:2009:500, paragraph 125.

142 — *Baustahlgewebe* v *Commission*, EU:C:1998:608, paragraph 128; *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 244 and 303; and *Papierfabrik August Koehler and Others* v *Commission*, EU:C:2009:500, paragraph 125.

143 — *Weig* v *Commission*, C-280/98 P, EU:C:2000:627, paragraphs 63 and 68, and *Sarrió* v *Commission*, C-291/98 P, EU:C:2000:631, paragraphs 97 and 99.

144 — *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 126, and *Schindler Holding and Others* v *Commission*, EU:C:2013:522, paragraph 165.

145 — See above, points 237 to 241 and 246 of this Opinion.

146 — See above, points 242 to 245 of this Opinion.

252. Consequently, the first ground of appeal advanced by the Commission must be upheld.

2. Second ground of appeal: an economic unit as a pre-requisite for the extension of mitigating grounds from the subsidiary to the parent company

253. The Commission puts forward its second ground of appeal solely in the alternative, in the event that its first ground of appeal is unsuccessful. Although I propose above that the first ground of appeal be upheld,[147] I will now, for the sake of completeness, also briefly consider the second.

254. The Commission accuses the General Court of making an error of law and an error of reasoning by allowing Del Monte also to benefit from the reduction of the fine granted to Weichert for its cooperation during the administrative procedure without discussing whether Del Monte and Weichert were still part of one and the same undertaking.

a) Admissibility

255. Del Monte considers this second ground of appeal advanced by the Commission to be inadmissible because the Commission has never previously argued — either in the contested decision or in the judicial proceedings at first instance — that Del Monte and Weichert should be assessed separately with regard to the amount of the fine.

256. That objection must be upheld.

257. It is true that the fact that the contested decision contains no findings relating to the question at issue here cannot operate to the Commission's detriment. This is because, in that decision, the Commission itself granted reductions in fines which related to events dating back to the period 2000 to 2002 only. Since the Commission still regarded Del Monte and Weichert as a single undertaking over that period, the issue to be discussed here of the different levels of fine applicable to one company and to the other did not arise for it.

258. However, the Commission could have, and should have, put forward its argument no later than during the judicial proceedings at first instance. In those proceedings, Del Monte had sought a reduction of the fine as compensation for Weichert's cooperation with the Commission during the administrative procedure. The Commission was free to argue in response to that plea in law that, after 2002, and in particular during the administrative procedure, Del Monte and Weichert were no longer a single undertaking, and that Del Monte should not therefore be rewarded for any cooperation with the Commission on the part of Weichert.

259. In those circumstances, it can therefore be argued only with difficulty that, in the present case, the Commission is putting forward a ground of appeal which arises from the judgment under appeal itself and which, accordingly, must necessarily be admissible.[148] This is *a fortiori* true inasmuch as, in accordance with settled case-law,[149] the General Court was in particular not obliged, in exercise of its unlimited jurisdiction (Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003), to undertake of its own motion a new and comprehensive investigation of the file and, as part of that investigation, to address issues such as that broached here by the Commission.

147 — See above, point 252 of this Opinion.

148 — See, in this regard, *Commission* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraphs 100 to 102, and *FLS Plast* v *Commission*, C-243/12 P, EU:C:2014:2006, paragraph 48.

149 — *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 66; *Kone and Others* v *Commission*, EU:C:2013:696, paragraph 32; and *Telefónica and Telefónica de España* v *Commission*, EU:C:2014:2062, paragraph 55.

260. If the Commission were now allowed to raise this issue for the first time at the appeal stage, it would be able to bring before the Court of Justice a case of wider ambit than that which came before the General Court. This is inadmissible at the appeal stage. [150]

b) Merits

261. Nevertheless, in the event that the Court were to find the second ground of appeal advanced by the Commission to be admissible, I would add that I take the view that the objection raised by the Commission would be sound in substantive terms.

262. As the Court has only recently ruled, the reduction of a fine, granted as reward for the cooperation of one participant in a cartel with the Commission during the administrative procedure, cannot be extended to a company which, for the whole or part of the infringement period, had formed part of the economic unit constituted by that undertaking, but had left that unit when that undertaking cooperated with the Commission. [151]

263. Contrary to what Del Monte and Weichert appear to believe, the joint and several liability of the parent company for the cartel offences committed by a subsidiary that is under that parent company's decisive influence cannot be reduced to purely a secondary relationship, as would exist in the case of a guarantee. In this connection, it is true that the Court has described the liability of the parent company as 'derivative and secondary' as regards the existence of an infringement and its duration. [152] Leaving aside that fact, there is, however, no general principle in EU law under which the parent company could never be called upon to pay a higher fine than the subsidiary. [153]

3. Summary relating to the principal appeal in Case C-294/13 P

264. All in all, by virtue of the first ground of appeal, the appeal brought by the Commission in Case C-294/13 P is thus wholly successful, meaning that point 1 of the operative part of the judgment under appeal should be quashed (first sentence of Article 61(1) of the Statute of the Court of Justice). In those circumstances, the second ground of appeal, which, whilst substantively accurate, does not satisfy the conditions of admissibility, is no longer relevant.

E – *The two cross-appeals brought by Weichert and Del Monte in Case C-294/13 P: scope of the protection against self-incrimination*

265. The cross-appeals brought by Weichert and Del Monte in Case C-294/13 P are directed against paragraph 839 of the judgment under appeal and both raise the same point of law: they claim that the General Court erred in law by failing to consider the question whether the requests for information made by the Commission to Weichert were consistent with the protection against self-incrimination (*nemo tenetur se ipsum accusare*). [154]

150 — *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraph 165; *Sweden* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 126; and *Telefónica and Telefónica de España* v *Commission*, EU:C:2014:2062, paragraph 99.

151 — *FLS Plast* v *Commission*, EU:C:2014:2006, paragraph 85. See, to the same effect, *FLSmidth* v *Commission*, EU:C:2014:284, paragraph 85.

152 — *Commission* v *Tomkins*, EU:C:2013:29, paragraphs 38 and 39.

153 — *FLS Plast* v *Commission*, EU:C:2014:2006, paragraph 107.

154 — *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraphs 28 to 35; *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraphs 62 to 65; and *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraphs 40 to 49.

266. This complaint is raised by both cross-appellants solely in the event that the Court were to agree with the line of argument advanced by the Commission in its principal appeal and take the view that Weichert was under a legal obligation to reply to simple requests for information within the meaning of Article 18(2) of Regulation No 1/2003.

267. As I have already stated,[155] Weichert's conduct during the administrative procedure was not sufficient to be regarded as a mitigating factor and to justify a reduction of the fine within the meaning of the Leniency Notice. However, completely irrespective of that fact, Weichert's responses to the Commission's simple requests for information were *voluntary*; in the absence of a decision pursuant to Article 18(3) of Regulation No 1/2003, Weichert was *not obliged* to provide the requested information to the Commission. For the same reason, the simple requests for information made by the Commission were incapable from the outset of requiring Weichert to incriminate itself.[156]

268. The two cross-appeals submitted in Case C-294/13 P are therefore without object and a ruling does not need to be given on them.

V – **Revision of the fine**

269. It is clear from the foregoing that only the appeal brought by the Commission in Case C-294/13 P is successful. The result of the quashing of point 1 of the operative part of the judgment under appeal that I propose in response to that appeal[157] is that the amount of the fine imposed on Del Monte and Weichert jointly and severally in Article 2(c) of the contested decision must be re-assessed.

270. In this regard, both during the proceedings at first instance before the General Court and in the present appeal proceedings, the parties had an opportunity to exchange views on all aspects of relevance. Nor do the facts need any further clarification. The state of proceedings is therefore such that judgment can be delivered (second sentence of Article 61(1) of the Statute of the Court of Justice).

271. In the context of its right to review decisions, the Court enjoys unlimited jurisdiction, as is laid down in Article 261 TFEU in conjunction with Article 31 of Regulation (EC) No 1/2003. It may therefore revise the fine at its own discretion.[158]

272. In order to correct the error of law found to exist in the judgment under appeal, the 10% reduction of the fine granted by the General Court in recognition of Weichert's cooperation during the administrative procedure[159] must be reversed.

155 — See, in this regard, my comments in relation to the Commission's first ground of appeal in Case C-294/13 P (points 232 to 252 of this Opinion).

156 — See, to this effect, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraphs 34 and 35, and *Erste Bank Group and Others* v *Commission*, C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraphs 271 and 272.

157 — See above, point 264 of this Opinion.

158 — See, in this regard, *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraph 218, and *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph 79.

159 — Paragraph 856 of the judgment under appeal.

273. In addition, in view of Weichert's continuous denial of the infringement during the administrative procedure,[160] the fine could conceivably be increased. The unlimited jurisdiction enjoyed by the Court does in principle also afford it that option,[161] in particular since there is no prohibition of *reformatio in peius* either in the proceedings at first instance or in the appeal proceedings. In addition, with regard to the amount of the fine, the Courts of the European Union are not bound by the forms of order sought by the parties, provided that they adhere to the subject-matter of the proceedings as determined in the action for annulment and in the appeal(s).

274. However, I would propose refraining from applying an increase in the present proceedings since, although Weichert continuously denied the infringement, it did nevertheless always duly respond to all requests for information from the Commission. Simply challenging the illegality of the conduct for which an undertaking is criticised, a challenge which is open to any party to the proceedings in the light of the presumption of innocence and the rights of the defence, does not justify any particular aggravation of the penalty to be imposed.

275. At the hearing before the Court, the parties to the proceedings, with whom all the abovementioned points were discussed, likewise unanimously pronounced themselves in favour of that approach. In particular, the Commission argued against regarding the denial of the infringement, taken in isolation, as an aggravating circumstance.

276. Leaving aside the matters just discussed regarding the appropriate assessment of the conduct of undertakings during the administrative procedure, I cannot identify anything in the present case which indicates that the fine imposed on Del Monte and Weichert was calculated incorrectly or that it was disproportionate or simply inappropriate.

277. Reconsidering all the circumstances of the individual case, in particular the nature, gravity and duration of the infringement, a fine of EUR 9.8 million seems to be commensurate with the nature and seriousness of the offence, with Del Monte and Weichert remaining jointly and severally liable.

VI – **Costs**

278. Where the appeal is well founded, and the Court itself gives final judgment in the case, the Court is to make a decision as to costs (Article 184(2) of the Rules of Procedure).

279. It follows from Article 138(1) in conjunction with Article 184(1) of the Rules of Procedure, that the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since by their respective claims — whether in the form of their own appeals, cross-appeals or in response to the appeals brought by other parties — Del Monte and Weichert have been unsuccessful, they should each bear their own costs in Cases C-293/13 P and C-294/13 P and, in addition, pay all the costs incurred by the Commission in both cases, the latter on a joint and several basis.[162]

VII – **Conclusion**

280. In the light of the foregoing considerations, I propose that the Court should:

(1) Set aside point 1 of the operative part of the judgment in *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129.

160 — Paragraph 855 of the judgment under appeal.

161 — *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 61.

162 — See, in this regard, *D and Sweden* v *Council*, C-122/99 P and C-125/99 P, EU:C:2001:304, paragraph 65; in that case, D and the Kingdom of Sweden had likewise brought two separate appeals and were ordered jointly and severally to bear the costs.

(2) Set the amount of the fine imposed by the European Commission on 15 October 2008 in Article 2(c) of Decision C(2008) 5955 final at EUR 9 800 000.

(3) Dismiss the appeal and the cross-appeal in Case C-293/13 P.

(4) Find that there is no need to rule on the two cross-appeals in Case C-294/13 P.

(5) Order Fresh Del Monte Produce, Inc. and Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG to bear their own costs in Cases C-293/13 P and C-294/13 P and, in addition, to pay all the costs incurred by the European Commission in both cases on a joint and several basis.