Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

14 March 2013*

(Competition — Agreements, decisions and concerted practices — Market in bananas — Decision finding an infringement of Article 81 EC — Information exchange system — Concept of a concerted practice having an anti-competitive object — Causal link between the collusion and the conduct of the undertakings on the market — Single infringement — Imputation of the infringement — Rights of the defence — Fines — Gravity of the infringement — Cooperation — Mitigating circumstances)

In Case T-587/08,

Fresh Del Monte Produce, Inc., established in George Town, Cayman Islands (United Kingdom), represented initially by B. Meyring, lawyer, and E. Verghese, Solicitor, and subsequently by B. Meyring,

applicant,

supported by

Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG, established in Hamburg (Germany), represented by A. Rinne, lawyer, C. Humpe and S. Kon, Solicitors, and C. Vajda QC,

intervener,

v

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

defendant,

APPLICATION for annulment of Commission Decision C(2008) 5955 of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39188 - Bananas) and, in the alternative, for a reduction of the fine

THE GENERAL COURT (Eighth Chamber),

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

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2012,

* Language of the case: English.

gives the following

Judgment

Facts giving rise to the dispute

1 The Fresh Del Monte Produce group ('the Del Monte group') 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, the Middle East and Africa. It markets its products, including bananas, worldwide under the Del Monte brand.

2 Fresh Del Monte Produce Inc. ('Del Monte' or 'the applicant') is the holding company and ultimate parent company of the Del Monte group. That group is involved in the marketing of bananas in Europe via numerous wholly-owned subsidiaries, including Del Monte Fresh Produce International Inc. ('DMFPI'), Del Monte (Germany) GmbH and Del Monte (Holland) BV.

3 Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG ('Weichert' or 'Interfrucht' or 'the intervener') 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, through its wholly-owned subsidiary Westeuropa-Amerika-Linie GmbH ('WAL'), which Del Monte purchased in 1994 through its subsidiary Global Reefer Carriers Ltd. Weichert was until 31 December 2002 the exclusive distributor for Northern Europe of Del Monte-branded bananas.

4 On 8 April 2005 Chiquita Brands International Inc. ('Chiquita') lodged an application for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the Leniency Notice').

5 On 3 May 2005, after Chiquita had produced new declarations and additional documents, the Commission of the European Communities granted it conditional immunity from fines, in application of point 8(a) of the Leniency Notice.

6 After carrying out inspections on 2 and 3 June 2005 pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) at the premises of various undertakings and sending a number of requests for information pursuant to Article 18(2) of Regulation No 1/2003, the Commission sent a statement of objections on 20 July 2007 to Chiquita, Chiquita International Ltd, Chiquita International Services Group NV, Chiquita Banana Company BV, Dole Food Company, Inc. ('Dole') and Dole Fresh Fruit Europe OHG, Del Monte, DMFPI, Del Monte (Germany), Del Monte (Holland), Fyffes plc ('Fyffes'), Fyffes International, Fyffes Group Limited, Fyffes BV, FSL Holdings NV, Firma Leon Van Parys NV ('Van Parys') and Weichert.

7 The undertakings mentioned in paragraph 6 above were given access to the Commission's investigation file in the form of a copy on DVD, apart from the recordings and transcriptions of the corporate statements made orally by the applicant for immunity and the documents relating thereto, which were made available at the Commission's premises.

8 Following the hearing of the undertakings concerned, which took place on 4 to 6 February 2008, Weichert sent the Commission a letter on 28 February 2008 containing comments and annexes.

9 On 15 October 2008 the Commission adopted Decision C(2008) 5955 final relating to a proceeding under Article 81 [EC] (Case COMP/39188 – Bananas) ('the contested decision'), which was notified to Del Monte on 22 October 2008.

Contested decision

10 The Commission states that the undertakings to which the contested decision is addressed participated in a concerted practice by which they coordinated their quotation prices for bananas marketed in Northern Europe, namely Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden, between 1 January 2000 and 31 December 2002 (1 December 2002 for Chiquita) (recitals 1 to 3 to the contested decision).

11 At the material time imports of bananas into the European Community were regulated by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1), which provided for a regime based on import quotas and tariffs. The Commission observes that while import quotas of bananas were set annually and allocated on a quarterly basis with a certain limited flexibility between the quarters of a calendar year, banana shipments to Northern European ports and the volumes marketed in that region were determined each week by production, shipment and marketing decisions taken by producers, importers and traders (recitals 36, 131, 135 and 137 to the contested decision).

12 The banana business distinguished three levels of banana brands, called 'tiers': premium Chiquita brand bananas, second-tier bananas (Dole and Del Monte brands) and third-tier bananas (also called 'thirds'), which included a number of other banana brands. This brand-division was reflected in banana pricing (recital 32 to the contested decision).

13 During the relevant period the banana business in Northern Europe was organised in weekly cycles. Banana shipping from Latin American ports to Europe took approximately two weeks. Banana shipments to Northern European ports generally arrived on a weekly basis and were made according to regular shipping schedules (recital 33 to the contested decision).

14 Bananas were shipped green and were green on arrival at the ports. They were then either delivered directly to buyers (green bananas) or ripened and then delivered approximately one week later (yellow bananas). Ripening could be carried out by the importer or on his behalf or be organised by the buyer. Importers' customers were generally ripeners or retail chains (recital 34 to the contested decision).

15 Chiquita, Dole and Weichert set their quotation prices for their brands each week, in practice on Thursday mornings, and announced them to their customers. The expression 'quotation prices' usually corresponded to quotation prices for green bananas, while quotation prices for yellow bananas were normally the green quote plus a ripening fee (recital 104 to the contested decision).

16 The prices paid by retailers and distributors for bananas (known as 'actual prices' or 'transaction prices') could be the result either of negotiations taking place on a weekly basis, in fact between Thursday afternoon and Friday (or later in the current week or at the beginning of the following week), or of the implementation of supply contracts with pre-established pricing formulae mentioning a fixed price or linking the price to a quotation price of the seller or a competitor or another reference price, such as the 'Aldi price'. The Commission states that each Thursday, between 11 a.m. and 11.30 a.m., the Aldi retail chain received offers from its suppliers and then sent a counter-offer; the 'Aldi price', the price paid to suppliers, was generally set at around 2 p.m. From the second half of 2002 the 'Aldi price' began to be increasingly used as an indicator for banana pricing formulae in certain other transactions, including for branded bananas (recitals 34 and 104 to the contested decision).

17 The Commission observes that the undertakings concerned engaged in bilateral pre-pricing communications during which they discussed banana price-setting factors, that is to say, factors relevant to the setting of quotation prices for the forthcoming week, or discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week. Those communications took place before the parties set their quotation prices, usually on Wednesdays, and all related to future quotation prices (recital 51 et seq. to the contested decision).

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

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

20 The Commission states that, after setting their quotation prices on Thursday morning, the undertakings concerned exchanged their quotation prices bilaterally. That subsequent exchange enabled them to monitor the individual pricing decisions in the light of the previous pre-pricing communications and reinforced their links of cooperation (recitals 198 to 208, 227, 247 and 273 et seq. to the contested decision).

21 According to the Commission, the quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices and were relevant for the banana trade and the prices obtained. In some transactions, moreover, the price was directly linked to quotation prices in accordance with formulae based on quotation prices (recital 115 to the contested decision).

22 The Commission considers that the undertakings concerned which participated in the concerted arrangement and remained active in the banana trade must necessarily have taken account of the information received from competitors when determining their conduct on the market, while Chiquita and Dole even expressly admitted having done so (recitals 228 and 229 to the contested decision).

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

24 The Commission considers that all the collusive agreements described in the contested decision constitute a single and continuous infringement having as its object the restriction of competition within the Community within the meaning of Article 81 EC. Chiquita and Dole were held responsible for the entire single and continuous infringement, while Weichert was held responsible only for the part of the infringement in which it participated, namely the part of the infringement relating to the collusive agreements with Dole (recital 258 to the contested decision).

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

26 The Commission states that no exemption under Article 81(3) EC could be granted in the absence of any notification of agreements or practice by the undertakings, which is a precondition for the application of Article 81(3) EC pursuant to Article 4(1) of Council Regulation No 17 of 6 February

1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), and even of any evidence that the conditions for the grant of an exemption were satisfied in the present case (recital 339 et seq. to the contested decision).

27 The Commission states that Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129), which was in force at the material time and provided that Article 81 EC was to apply to all agreements, decisions and practices relating to production of or trade in various products including fruit, provided in Article 2 for a number of exceptions to the application of Article 81 EC. As the conditions for the application of those exceptions were not satisfied in the present case, the Commission concludes that the concerted practice described in the contested decision could not be exempted under Article 2 of Regulation No 26 (recital 344 et seq. to the contested decision).

28 After finding that Del Monte, jointly with the general partners of Weichert, had been able to exercise decisive influence on the way in which Weichert ran its business and had in fact exercised such influence during the infringement period, the Commission found that Del Monte and Weichert formed an economic unit, as Weichert had not independently determined its own conduct on the market. Consequently, Del Monte and Weichert were declared 'jointly and severally' liable for the infringement of Article 81 EC found in the contested decision (recitals 384 and 432 to 434 to the contested decision).

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

30 The Commission determined a basic amount of the fine to be imposed, which corresponds to an amount of between 0% and 30% of the value of the relevant sales of the undertaking, depending on the degree of gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of the sales in order to deter undertakings from engaging in unlawful conduct (recital 448 to the contested decision).

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

— EUR 208 000 000 for Chiquita;

— EUR 114 000 000 for Dole;

— EUR 49 000 000 for Del Monte and Weichert.

32 The basic amount of the fine to be imposed was reduced by 60% for all the addressees of the contested decision, in view of the specific regulatory regime in the banana sector and on the ground that the coordination related to the quotation prices (recital 467 to the contested decision). A reduction of 10% was granted to Weichert, which had not been informed of the pre-pricing communications between Dole and Chiquita (recital 476 to the contested decision).

33 Following adjustment, the basic amounts were as follows:

— EUR 83 200 000 for Chiquita;

— EUR 45 600 000 for Dole;

— EUR 14 700 000 for Del Monte and Weichert.

34 Chiquita was granted immunity from fines under the Leniency Notice (recitals 483 to 488 to the contested decision). No other adjustment was made for Dole or for Del Monte and Weichert, for which the final amount of the fines corresponded to the basic amounts of the fines to be imposed referred to in paragraph 33 above.

35 The contested decision includes the following provisions:

'*Article 1*

The following undertakings infringed Article 81 [EC] by participating in a concerted practice by which they coordinated quotation prices for bananas:

— [Chiquita] from 1 January 2000 until 1 December 2002;

— Chiquita International Ltd from 1 January 2000 until 1 December 2002;

— Chiquita International Services Group NV from 1 January 2000 until 1 December 2002;

— Chiquita Banana Company BV from 1 January 2000 until 1 December 2002;

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

— Dole Fresh Fruit Europe OHG from 1 January 2000 until 31 December 2002;

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

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

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

Article 2

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

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

— [Dole] and Dole Fresh Fruit Europe OHG, jointly and severally: EUR 45 600 000;

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

...'

Procedure and forms of order sought

36 By application lodged at the Court Registry on 31 December 2008, the applicant brought the present action.

37 By document lodged at the Court Registry on 9 April 2009, Weichert applied for leave to intervene in the proceedings in support of the form of order sought by the applicant.

38 The applicant and the Commission submitted their written observations on that application to intervene by documents lodged at the Court Registry on 18 and 28 May 2009 respectively.

39 By document lodged at the Court Registry on 28 May 2009, the Commission requested confidential treatment vis-à-vis Weichert of certain elements in the defence and the annexes thereto.

40 By document lodged at the Court Registry on 29 May 2009, the applicant requested confidential treatment vis-à-vis Weichert of certain elements in the application and the annexes thereto.

41 By order of 17 February 2010 the Court granted Weichert's application to intervene and ordered that a copy of all the procedural documents, in a non-confidential version, be communicated to it.

42 The intervener lodged a statement in intervention and the other parties lodged their observations thereon within the prescribed periods.

43 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the General Court, put a question to the applicant and to the Commission, inviting them to reply to it in writing.

44 Del Monte, Weichert and the Commission lodged their written observations, in reply to the question from the Court, on 4 January 2012 (Del Monte) and 6 January 2012 (Weichert and the Commission).

45 The parties presented oral argument and answered the questions put by the Court at the hearing on 1 February 2012.

46 The applicant, supported by the intervener, claims that the Court should:

— annul Articles 1, 2, 3 and 4 of the contested decision in so far as they concern the applicant;

— in the alternative, substantially reduce the fine imposed in Article 2(c) of the contested decision;

— order the Commission to pay the costs.

47 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The claim for annulment of the contested decision

48 The applicant raised six pleas in law in favour of annulment of the contested decision in its written pleadings, alleging (i) infringement of Article 81 EC and of Article 23(2)(a) of Regulation No 1/2003 on account of the fact that it was found by the Commission to be jointly and severally liable with Weichert; (ii) infringement of Article 253 EC as a result of the fact that the Commission did not explain how the applicant could have had, and actually exerted, decisive influence over Weichert; (iii) breach of the rights of the defence, on account of the Commission's refusal to disclose relevant evidence; (iv) infringement of Article 81 EC owing to the – incorrect – finding of the existence of a concerted practice having an anti-competitive object; (v) infringement of the right to be heard; and (vi) infringement of Article 81 EC, Article 7 of Regulation No 1/2003 and Article 253 EC on account of the incorrect nature of the operative part of the contested decision.

49 The Court considers that all those pleas together must be regarded as alleging, first, infringement of Articles 81 EC and 253 EC and, second, breach of the rights of the defence.

1. *The plea alleging infringement of Articles 81 EC and 253 EC*

Imputation of the infringement to Del Monte

Preliminary considerations

50 With regard to the joint and several liability of a parent company for the conduct of its subsidiary, the Court observes that the fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 132).

51 European Union competition law refers to the activities of undertakings, and the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraphs 54 and 55, and Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 53).

52 The Courts of the European Union have also stated that in this context the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40, and *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 53). They have thus emphasised that, for the purposes of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity is not decisive. The test is whether or not there is unity in their conduct on the market. Thus, it may prove necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (*Imperial Chemical Industries* v *Commission*, paragraph 50 above, paragraph 140, and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

53 When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 51 above, paragraph 56, and *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 53 and the case-law cited).

54 Thus, the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary, despite having a separate legal personality, 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, regard being had in particular to the economic, organisational and legal links between those two legal entities (Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 117; and *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 54).

55 In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned above. It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute

a single undertaking within the meaning of Article 81 EC that the Commission may address a decision imposing fines to the parent company (*Akzo Nobel and Others* v *Commission*, paragraph 51 above, paragraph 59, and *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 55).

56 In that regard, it must be made clear that the Commission cannot merely find that an undertaking is able to exert decisive influence over another undertaking, without checking whether that influence was actually exerted. On the contrary, it is, as a rule, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other (see, to that effect, Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraphs 96 to 99; *Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraphs 118 to 122; and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136).

57 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed European Union competition rules, the parent company can exercise decisive influence over the conduct of the subsidiary and, moreover, there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary (*Akzo Nobel and Others* v *Commission*, paragraph 51 above, paragraph 60, and *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 56).

58 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 40, and *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 57).

59 It is in the light of the case-law recalled above that the Court must consider the applicant's complaints that (i) the Commission infringed Article 253 EC by failing to provide sufficient reasons for the contested decision with regard to the imputation of the infringement committed by Weichert, and (ii) the Commission infringed Article 81 EC by imputing the infringement to the applicant.

Breach of the obligation to state reasons

60 The applicant, the ultimate parent company of the Del Monte group, maintains that the Commission failed to fulfil its obligation to provide reasons, in that it did not explain to the applicant how it was able to have, and in fact exerted, decisive influence over Weichert. The Commission's argument on parent company liability relies on two relationships between Weichert and that group, namely WAL's limited partnership interest in Weichert's capital and the distribution agreement between Weichert and DMFPI. Yet there is not a single sentence in the contested decision which explains how Del Monte itself exercised decisive influence over Weichert or explaining the relationships between WAL, DMFPI and Del Monte.

61 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the

relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 58).

62 The Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned; it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision. In particular, it is not required to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (see, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 61 above, paragraph 64; Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 64; and Case T-185/06 *L'Air liquide* v *Commission* [2011] ECR II-2809, paragraph 64).

63 It is also settled case-law that, where a decision taken in application of Article 81 EC relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who according to the decision must bear the liability for the infringement (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 26, and Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 93). Thus, in regard to a parent company held jointly and severally liable for the infringement, such a decision must contain a detailed statement of reasons for attributing the infringement to that company (see, to that effect, Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraphs 78 to 80, and Case T-197/06 *FMC* v *Commission* [2011] ECR II-3179, paragraph 45).

64 In the present case, in the first place, it must be observed that the Commission described the structure of the Del Monte group clearly in the contested decision.

65 The Commission explained that Del Monte was the holding company and ultimate parent company of the Del Monte group, which was involved in the marketing of bananas in Europe via numerous 'wholly-owned' subsidiaries, including DMFPI (recital 19 to the contested decision).

66 The Commission also stated that from 24 June 1994 to 31 December 2002 Del Monte indirectly held 80% of Weichert's share capital through its wholly-owned subsidiary WAL, acquired in 1994 through its subsidiary Global Reefer Carriers, the remaining shares in Weichert being held, from March 1999, by natural persons, namely Mr D. W. and his two sons, Mr A. W. and Mr H. W., (together, 'the W. family'), in their capacity as general partners, and by a limited liability company, Interfrucht Beteiligungsgesellschaft mbH (recitals 15 and 381 to the contested decision).

67 The Commission set out the principles that it intended to apply in order to identify the addressees of the contested decision by referring to the relevant case-law of the Court of Justice and of the General Court on the concept of 'undertaking' within the meaning of Article 81 EC (recitals 360 to 366 to the contested decision). It observed, in particular, that it could assume that a parent company did actually exercise decisive influence on its wholly-owned subsidiary, but that the parent company could rebut that presumption by producing sufficient evidence that the subsidiary had decided independently on its own conduct on the market (recital 364 to the contested decision).

68 All the matters mentioned in paragraphs 65 to 67 above were already included in paragraphs 17, 27, 441 and 475 of the statement of objections addressed to the applicant, and their summary enabled the applicant to ascertain the reasons for the Commission's view that, within the Del Monte group, the applicant actually exercised decisive influence over WAL and DMFPI.

69 In that regard the Commission points out, without being contradicted by the applicant, that the applicant did not attempt during the administrative procedure to rebut the presumption in relation to its 100% shareholding in its subsidiaries WAL and DMFPI, and correctly states that it was not, therefore, required to explain in further detail how the applicant exercised influence over those undertakings.

70 In the contested decision, the Commission thus considered whether Del Monte was able to exercise and had in fact exercised decisive influence over Weichert and, having found that Del Monte indirectly held only 80% of Weichert's share capital, took the view that the presumption of a parent company's decisive influence over its wholly-owned subsidiary was not applicable in respect of Del Monte (recital 384 to the contested decision).

71 Contrary to what is suggested by the applicant in its written pleadings, the consideration that '[t]he presumption of the exercise of decisive influence … is not applicable in respect of [the applicant]' cannot refer to the relationship between the applicant and its subsidiaries WAL and DMFPI.

72 In the second place, the Commission stated that, rather than being a subsidiary of Del Monte, Weichert was a partnership between Del Monte, a limited partner, and, initially, Mr D. W., then from March 1999 the W. family, in their capacity as general partners. The commercial relationship between the partners in that joint undertaking was established by the partnership agreement that was intended to define the statutes of the limited partnership and specifically the mechanisms of control and management, and by an exclusive distribution agreement relating to the bananas supplied by Del Monte for the purpose of importing them into the Community (recitals 382 and 383 to the contested decision).

73 On the basis of the documents contained in the file and Weichert's statements, the Commission concluded that 'Del Monte (jointly with the general partners [the W. family]), had the possibility to exercise decisive influence on the way Weichert ran its business, and in fact also did exercise such influence during the period in question' (recital 384 to the contested decision). It also stated that '[d]uring the 2000-2002 infringement period, Weichert [had been] influenced decisively by the partners which [had] jointly set up this company as a KG in common agreement' (recital 385 to the contested decision).

74 In recital 386 to the contested decision, the Commission asserted that, '[u]ntil 31 December 2002, Del Monte held jointly with the general partners [the W. family] a supervision and management role over Weichert', and mentioned, by way of justification for that conclusion, various facts grouped together under three headings: 'Important strategic decisions in Weichert required the consent of all partners' (recital 387 to the contested decision); 'Del Monte was in a position to influence Weichert in the management and in pricing and marketing issues, and there is evidence that it did exercise this influence' (recitals 388 to 391 to the contested decision); and 'Del Monte was in the position to and in fact regularly received price and market information from Weichert' (recitals 392 to 393 to the contested decision).

75 After examining and rejecting the arguments by which Del Monte sought to challenge any possibility that it actually exercised decisive influence over Weichert (recitals 394 to 433 to the contested decision), the Commission found that Weichert formed an economic unit with Del Monte, as Weichert did not determine independently its own conduct on the market (recital 432 to the contested decision).

76 In those circumstances, the Commission cannot be criticised for any infringement of Article 253 EC.

The imputability test applied in the contested decision

77 The applicant submits that the Commission declared it 'jointly and severally' liable for Weichert's conduct on the basis of alleged joint control 'alone', whereas joint control can never be sufficient to establish joint and several liability. It observes that Article 81 EC applies to 'undertakings' and not to legal entities and that, therefore, more than one legal entity may be liable for an infringement if they form part of one and the same undertaking. According to the applicant the Commission claims – contrary to the case-law and its own practice in taking decisions before 2007 – that the fact that one legal entity has joint control over another legal entity is sufficient to establish that they form part of a single undertaking.

78 The applicant's arguments in that regard are based on a false premiss and must therefore be rejected.

79 It will be recalled that the Commission set out the principles that it intended to apply in order to identify the addressees of the contested decision by referring to the relevant case-law of the Court of Justice and of the General Court on the concept of 'undertaking' within the meaning of Article 81 EC (recitals 360 to 366 to the contested decision). Having found that the presumption of the exercise of decisive influence linked to a 100% shareholding was not applicable to Del Monte so far as its relationship with Weichert was concerned, the Commission stated that it 'therefore examined whether Del Monte was able to influence and effectively influenced Weichert in determining Weichert's market behaviour' (recital 384 to the contested decision).

80 It follows from a reading of the contested decision as a whole that, while the Commission effectively took the view, principally in the light of the capital links and the terms of the partnership agreement between Weichert and WAL, that Del Monte had, together with the general partners, jointly controlled Weichert, it did not confine itself to that finding concerning the ability to exercise decisive influence but considered and verified whether Del Monte had actually exercised such influence over Weichert.

81 In support of its assertions, the applicant refers to recital 384 to the contested decision, which it reproduces in part in the reply, but wrongly suggests that the Commission found there that because 'Del Monte jointly with the general partners … had the possibility to exercise decisive influence on the way Weichert ran its business', Del Monte and Weichert formed a single undertaking, although the latter point is not one that is made in that recital.

82 Furthermore, the contested decision contains nothing to indicate that Del Monte and Weichert formed an economic unit solely because the former, jointly with the general partners, exercised control over the latter.

83 The applicant also asserts that it is impossible to reconcile the need to prove that the subsidiary carried out, in all material respects, the instructions given to it by the parent company with the concept of joint control, as 'a jointly controlling parent may have nothing more than veto rights'. It adds that the very principle of personal liability is put into question if an entity which has no more than limited veto rights over certain elements of a company's conduct can be held liable for conduct of that company that is beyond its control.

84 Once again, those general considerations do not serve to establish an infringement, in the present case, of Article 81 EC by virtue of the imputation to Del Monte of the infringement committed by Weichert.

85 As the Commission correctly states in its written pleadings, the imputation of the infringement committed by Weichert is based not only on the powers conferred on Del Monte under clause 7(2) and (3) of the partnership agreement – in this case veto rights in respect of certain decisions concerning the operation of the undertaking – but on a wider range of matters relating to the legal, organisational and economic links tying Del Monte and Weichert, and demonstrating, according to the Commission, Del Monte's overall control over Weichert.

86 In so far as the applicant's arguments may be construed as meaning that only the parent company's exclusive control over the subsidiary can support a finding that those two legal entities constitute an undertaking and the imputation to the former of the latter's unlawful conduct, that line of argument too must be rejected.

87 The Court has previously ruled that the exercise of joint control, by two parent companies who are independent of each other, of their subsidiary does not, in principle, preclude a finding by the Commission of the existence of an economic unit comprising one of those parent companies and the subsidiary concerned, and that that applies even if the proportion of the subsidiary's share capital owned by that parent company is smaller than that owned by the other parent company (see, to that effect, Case C-480/09 P *AceaElectrabel Produzione* v *Commission* [2010] ECR I-13355, paragraph 64).

88 In *Avebe* v *Commission*, paragraph 56 above, the General Court upheld the Commission's decision imputing to two companies – each holding 50% of a subsidiary and having joint management power with respect to its commercial management – liability for the unlawful conduct of that subsidiary. The Court found in that case that the two partners which each held a 50% stake in the joint venture concerned were empowered only jointly to act and sign on behalf of the joint venture, to bind it towards third parties, to bind third parties to it, and to receive and spend funds on its behalf. In addition, the day-to-day management was entrusted to two directors appointed by the parent companies. Last, the parent companies assumed the subsidiary's commitments jointly and without limitation.

89 The differences noted by the applicant between the case giving rise to the judgment in *Avebe* v *Commission*, paragraph 56 above, and the present proceedings do not call in question the approach to be adopted as a matter of principle that is applied in that judgment.

90 The applicant claims, last, that the Commission interpreted Article 81 EC correctly until 2007 with regard to the question of the imputability of an infringement, and that the contrary position now defended by the Commission – that joint control justifies parent company liability – is wrong.

91 It must be borne in mind in that regard that the Court of Justice has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 205). It follows that the applicant cannot invoke the Commission's decision-making policy before the Courts of the European Union (Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 123).

Existence of an economic unit comprising Del Monte and Weichert

– The partnership agreement

92 It must be noted that throughout the entire period of the infringement Weichert was a limited partnership under German law, which distinguishes two types of partners within such a legal person, namely general partners and limited partners.

93 It is clearly stated in the contested decision (recitals 399 and 400) that, pursuant to the relevant provisions of the German Commercial Code (Handelsgesetzbuch; 'the HGB'), limited partners are normally excluded from the management of a limited partnership's business and cannot object to actions taken by the general partner, except for measures falling outside the scope of the ordinary course of business.

94 Management of the day-to-day business is therefore normally entrusted to the general partner, who has personal and unlimited liability for debts, unlike the limited partner, whose liability is limited to his financial contribution. The Commission thus explains in recital 382 to the contested decision that, while the representatives of the W. family were the general managing partners with personal and unlimited liability for Weichert, Del Monte took the role of a partner providing the main financial resources or holding the main financial stake with limited liability.

95 The Commission noted, without being contradicted by the applicant, that it was possible lawfully to derogate from the provisions of the HGB concerning the management of a limited partnership by means of a partnership agreement, which is what had happened in the present case, with the partnership agreement of 12 March 1992, amended on 28 March 1996 and 1 June 1999 (recitals 381, 399 and 401 to the contested decision).

96 The Commission and the applicant disagree, however, as to the effect of the partnership agreement.

97 The applicant claims that the partnership agreement did not alter the distribution of partners' powers, as defined by the HGB, but reinforced it by means of specific provisions that strengthened the controlling position of the general partners. The applicant had only limited veto rights enabling only certain specific actions not relating to management or the day-to-day activities of Weichert to be blocked, which accords with the general principles set out in Article 164 of the HGB, according to which '[t]he limited partners are excluded from the management of the business; they cannot object to an action taken by the general partners unless the action goes beyond the ordinary course of business of the partnership'. It asserts that the Commission has not even demonstrated that the applicant even had an opportunity to exercise those veto rights which have, in fact, never been used.

98 Although the Commission does indeed note in the contested decision that, according to clause 7(1) of the partnership agreement, 'the partner with personal liability [Mr D. W.] shall be authorised and bound to represent and manage the company', it refers to other provisions of that agreement in order to assert that the agreement clearly provided the limited partner, that is Del Monte through its subsidiary WAL, with the legal rights and means necessary to influence the course of Weichert's business.

99 The Commission mentions, in recital 387 to the contested decision, clause 7(2) of the partnership agreement, which required the unanimity of the partners for adoption of the general partners' annual written proposals concerning the budget and the investment and staffing plans. The measures proposed by the general partners could not therefore be implemented in the absence of unanimous agreement and the general partners were bound by them if the measures were adopted. It must also be pointed out that the applicant itself indicates that clause 7(2) of the partnership agreement provided 'three high-level veto rights'.

100 In addition, the Commission states that clause 7(3) of the partnership agreement provided that the general partners were required to ask for the prior written consent of all partners for a number of legal acts (recital 387 to the contested decision). It is apparent from the partnership agreement that those acts 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, at least where they provide for annual remuneration of less than DEM 60 000.

101 It thus appears 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.

102 As regards the applicant's claim concerning the non-use of the limited partner's 'veto rights' it must be noted that such a situation would simply establish that Weichert was operating normally during the infringement period and that the partnership agreement was effective, unless the applicant is seeking to claim that the general partners acted contrary to the terms of that agreement and in particular those of clause 7(2) and (3), and that that agreement was, in actual fact, ineffective.

103 It is important to note in that regard that the applicant claims that the Commission did not put forward any evidence at all to show that budgets or investment or staffing plans were ever presented to the applicant for approval, and that the general partner, by contrast, made investments that required the applicant's consent under clause 7(3) without even informing the applicant, let alone seeking its consent.

104 It must be noted at this stage that, according to the Court's case-law, it is for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it is for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence. Thus, although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6371, paragraph 80).

105 In the present case, the Commission relied in support of its findings that Del Monte was in a position to exercise, and did in fact exercise, decisive influence over Weichert in particular on the partnership agreement, the terms of which, and the legal effects of which with respect to the partners, are not in dispute between the parties.

106 It is therefore for the applicant, which relies on the ineffectiveness of certain clauses of the partnership agreement, to demonstrate this, and it must be noted that the applicant mentions in that respect just one investment decision of which it was not informed, namely a new facility in Hamburg (Germany), incorporating a distribution centre, which was opened in 1997 and cost several million German marks. In addition to the fact that the project in question was completed in 1997, that is to say, before the infringement period, it must be noted that the applicant has produced no evidence to show that the general partner disregarded the terms of the partnership agreement on that occasion, even though the cost and duration of the implementation of such an investment would rule out any possibility of dissimulation. In the light of the various messages which the applicant sent to Weichert to express its dissatisfaction with certain pricing decisions, it is hardly plausible that the applicant might have allowed a serious breach of clause 7(3) of the partnership agreement without reacting at all.

107 The Commission also relies in the contested decision on clause 7(4) of the partnership agreement, which stated that '[t]he partner with personal liability [would] be bound to grant an authorised representative of the partners with limited liability, on request, information on the state of the business in general, on individual management measures as well as on management plans and to give permission to inspect the company records' (recital 387 to the contested decision).

108 Clause 7(4) of the partnership agreement, which clearly supplements the responsibilities set out in clause 7(2) and (3) of that agreement, establishes a direct link between the rights conferred on the limited partner and the management of Weichert. It is also apparent that the rights of information and of access to the undertaking's records, enabling the limited partner to verify information received, could be exercised at any time and were not limited – contrary to the applicant's assertions – to purely historical data.

109 The Commission further noted that the partnership agreement did not support the conclusion that the general partner(s) had the sole right of initiative for proposing decisions to be taken by the partners, whether for ordinary matters or for extraordinary matters going beyond the ordinary course of business. Clause 8(2) of that agreement stated that the general partners were required to call an extraordinary partners' meeting if a limited partner, holding a certain percentage of the share capital, requested it in writing, indicating the agenda points to be discussed. Del Monte, which had an 80% shareholding in Weichert through its subsidiary WAL, was, unlike the general partners, in a position to call at any time for an extraordinary partners' meeting to be held, regardless of any specific reference to 'the interest of the company' (recital 408 to the contested decision), on any matter concerning the smooth running of the undertaking. The applicant has not commented on that clause of the partnership agreement.

110 The applicant highlights other terms of the partnership agreement that strengthen the management power conferred on the general partner by clause 7(1) of that agreement.

111 First of all, the applicant refers to clause 9(2) of the partnership agreement, from which it is evident that decisions of the partners' meeting must be taken by a majority of votes cast in order to be effective, and must always have the general partner's approval.

112 The Commission accepts that that condition amounts to a 'veto right of the general partners', while emphasising that it did not preclude the limited partner from having any influence over the decisions concerned. According to clause 9(1) of the partnership agreement, each partner had a number of votes corresponding to his capital contribution, that is one vote for DEM 1 000 of his contribution. According to the partnership agreement, the partners' respective contributions to Weichert's capital were as follows: DEM 6.5 million for WAL, DEM 1 000 for Interfrucht Beteiligungsgesellschaft and DEM 1.5 million for Mr D. W., although it should be noted that, in March 1999, Mr D. W. assigned to each of his sons, A. W. and H. W., 25% of his shares in Weichert. In practice that meant that decisions taken by the partners' meeting also always required the limited partner's approval (footnotes 407, 411 and 439 to the contested decision).

113 In addition the Commission correctly observes that, in accordance with clause 9(3) and (4) of the partnership agreement, the partners' meeting had well-defined powers, namely in respect of amendments – which had to be unanimous – of the partnership agreement, and, moreover, in respect of approval of the financial statement, discharge of the general partner for his management, and appointment of an auditor, which did not mean that Del Monte was precluded altogether from being able to exert decisive influence over Weichert's conduct on the relevant market.

114 That being the case, it is not apparent from the terms of the partnership agreement that, as the applicant submits, the general partner held a right of veto over 'any' decisions of the company.

115 Next, the applicant relies on clause 9(5) of the partnership agreement, which laid down a specific arbitration process. If a request submitted by a partner was not approved at two successive meetings, that partner had the right to request that an 'advisory council' be established that was solely responsible for determining, in place of the partners, the decision to be taken on that request. Each partner thus appointed a member of the advisory council which, in turn, appointed an arbitrator. If a partner failed to appoint a member of the council, or if the members could not agree on an arbitrator, that member or the arbitrator were to be appointed by an independent party, the president of the Hamburg Chamber of Commerce (recital 409 to the contested decision and footnote 442).

116 While the applicant correctly observes that, in view of the number and identity of Weichert partners, and the rules relating to the composition of the advisory council, the W. family was certain not to be in a minority situation, the claim that decisions were adopted by simple majority within that council

and were thus inevitably favourable to that family has not been substantiated. 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.

117 Last, the applicant mentions clause 9(3) of the partnership agreement to support its assertion that WAL did not have the necessary powers to appoint, replace or even veto the appointment of the company's managers. It is sufficient, however, to state that the condition in question required the unanimity of the partners for any amendment of the partnership agreement, including clause 7(1), which gave the general partner, Mr D. W., responsibility for the management and representation of the company.

118 It follows from the foregoing considerations that the partnership agreement reflects – in the terms used by the applicant itself in its pleadings – a 'balance of power' between general and limited partners, and that the Commission was fully entitled to conclude that Weichert was a partnership between the W. family and Del Monte, general and limited partners exercising joint control over the joint undertaking. That situation was indicative of Del Monte's ability to exercise decisive influence over Weichert.

119 It must also be noted that the applicant maintains that the Commission infringed Article 253 EC by not providing reasons for its assumption that the passive veto rights meant that WAL had decisive influence over Weichert's conduct on the relevant market.

120 Those arguments of the applicant cannot be accepted.

121 Suffice it to note in this regard that that complaint is based on a false premiss, in that the Commission was merely able to conclude from its analysis of the terms of the partnership agreement that Weichert had the 'legal rights and means necessary to influence the course of [Weichert's] business' (recital 387 to the contested decision). That conclusion is based on a clear and sufficient analysis of the conditions of the partnership agreement referred to in recitals 387, 399 to 403 and 407 to 410 to the contested decision, bearing in mind that the terms of that agreement are only one of the factors taken into account by the Commission in imputing to Del Monte the infringement committed by Weichert.

– The capital links tying Del Monte and Weichert

122 It must be noted that Del Monte held an 80% shareholding in Weichert and that, in accordance with clause 11(4) of the partnership agreement, profits and losses were allocated to partners on the basis of their respective financial contributions (recital 387 to the contested decision), which meant that 80% of profits or losses were imputed to Del Monte.

123 In the first place, the applicant submits that the Commission does not explain how the applicant's interest in Weichert and participation in Weichert's profits and losses could possibly amount to the applicant's having decisive influence over Weichert.

124 It must nevertheless be observed that, in recital 404 to the contested decision, the Commission clearly states that it does not consider 'the 80% shareholding in itself as sufficient to attribute liability for Weichert's behaviour to Del Monte', but that 'the size of the shareholding provides an indication pointing to a company's interest in exercising decisive influence as well as its capability of ensuring means for exercise of such influence'. The Commission adds that 'a large multinational company is unlikely to forgo any influence on [an undertaking representing] a profit-generating financial engagement of 80%'.

125 It appears, as the Commission correctly pointed out, that Del Monte's financial interest in the activities of Weichert constituted an obvious incentive for Del Monte to exert influence over Weichert, and that the size of its shareholding indicated a certain economic power and thereby an ability to exert influence. It is in the light of that interest and of that power that the Court must assess the control and information mechanisms previously described, as well as the applicant's conduct towards Weichert during the infringement period.

126 In the second place, the applicant maintains that the Commission's comment in recital 404 to the contested decision is incorrect, since, even where a general partner only holds a symbolic share in the capital or no share at all and all the capital is held by a limited partner, the very structure of the limited partnership is an indication of exclusive control by the general partner(s) and of the lack of control on the part of the limited partner, which the Commission itself acknowledges in its Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1).

127 Apart from the specific subject-matter of the issues involved in the imputation to one undertaking of an infringement committed by another, which is distinct from that of the notice in question, it must be noted that the applicant's argument is based solely on the legal form of the limited partnership and thus totally disregards the terms of the partnership agreement governing the distribution of powers between the applicant and the W. family.

128 That argument is not inconsistent with recital 404 to the contested decision as to Del Monte's incentive to exert influence on Weichert, given its financial interest in Weichert's activities and its ability to exercise it.

129 In the third place, the applicant states that only the general partners had unlimited personal liability, which could not legally be modified in the partnership agreement, whereas WAL's share of any losses was limited to its interest in the capital.

130 It will be recalled that the 80% shareholding in Weichert represented, according to the partnership agreement, the sum of DEM 6.5 million, the shares of the W. family and those of Interfrucht Beteiligungsgesellschaft amounting to DEM 1.5 million and DEM 1 000, respectively, and that, in those circumstances, as the Commission correctly points out in its written pleadings, the fear of the loss of its limited partner's contribution and even the fear of the lack of any profit despite that investment were sufficient incentive for an important market player such as Del Monte to defend its interests, irrespective of the unlimited personal liability of the general partners.

131 Regarding the applicant's reference to *Avebe* v *Commission*, paragraph 56 above, and the statement that 'it is definitely in the partners' interest to prevent their subsidiary from acting independently of their instructions, given the risk of legal proceedings or claims for damages from third parties in the event of unlawful conduct by their subsidiary', it must be noted that that last consideration is not relevant only to partners with unlimited personal liability for their company's debts.

– The distribution agreement

132 It must be noted that the Del Monte group, through DMFPI's predecessor, entered into a first distribution agreement with Weichert in 1971, and then a second distribution agreement in 1986, which was reformulated and expanded to become the distribution agreement of 1 May 1988 ('the distribution agreement'), which was subject to a number of amendments dated 28 August 1990, 27 May 1991 and 10 February 1994.

133 The last amendment of the distribution agreement, dated 10 February 1994, followed the entry into force of Regulation No 404/93, under which the importation of bananas into the Community was covered by a licence regime with fixed annual quotas allocated on a quarterly basis.

134 The distribution agreement, as amended, contained an exclusivity clause (paragraph 11) according to which Del Monte agreed that during the existence of the contract it would sell and deliver bananas, pineapples and papayas only to Weichert for resale within the European markets covering Norway, Hungary, Poland, the former Czechoslovakia, Sweden, Finland, Denmark, Belgium, the Netherlands and Luxembourg, Germany and Austria, the last eight countries referred to constituting the geographical market mentioned in the contested decision. Weichert was in turn obliged to purchase those products only from Del Monte for resale in the aforementioned markets, and the only – minor – exception to that exclusive-supply clause related to air shipments.

135 The Commission was thus able to state, without being challenged in that respect by the applicant, that 'Del Monte was *de facto* the sole supplier of bananas to Weichert for distribution in Northern Europe and the latter was under the distribution agreement an exclusive distributor of Del Monte-branded bananas in this geographic area until 31 December 2002' (recital 383 to the contested decision).

136 Paragraph 2(a) of the distribution agreement fixed the quantities of bananas to be bought or sold weekly as '[a] minimum of one vessel per week to be loaded with 100 000 to 200 000 42 lb boxes of Costa Rica or Guatemala bananas'. According to paragraph 5 of the agreement, 25 days before the scheduled date of each weekly loading, Del Monte was to provide Weichert with a written estimate of the fruit expected to be available for shipment. The contested decision also refers to the third subparagraph of paragraph 9 of the distribution agreement, which stipulated that in the event of supply shortages due to *force majeure*, Del Monte had the right to reduce its quantities proportionately and that if the weekly quantities were to drop below a certain threshold – namely 60 000 boxes – for the same reason, the contract would be automatically suspended unless otherwise agreed in writing by both parties (recital 426 to the contested decision).

137 While paragraph 3 of the distribution agreement mentioned fixed prices for each 42 lb box of bananas according to variety, paragraph 4 of the agreement provided for a financial adjustment mechanism depending on Weichert's results, the terms of which were such that Del Monte shared in a certain proportion of net profits but also in certain circumstances in Weichert's losses on fruit sales in any given month.

138 The applicant acknowledges that it had an interest in Weichert selling at higher prices because those sales would have led to an increase of the variable price component under paragraph 4 of the distribution agreement and higher profits for Weichert, in which WAL had an 80% financial interest. The risks attached to any losses by Weichert, in the context of the implementation of that agreement, are also not denied by the applicant, as it states in the application that 'DMFPI had to bear 75% of the financial impact under [paragraph] 4(c) [of the distribution agreement] and of the remaining 25%, 80% were ultimately born by WAL' (see also recital 411 to the contested decision).

139 As the Commission observes, those findings show that Del Monte had a double interest in exercising control over prices charged by Weichert, since these not only had an impact on Weichert's revenues, and thereby on profits produced for shareholders, but also directly influenced the prices obtained by Del Monte for the bananas supplied to Weichert under the distribution agreement (recital 414 to the contested decision).

140 In order to enable Del Monte to calculate the price on the basis of which the banana supplies had to be billed, paragraph 4 of the distribution agreement provided that 10 days following discharge of each shipment covered by the agreement, Weichert was required to provide Del Monte with a complete account of sales of each cargo, reflecting all costs, sales, prices, etc. (recital 413 to the contested decision).

141 While, in view of the reciprocal rights and obligations of the parties contained in the distribution agreement, the Commission evokes a partnership characterised by the mutual dependence of the undertakings concerned (recitals 418 and 425 to the contested decision), it also argues that that agreement strengthened Del Monte's economic and legal capacity to exert influence on the day-to-day management of Weichert's business (recital 402 to the contested decision).

142 The applicant challenges that interpretation and claims that the Commission has failed to identify any power going beyond some form of commercial leverage that would be held by any significant or exclusive supplier, and overlooks a number of key factors. According to the applicant, the distribution agreement was in place long before it indirectly acquired its partnership interest, and yet neither the agreement nor the way in which it operated in practice changed following that acquisition. Furthermore, the distribution agreement covered only some of Weichert's products and Weichert could have terminated that agreement and found another supplier, which it did after 2002.

143 In the first place, with regard to the anteriority and inviolability of the distribution agreement since 1994 when the applicant acquired WAL, the applicant has not, in its pleadings, explained the effect of its argument and merely points out that that finding 'is in stark contrast to recital 382 [to the contested decision]' which suggests that the partnership agreement and the distribution agreement had a 'common purpose'.

144 In recital 382 to the contested decision, the Commission indicates that the partnership agreement and the distribution agreement had a common purpose of importing and marketing bananas in Northern Europe under the regulatory framework applicable in the Community. That simple objective finding is not in any way inconsistent with that relating to the anteriority and the unchanging nature of the distribution agreement since 1994.

145 The applicant's reflections on timing do not in any event invalidate the conclusions of the Commission, which are based on its assessment of the terms of that agreement.

146 It must be noted that the applicant also referred to paragraph 14 of the distribution agreement, which provided that '[t]he parties [thereto were] independent contractors and nothing [therein] contained [was] ever [to] be construed [as making] them partners, joint venturers or associates of any kind, character or description'. While the Commission does not dispute that that agreement has remained unchanged since 1994, it is common ground that, by purchasing WAL and its interest in Weichert in 1994, Del Monte became a limited partner of Weichert.

147 In the second place, as regards the subject-matter of the distribution agreement, it must be noted that the agreement related not only to bananas but also to pineapples and papayas, that bananas represented a substantial part of Weichert's turnover, according to paragraph 1 of Weichert's reply to the request for information of 10 February 2006, and that the countries covered by the distribution agreement included Germany, a very important European market in terms of the volume of bananas consumed.

148 As regards the option of terminating the distribution agreement, the clause in question is customary in that type of mutually beneficial contract, bearing in mind that in the event of that clause being invoked, each party would be faced with the same question regarding the necessary alternative. The circumstances of the termination of the distribution agreement in the present case and the impact of that situation on the relationship between Del Monte and Weichert will be considered in conjunction with the arguments relating to Weichert's failure to meet Del Monte's expectations in relation to banana pricing (see paragraphs 195 to 198 below).

149 In the third place, with regard to a more general assessment of the distribution agreement and the applicant's comment that the Commission does not show that the applicant had any power going beyond some form of commercial leverage that would be held by any supplier, it must be noted that

the Commission states that 'Del Monte had a contractual possibility to influence the volume significantly within the established contractual minimum (between 100 000 and 200 000 boxes) or above it', bearing in mind that it was Del Monte which, according to the agreement, was responsible for providing an estimate of fruit available for future deliveries. That information reveals a sizeable difference between the upper and lower thresholds of that 'minimum volume'. The Commission is right in stating that given that Weichert was obliged to acquire almost its entire banana volume from Del Monte in connection with its business in numerous European markets, the possibility of reducing the supply volume under the contract provided a powerful means of putting pressure on Weichert (recital 426 to the contested decision). As the Commission observes, Del Monte did indeed use that latitude in supplying Weichert for the purpose of controlling Weichert (see the document referred to in footnote 456 and recital 390 to the contested decision).

150 That last finding in relation to Del Monte's substantial discretion as to the volume supplied to Weichert substantiates the Commission's assertion that the distribution agreement strengthened Del Monte's economic and legal capacity to exert influence on the day-to-day management of Weichert's business.

151 Last, it must be noted that the applicant's reference to Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 541 and 542, and Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, which, according to the applicant, show that an exclusive distribution relationship in no way indicates that two entities are part of a single undertaking, is irrelevant, since those judgments concern legal issues and have factual backgrounds that differ from those of the present case. *Suiker Unie and Others* v *Commission* concerns the applicability of Article 81 EC to agreements concluded between trade representatives and principals. *BMW Belgium and Others* v *Commission* concerns direct responsibility in the light of a fine which the Commission imposed on car dealers for having agreed on an export prohibition. In neither of those decisions was the Court required to examine and determine the question whether the conditions for the imputation to one undertaking of an infringement committed by another were satisfied.

– The information received by Del Monte

152 The Commission contends that, in addition to the information required to be communicated to Del Monte under clause 7(4) of the partnership agreement and paragraph 4 of the distribution agreement, Del Monte asked Weichert, in a fax addressed to Mr D. W. of 5 May 2000, to send it every week, on Monday or Tuesday at the latest, a report with information on Germany, Austria, the Benelux countries, Scandinavia and countries outside the European Union, according to a format that was attached. Weichert provided the Commission with that fax as well as with copies of the reports that it sent to Del Monte concerning the banana market situation from 'week 18' of 2000 until 'week 3' of 2002 (recital 392 to the contested decision). Those reports comprise two columns corresponding to two consecutive weeks with, for the past week, an indication in respect of Del Monte, Dole, Chiquita and the 'others', as well as each of the relevant geographical markets, of the volumes concerned, the official prices and the actual prices. The same information was mentioned in the table for the current week, the only difference being the reference to a 'tentative net price' instead of an actual net price. In addition to that statistical information, the reports included a space in which Weichert could add comments on the state of each market.

153 Weichert also stated that it sent Del Monte weekly price reports until 1 January 2003. Copies of those reports are in the Commission's file and show an 'official' price and an 'actual price range' for Del Monte-branded bananas and competing products (recital 392 to the contested decision).

154 The applicant maintains that it is implausible that the fact that it obtained specific information under the distribution agreement conferred on it any influence over Weichert's future conduct, the Commission having failed, moreover, to explain how the applicant would have been able to transform that *ex post* information into decisive influence.

155 It must be observed that the content of the reports in question does not correspond to the information required by paragraph 4 of the distribution agreement, and that those documents were an additional source of information directly linked to the marketing of bananas in the context of the weekly negotiations, and thus to the day-to-day management of Weichert.

156 As has been described, the reports in question contained specific and relevant information, namely an indication of official prices, but also estimates of actual prices for the relevant week, including in the form of a price range. In addition, the regular nature of the weekly transmission of those reports resulted in a continuous flow of information to Del Monte, giving it an extensive and precise understanding of the market, including of Weichert's positioning in relation to that of other operators, and of market development.

157 It is apparent from the contested decision that the receipt of the reports in question formed part of what the Commission calls 'information mechanisms' which, in conjunction with the control mechanisms in the partnership agreement, at least would have allowed Del Monte to influence Weichert's commercial conduct, including the day-to-day business management. The Commission adds that the evidence described also shows that Del Monte effectively exercised that influence (recital 393 to the contested decision).

158 It must be observed that the reports in question, which were sent to Del Monte by Weichert on a weekly basis, constituted information that was requested and above all obtained outside the contractual framework governing the parties' relationship, bearing in mind that, at its Commission hearing, Weichert clearly stated that the weekly detailed reporting mechanism had been imposed on it by Del Monte. That is clear evidence of the exercise by Del Monte of influence over Weichert.

159 At the hearing before this Court, the applicant claimed that the reports referred to in paragraph 153 above did not concern information specifically for the applicant but were communicated to the whole market. It must, however, be noted that that assertion is not based on any concrete, objective evidence and cannot, therefore, be accepted.

– The discussions regarding pricing policy and Weichert's supplies

160 It must be noted that, in the contested decision, the Commission first of all recalled certain statements made by Weichert during the administrative procedure, concerning its relationship with Del Monte.

161 Recital 388 to the contested decision is worded as follows:

'According to Weichert, there were several discussions each week between Weichert and Del Monte in relation to day-to-day management issues, as well as pricing and marketing issues regarding the distribution of bananas. Weichert also submits that its "official price", which was determined each Thursday morning, was determined by Weichert in consultation with Del Monte. It also explains that while Del Monte did not formally instruct it to have the same official price as Dole, Del Monte effectively expected Weichert to have an official price at least as high as that of Dole. According to Weichert, it therefore set its official price at the same level as the official price of Dole.'

162 In recital 390 to the contested decision, the Commission mentions Weichert's statement that 'in addition to the influence of Del Monte due to its majority shareholding, Weichert was, in particular, trying to accommodate the expectations of Del Monte since it feared that Del Monte would stop supplying Weichert or at least reduce supplies significantly, should Weichert's official price not be in line with Del Monte's expectations'.

163 The Commission then referred to the various items of documentary evidence which '[confirmed] this type of [contact] between Weichert and Del Monte and [showed] that Del Monte [had] exerted pressure to influence … Weichert's pricing policy directly' (recital 389 to the contested decision).

164 The Commission thus referred to:

— a fax of 28 January 2000, in which Mr A., an employee of Del Monte, asked Mr A. W. to provide him with an explanation of the difference between the 'final price' and the 'expected price' in these terms:

'Further to our yesterday telephone conversation, I would like to state once more my disbelief where reading Interfrucht's sales report for week 3. I need to receive a complete explanation of the difference between your final price of … and the "expected" price of … The fact that Interfrucht entered into a promotional campaign with some supermarkets, when the banana market was eventually recovering to its normal level – for the period – is absolutely staggering! What kind of commercial strategy is that? Also, it is about time that you realise that you are selling our fruit. You very well know that Del Monte participates at …% to the final results; how can you take such a decision – to enter into a promotion – without seeking approval from your partners? or at least informing them! To make matters worse, I talked on two distinct occasions with the person in charge in your company of the commercialisation of the bananas, to discuss about market conditions and prices. I was told that [Weichert] will keep its prices "very close" to the official price!!! … In any case, this is purely unacceptable. This matter will be on top of the agenda when we shall meet next week with Mr [E.] … We would like to inform you that if your sales performance does not improve – meaning to be more in line with the market – and to a comparable level to other Del Monte operators, Del Monte will take all necessary actions to protect its interests' (recital 389 to the contested decision);

— a fax of the same date from Mr A. W. in reply to Mr A., apologising to him for the misunderstanding that occurred during a telephone conversation between Mr A. and the Weichert employee, providing an explanation of Weichert's financial results and ending with the remark: '[w]e are happy to have the possibility to explain personally the situation in our next week's meeting' (recital 389 to the contested decision and footnote 424);

— an exchange of faxes on 6 April 2000 between Mr A. and Mr A. W., in which Mr A. refers to a report from Tuesday and requests full details of the difference between the actual price and the quotation price, and Mr A. W. states that 'the reason for the relatively large gap between the official quotation and the actual price is that the increase from DEM 33 to DEM 35 could never be realised', concludes from this that '[their] price range is between DEM 30.00 and DEM 33.00 less rebates', and ends with the remark, '[a]ny questions, please call' (recital 389 to the contested decision and footnote 424);

— a fax from Del Monte to Weichert of 12 June 2000, in which Del Monte confirms its position, as explained during a meeting in Miami (United States) and a telephone conversation on the same day, stating clearly that prices had to be fixed within a given range according to the bananas' geographical origin and that in any case those prices were not to be lower than a price also determined according to origin, and which includes the following statement: 'If you cannot achieve these prices, our position, as clearly stated during our last week meeting in Miami, is to

consequently reduce your banana volume to the level of Interfrucht's own licences, i.e. +/- 60 000 boxes per week. Please make sure to keep us informed, on a daily basis, of the outcome of your price negotiations with your customers' (recital 390 to the contested decision);

— a fax of 12 December 2000 from Mr A. to Mr A. W. stating:

'Our intention is not to put Interfrucht out of business … We are only trying to mitigate our losses – Del Monte's and Interfrucht's – in a not too favourable market situation. Our message was clear and not ambiguous, if you are not able to sell at a range of US … during the first quarter, you will not be able to build up a small profit reserve to compensate for the low prices in the last two quarters of the year, it will mean that 2001 will be a disaster in terms of banana results. To conclude, the volume reduction is the only way to stop this downslide. …' (recital 389 to the contested decision and footnote 424);

— an email of 23 July 2002 from Del Monte's regional internal auditor to Weichert asking why the prices of certain Weichert import lots per week in 2001 had been lower than those of Del Monte's UTC-branded bananas sold in Holland by Del Monte Belgium, or lower than the *Sopisco* trade press had reported as being the lowest 'actual' price projected for certain weeks; and, moreover, whether it would be possible to see any contracts there may have been in 2001 providing for rebates or discounts for certain Weichert customers (recital 389 to the contested decision and footnote 424).

165 According to the Commission, those facts demonstrate that, during the infringement period, Del Monte regarded itself as being in a position or having the right to influence Weichert's pricing policy and to exert influence on the day-to-day management of Weichert's business, and that in practice it did exert such influence (recital 391 to the contested decision), which the applicant disputes in these proceedings.

166 In the first place, the applicant submits that the Commission relies heavily on the self-serving statements made by Weichert during the administrative procedure with a view to sharing the burden of liability, in spite of the absence of supporting documentary evidence, indeed where contradictory evidence exists, and in spite of the requirements to the contrary laid down in the case-law. It adds that it is telling that the Commission bases its entire case in relation to parent liability on Weichert's unsubstantiated submissions, while rejecting all of Weichert's arguments and evidence on the alleged infringements themselves.

167 That assertion, like the underlying assertion that the Commission's approach was contradictory, is based on a false premiss. In recitals 388 and 390 to the contested decision the Commission merely recalled Weichert's statements concerning its relationship with Del Monte in order to go on to highlight the existence of documentary evidence, contemporaneous with the infringement period, of regular discussions with Del Monte on prices and the pressure exerted by Del Monte (recitals 389 and 390 to the contested decision).

168 In respect of the alleged 'contradictory evidence', the applicant observes that Weichert is described as 'an indirect subsidiary of and part of [the Del Monte group]' whereas numerous statements by Weichert, predating the Commission's investigation, show that Weichert's interests and those of Del Monte were not the same.

169 In addition to the objective nature of the finding linked to Del Monte's 80% shareholding in Weichert, through its subsidiary WAL, it must be noted that those earlier statements by Weichert in various emails sent to Del Monte and revealing tensions between them are not inconsistent with subsequent claims regarding the existence of regular discussions with Del Monte on prices and the pressure exerted by Del Monte.

170 The applicant also refers to an extract from a defence statement submitted by Weichert to a German court in 2002 in proceedings between Weichert and WAL, in which it is claimed that all of Weichert's economic added value, that is acquisition, marketing and logistics, was exclusively attributable to the general partners, and that the role of WAL within the partnership was limited to financial participation. The proceedings, the outcome of which has not been communicated by the applicant, concerned the question as to who had contributed most to Weichert's economic added value, which is a separate issue from the issue – specific to European Union competition law – of the imputation to one undertaking of an infringement committed by another.

171 It is in any event important to note that the existence and authenticity of the correspondence referred to in recitals 389 and 390 to the contested decision, which is corroborated by certain Weichert statements concerning the regular discussions with Del Monte on prices and on the pressure exerted by Del Monte, are not disputed by the applicant.

172 In the second place, the applicant states that it has no recollection of a single occasion on which it discussed quotation prices or transaction prices with Weichert before those prices were set. Apart from the communications required under the distribution agreement between DMFPI and Weichert, very few discussions were held between those two companies. The correspondence quoted in footnote 424 to the contested decision is limited to examples in which Weichert provided Del Monte with *ex post* information and explanations of its performance as Del Monte's distributor. The applicant observes in that regard that the Commission's assertion that 'the managers of Weichert in turn reported to Del Monte' (recital 380 to the contested decision) is incorrect, since the general partners did not have any superior in the hierarchical sense and no one could dismiss them, as their powers were determined directly by the partnership agreement and the HGB.

173 First, it is apparent from the Commission's written pleadings that the applicant's argument concerning the wording of recital 380 to the contested decision is based on a misunderstanding of it, since the remark in question does not include an underlying claim that Weichert's managers were hierarchically subordinate to Del Monte.

174 Second, the applicant cannot legitimately reduce the object of the correspondence with Weichert to nothing more than *ex post* information about the application of the distribution agreement.

175 That correspondence, as described in recitals 389 and 390 to the contested decision, reveals the applicant's direct intervention on Weichert's marketing and pricing; very precise instructions – since they include figures – on the pricing policy to be adopted; meetings and telephone conversations on that subject; an express request for information to be provided daily on commercial negotiations; overt pressure in relation to supply; and Weichert's explanations or justification of its day-to-day management. It should be borne in mind that that correspondence was part of the regular transmission by Weichert to Del Monte of reports containing precise information about the present and projected state of the banana market.

176 It must be noted that the applicant's own analysis of the correspondence in question differs in other parts of its pleadings. Thus, it states that the Commission 'refers to a small number of incidents where Del Monte contacted Weichert *ex post* to express its wish to achieve premium prices generally', and finally acknowledges in the reply that '[t]here is no doubt that the four faxes are an attempt by [the applicant] to influence Weichert's conduct', and that 'Del Monte is actually protesting that Weichert had not followed instructions received from Del Monte'.

177 In the third place, the applicant maintains that Weichert's alleged fear concerning its supplies of bananas is not an argument that supports the Commission's theory.

178 The applicant claims, first of all, that a supplier's right to end a relationship with a distributor does not confer decisive influence, as otherwise all (significant) suppliers would be liable for independent distributors' competition law infringements, and there is no case that would suggest such liability.

179 Suffice it to note that that general, abstract statement is not inconsistent with the Commission's conclusion in recital 391 to the contested decision, which was based on an assessment in this case of the relationship between Weichert and Del Monte.

180 Next, it is mentioned in the application that 'Del Monte's announcements referred to situations in which Weichert purchased additional import licences, without ever having consulted Del Monte beforehand and often at prices that were so high that it ultimately had to sell the bananas at a loss', and that it is evident that Del Monte opposed this strategy as it damaged its brand and Weichert's results.

181 The situation thus described does not correspond in any way to the substance of the exchanges between Weichert and Del Monte. Furthermore, Del Monte has not produced anything that might support its claims regarding Weichert's – overly onerous – acquisition of additional import licences and, subsequently, the sales at a loss that justified its intervention. Moreover, the fact that Del Monte was, as it claims, pursuing a legitimate objective by intervening in Weichert's day-to-day management is not inconsistent with the Commission's conclusions regarding the imputation of liability.

182 Last, it is claimed that there was no risk that Del Monte would stop supplying Weichert, as Weichert declared during the administrative procedure. Cutting off Weichert's supplies would not only have constituted a breach of contract but would also have hurt WAL, since it would have had to bear 80% of the financial consequences. Further, to do so would have increased the risk of a rival banana distributor capturing market share and would have had a negative impact on the Del Monte brand.

183 The applicant adds that its correspondence with Weichert 'suggests' that Weichert had no compelling incentive to take the applicant's wishes in relation to pricing into account, particularly since, in the period from 2000 to 2002, the supplier/distributor relationship fell within the framework of a distribution agreement that had been terminated since 1997.

184 The applicant's arguments in that respect are based on a partial reading of the statements made by Weichert that are recalled in recital 390 to the contested decision, according to which '[Weichert] was, in particular, trying to accommodate the expectations of Del Monte since [Weichert] feared that Del Monte would stop supplying Weichert or at least reduce supplies significantly'. By failing to refer to the reduction of supplies, the applicant misrepresented the nature of Weichert's statements concerning its fears about supplies, which the documentary evidence obtained by the Commission corroborated, and provided explanations which do not reflect the true nature of the relationship with Weichert and of the distribution of powers, as revealed by those documents.

185 It is evident from the distribution agreement and the faxes sent to Weichert that Del Monte had a real capacity significantly to influence Weichert's supplies and that, in practice, Del Monte used that power to put Weichert under considerable pressure in order to influence Weichert's pricing policy.

186 The correspondence between Del Monte and Weichert shows how each of them perceived the situation at that time and it is significant in that regard to note that Del Monte threatened to reduce the volume of the weekly banana supply 'to the level of Interfrucht's own licences, i.e. +/- 60 000 boxes per week', without referring to any case of *force majeure*, that is to a quantity below the minimum threshold provided for by the distribution agreement, under which Del Monte was not allowed to reduce supply below a minimum quantity (100 000 boxes) save in the case of *force majeure*, and which provided for automatic suspension of the contract in the event of a weekly delivery of fewer than 60 000 boxes. It is thus apparent that Del Monte had no hesitation in departing from strict compliance with the terms of the contract linking it to Weichert, taking the view that the

minimum delivery threshold was not the volume of bananas it was required to supply under the distribution agreement but the volume of bananas corresponding to the licences held by Weichert. Del Monte confirmed its position unequivocally during the administrative procedure (see paragraph 54 of its reply to the statement of objections, reproduced in recital 420 to the contested decision).

187 Furthermore, the distribution agreement covered not only the Member States of the north of the Community, but also other States in which the Community banana licence regime did not apply, namely Norway, Hungary, Poland and the former Czechoslovakia. Thus, the reduction of volumes to the level of import licences, as a tool for influencing the level of banana prices (Del Monte's main concern according to its own statements) was likely to create difficulties for Weichert in its relationships with its customers in the abovementioned countries. It must be borne in mind that, under the licence regime in force at that time, it was costly for an undertaking not to use its licences during a year, since licences for a subsequent year depended on those used in the preceding year and licence-holders also forfeited part of their security if licences were not used (see recital 37 to the contested decision).

188 It is also important to note that in its written pleadings Del Monte provided explanations concerning the distribution of imported bananas that reveal its economic power and a certain independence; in that respect it clearly differs from Weichert.

189 The applicant states in the application (paragraph 76):

'During the relevant period, import licences were required for the sale of bananas in the European Union. As a traditional player in the Northern European area, Weichert had a significant volume of import licences (approximately 137 000 tons for 2002) … that were essentially reallocated to Weichert each year. [*confidential*] [1].'

190 That flexibility in the banana market which the applicant describes is confirmed by the Commission's findings concerning the existence of significant movements of volumes from the Northern European region to other parts of the Union, and vice versa, demonstrated by data from Eurostat (Statistical Office of the European Union), and by those relating to the variability from one week to the next in volumes of bananas reaching Northern European ports, then allocated among the various countries of Northern Europe and other countries, revealed by the exchange of information between importers on arrivals of bananas at those ports, exchanges which have not been challenged in the present proceedings (recitals 131 and 135 to the contested decision). The fact that it was not possible for the applicant to incorporate [*confidential*] does not in any way alter the applicant's organisational arrangements in the distribution of its bananas, including those sold under the Del Monte brand, and the flexibility that characterises those arrangements.

191 In recital 19 to the contested decision, the Commission also indicates that the Del Monte group is involved in the sale and marketing of bananas in Europe via numerous wholly-owned subsidiaries, including DMFPI, Del Monte Germany, which has been active on the market for bananas since 1 January 2002, and Del Monte Holland. The latter's activities in the resale of bananas under the UTC brand resulted, moreover, in a protest from Weichert dated 18 November 1998, in which Weichert requested 'written confirmation … that Del Monte [would] stop said activities immediately and comply with the [distribution agreement]'. Three years later, in a letter dated 30 October 2001, a general partner of Weichert wrote to Del Monte as follows: 'Concerning the present [distribution] agreement when you started to supply your companies in the Netherlands and Belgium with the same bananas and pineapples under the UTC label you broke the contract at least twice.' The quoted extracts reveal the imbalance in the relationship between Del Monte and Weichert, in the sense of it

1 — Confidential material removed.

being noted that the 'same bananas and pineapples' are distributed under a different label via Del Monte's subsidiaries in the territory covered by the distribution agreement, which could not but disrupt Weichert's business, but which merely resulted in an expression of discontent.

192 With regard to the applicant's assertion that the correspondence with Weichert 'suggests that Weichert did not see any compelling incentive to take Del Monte's wishes into account', it must be noted that the applicant refers to two letters from the general partner, Mr D. W., which were sent to it, in one case, before the faxes from Del Monte threatening Weichert with a reduction of supply, as it is dated 10 January 1997, the other, dated 23 April 2001, expressing that partner's opposition to any change in the legal structure of Weichert that would give Del Monte 'full control'.

193 However, the fact that Del Monte's desire to modify Weichert's legal status encountered resistance from a general partner does not in any way alter the economic issues arising from the distribution of powers between those undertakings in the context of the implementation of the distribution agreement until 31 December 2002, a distribution of powers which favoured Del Monte, given the terms of that agreement and Del Monte's size and thus economic power, which lends credibility to the fears that Weichert expressed.

194 As regards the argument that, in the period from 2000 to 2002, the supplier/distributor relationship fell within the framework of a distribution agreement that had been terminated since 1997, it is important to note the terms of that agreement with regard to the termination option available to each of the parties.

195 The 1988 distribution agreement was originally concluded for a term of five years, paragraph 1 providing that '[t]his Agreement [would be] effective until 31 December 1993, a date which [was] five years after the end of the current agreement between the parties'. It was also provided that, on 31 December 1988 and on each 31 December thereafter, the term of the agreement would be extended by one year unless one of the parties notified the other in writing that it declined to extend or renew the term, such notice to be sent no later than 1 October 1988 or 1 October in any succeeding year. Accordingly, the distribution agreement provided for the automatic renewal of the contract on an annual basis, with the option of unilateral termination by one of the parties, to be notified to the other three months before the end of the term.

196 It is common ground that, by letter dated 10 July 1997, Del Monte informed Weichert that it declined to extend or renew the distribution agreement and that the agreement would expire on 31 December 2002 (recital 431 to the contested decision).

197 In so doing, Del Monte departed from the terms of the distribution agreement and gave notice of termination resulting, in practice, in a five-year extension, although the date of 31 December 2002 was not perceived by the parties as the inevitable end of the agreement. Indeed, it is apparent from the applicant's own statements and the documents produced to the Court that, notwithstanding their differences concerning the modification of Weichert's legal status, the applicant was involved in negotiations with the general partners for the renewal of the distribution agreement. Thus, although, in a letter dated 30 October 2001, Mr D. W. expressed his disagreement with proposals for the renewal of a modified agreement put forward by Del Monte, he nevertheless invited Del Monte to reconsider its position in the light of the comments made in the letter.

198 In any event it must be noted that Del Monte and Weichert maintained their commercial relationship until 31 December 2002, which is also the date on which Del Monte's transfer of its limited partner's share in Weichert to JA Kahl Holding GmbH & Co. KG took effect within the framework of the distribution agreement, the economic contingencies with which the undertakings were faced leaving them no other choice.

199 In the fourth place, the applicant claims that the Commission's conclusion regarding the existence of an economic unit with Weichert is based on four faxes sent to the general partners of Weichert, all of which date from 2000 and were misinterpreted by the Commission.

200 The applicant submits that Weichert had a strategy of selling large volumes in order to use all its licences and consequently always set its official price after Dole had set its own and at the same level as Dole, whereas the applicant's strategy was to achieve a premium price and a quotation price closer to that of Chiquita, which was known even to other market operators. It observes that discussions with Weichert concerning the setting of quotation prices or transaction prices would not have made sense since Weichert always followed Dole's prices.

201 The applicant maintains that, in that context, the four faxes at issue provide documentary evidence of two points: first, that Del Monte attempted, on some occasions, to influence certain decisions relating to Weichert's banana business but to no other part of its activities and, second, that Weichert did not follow the instructions given by Del Monte, against which Del Monte protested. None of the evidence put forward by the Commission indicates that Weichert carried out Del Monte's instructions in any material respect. The fact that a subsidiary, even a wholly-owned subsidiary, disregards the interests of its parent company or consistently ignores the latter's instructions supports the conclusion that the subsidiary is largely determining its own commercial policy. In the present case Weichert acted contrary to Del Monte's 'general commercial strategy' and was, as the Commission itself acknowledges, 'not necessarily following the policies laid down' by Del Monte.

202 It must be noted that the documentary evidence to which the Commission refers in recitals 389 and 390 to the contested decision consists of seven messages, five from Del Monte and two from the general partners of Weichert.

203 The messages from Del Monte reveal that Weichert was questioned directly about its marketing and pricing policy, which is even described as 'unacceptable'. They also reveal very precise instructions – since they include figures – on the pricing policy to be adopted, meetings and telephone conversations on that subject, an express request for information to be provided daily on commercial negotiations, and overt pressure in relation to supply, the final sentence of the fax of 12 December 2000 containing more than a threat, since it announces a reduction in the volume of supply, which was Del Monte's decision alone, in order to halt a drop in prices and prevent a 'a disaster in terms of … results' for 2001.

204 It is thus clear that Del Monte, which was kept regularly informed of the state of the market and prices by Weichert's weekly reports, closely monitored Weichert's commercial behaviour and even intervened directly in the determination of its pricing policy.

205 The Commission also produces two messages in reply from a Weichert general partner, in which, on the very same day as Del Monte's questioning, the person concerned provides the explanations required by Del Monte and expresses his satisfaction at being able to explain the situation in a forthcoming meeting with Del Monte. Those messages do not express any surprise, reticence or opposition on the part of Weichert, but reveal, on the contrary, that Weichert felt obliged to account to Del Monte for its pricing decisions and to try to meet Del Monte's expectations.

206 While the applicant has provided letters from Weichert's general partners revealing that they were opposed to a change in the limited partnership's legal status and were unhappy with the activities of the applicant's Belgian and Dutch subsidiaries, it does not refer to any correspondence from Weichert expressing disapproval of or resistance to that direct intervention by Del Monte in its commercial management.

207 That finding is perfectly consistent with Weichert's statements, according to which, in the light of the risks to its supplies and the occasional reductions in those supplies, it was obliged to follow Del Monte's instructions in order to avoid going out of business, that fear clearly having been relayed to its supplier, as the beginning of Del Monte's fax to Weichert of 12 December 2000 shows.

208 Although, as the Commission itself acknowledges in recital 424 to the contested decision, Weichert's pricing decisions may not have met Del Monte's expectations, it cannot be inferred from the documentary evidence obtained by the Commission that Weichert generally did not – in the words of the applicant – follow 'the instructions of Del Monte', and behaved independently on the market. Not only did Del Monte thereby acknowledge that its role was not just that of financial investor, but its interpretation of the correspondence referred to in recitals 389 and 390 to the contested decision amounts to a theoretical extrapolation that overlooks the true position regarding the economic links tying it to Weichert and a distribution of power that favoured the applicant.

209 With regard to the alignment of Weichert's quotation prices with those of Dole, the applicant draws the conclusion that Weichert was fully independent, since the applicant wanted, on the contrary, quotation prices that were closer to those of Chiquita. That situation reflected the strategic disagreement that existed between Weichert and Del Monte, Weichert preferring large volume sales, contrary to Del Monte's wish to achieve premium prices.

210 Although the applicant refers to 'explicit wishes' with regard to its commercial strategy, it has not produced evidence of a clear expression of its expectations in regard to Weichert. Weichert indicated that although Del Monte had not formally instructed it to have the same official price as Dole, it expected an official price to be adopted that was at least as high as Dole's official price and not that of Chiquita, since Del Monte considered the Dole brand to be the closest to its own in terms of quality and reputation of bananas.

211 In its pleadings, Del Monte quotes extracts from the statements of other importers that are supposed to corroborate its claims but which in fact, particularly in the case of Dole's statements, contradict them.

212 Dole stated that '[a]s part of Del Monte's efforts to position itself on the market as a well-known and quality supplier, it was common knowledge in the industry that Del Monte would look to the Dole quotation price as a benchmark for its quotation price' (reply to the request for information of 24 November 2006, p. 9). Dole made the same remark in its reply to the request for information of 15 December 2006 (p. 3) and added, referring directly to its first reply, that '[i]t was common knowledge in the industry that Weichert, as the agent in charge of marketing Del Monte bananas … wished to position the Del Monte brand … on par with Dole-branded bananas' (reply to the request for information of 15 December 2006). That last assertion, which the applicant repeated in its pleadings, is indissociable from the statement that precedes it.

213 Chiquita stated that 'Dole and Del Monte [had] started having different quote prices when Del Monte opened its own business in Germany in 2003', but that does not necessarily mean that it was Del Monte's strategy before that date to obtain quotation prices close to those of Chiquita. Dole's statements even demonstrate the opposite. To the statements mentioned in paragraph 212 above must be added Dole's explanation that, in early 2003, Del Monte had begun to market its bananas through its own entity in Hamburg and that, with the arrival of a new Del Monte general manager in April 2003, there was tremendous pressure on the Hamburg sales teams to demonstrate that Del Monte was a strong player on the German market. As part of that strategy, Del Monte sought to close the gap between the Chiquita quotation price benchmark, that is to say, the highest quotation price, and Del Monte's quotation price. Dole further explained that Del Monte's 'shift' to using the Chiquita quotation price as a benchmark was part of the strategy pursued by Del Monte's new management to promote its bananas as a superior brand.

214 The following quotation of Dole's remarks, which was highlighted by the applicant, must be read in the light of Dole's comments mentioned in paragraphs 212 and 213 above: 'Dole believes that Del Monte had been dissatisfied with Weichert's marketing results' and 'apparently broke off relations with Weichert to undertake an aggressive own-marketing approach in order to have the Del Monte-branded bananas be viewed as a "premium" or "First Tier" banana brand'. The fact that the financial results of the marketing of its bananas may not have matched Del Monte's expectations and that Del Monte was disappointed and dissatisfied with its relationship with Weichert does not mean that Weichert was starting to act autonomously on the market, as the applicant claims.

215 In the absence of evidence from the applicant that Weichert would wait to find out Dole's quotation price in order unilaterally and systematically to set its own at the same level, the argument that discussions with Weichert about the setting of quotation prices or transaction prices would not have made sense since Weichert always followed Dole's prices is wholly unfounded and must be rejected.

216 Last, it must be noted that the applicant highlighted the fact that the four faxes on which the Commission's findings are based all dated from 2000, whereas the infringement period covered three years: 2000 to 2002.

217 It must be noted, however, that the applicant disregards the email sent to Weichert by Del Monte's regional internal auditor, asking why the prices of certain Weichert import lots per week in 2001 had been lower than those of Del Monte's UTC-branded bananas sold in Holland by Del Monte Belgium, or lower than the *Sopisco* trade press had reported as being the lowest 'actual' prices projected for certain weeks. That document demonstrates the persistence of Del Monte's monitoring of and intervention in Weichert's management.

218 Furthermore, it is common ground that Weichert continued to send price reports to Del Monte every week until 31 December 2002, and that the commercial relationship between the two undertakings continued until that date in accordance with the terms of the distribution agreement which put Del Monte in a position of strength that was further enhanced by the size and economic power of Del Monte, which had a double financial interest in supervising and intervening in Weichert's pricing policy.

219 In the absence of any structural change in the relationship between Del Monte and Weichert between 2000 and 2002, there is nothing from which it might be concluded that the nature of that relationship, as illustrated by the correspondence exchanged in 2000, may have been different in subsequent years.

220 It follows from the foregoing considerations that the correspondence between Del Monte and Weichert referred to in recitals 389 and 390 to the contested decision is indicative of the exercise by Del Monte of decisive influence over Weichert during the infringement period.

– The alternative evidence provided by the applicant

221 Irrespective of the burden of proof on the Commission, the applicant submits that there is a variety of evidence that demonstrates that it cannot be held liable for Weichert's conduct.

222 In the first place, the applicant maintains that if it had had decisive influence over Weichert it would have made sure that [*confidential*]. As it did not have access to Weichert's import licences, that [*confidential*], Weichert having used its licences to pursue its volume strategy, against Del Monte's interests.

223 It must first be pointed out that that argument – which leads, on the basis of nothing more than an unsupported assertion, to the conclusion that there was no decisive influence – is not inconsistent with the substantive and objective findings on which the Commission's conclusions are based.

224 Next, it must be recalled that the applicant and Weichert were linked by the distribution agreement, the terms of which were binding on the parties to the agreement and explicitly laid down the conditions of use of Weichert's import licences.

225 The last amendment of that agreement is dated 10 February 1994 and follows the entry into force of Regulation No 404/93, under which the importation of bananas into the Community was covered by a licence regime with fixed annual quotas allocated on a quarterly basis.

226 According to the distribution agreement, as amended, Weichert owned its licences but had to use them to import Del Monte-brand bananas and market them in the territory defined in the agreement, and was not entitled to transfer its licences to any other party without the prior written consent of Del Monte, which Weichert confirmed at its hearing.

227 The true position regarding the contractual links tying Weichert and Del Monte is that Del Monte had powers of control in respect of Weichert's import licences, which is a further indication of Del Monte's ability to excercise decisive influence over Weichert.

228 In the second place, the applicant submits that, had it had the ability to exercise decisive influence over Weichert's conduct on the market, [*confidential*].

229 It must be borne in mind that the Commission took Weichert's special status of a limited partnership into account and analysed the division of powers between the general partners and the limited partner, as defined by the partnership agreement. It correctly found that the partners exercised joint control, noting, in particular, the need for the partners' unanimous agreement to any amendment of the partnership agreement (clause 9(3) of the partnership agreement).

230 That situation explains why discussions were held between the general partners and the limited partner about an amendment of the partnership's legal status, the failure of those discussions leading ultimately to the termination of the contractual relationship.

231 In fact the applicant's argument effectively treats that joint control as evidence of an inability to exercise decisive influence over Weichert's conduct on the market, which is entirely unfounded. The existence of such control is not, in itself, inconsistent with the Commission's finding imputing to Del Monte liability for the infringement committed by Weichert.

232 In the third place, the applicant submits that Weichert managed legal affairs independently, to the extent of instructing its lawyers to defend the partnership's interests against the Del Monte group and to threatening, through those lawyers, to take legal proceedings against the Del Monte group. According to the applicant, the Commission confused, in recital 428 to the contested decision, the right of an individual shareholder to bring a legal action and the ability to decide whether Weichert could initiate such an action. In the applicant's submission, if it had been in a position to exercise decisive influence over Weichert it would not have authorised Weichert to instruct lawyers to bring proceedings against the applicant.

233 First, the applicant refers to a letter that was sent to it on 27 March 1997, prior to the infringement period, by a lawyer acting for Weichert.

234 It must be noted that that letter is part of the exchange of correspondence about the alteration of Weichert's legal status sought by Del Monte, and that it does not contain any threat of legal proceedings against Del Monte.

235 The letter refers to clause 9(2) of the partnership agreement, from which it is clear that resolutions of the partners' meeting have to be taken by a majority of votes cast in order to be effective and always require the approval of the general partner, and to the fact that the general partner had neither impliedly nor explicitly consented to any such change and that, 'in principle', he did not consider that he would give his consent in the future.

236 In the context of joint control of Weichert, the fact that a partner calls on a lawyer to assert his rights and defend himself against someone he suspects of infringing them is not a sign of the other partner's inability to exercise decisive influence over the conduct of the joint undertaking, as the Commission correctly points out in recital 428 to the contested decision.

237 Second, the applicant refers to an extract from a defence statement dated 15 May 2002 submitted by Weichert to a German court in proceedings between Weichert and WAL, in which it is claimed that all of Weichert's economic added value, that is acquisition, marketing and logistics, was exclusively attributable to the general partners, and that the role of WAL within the partnership was limited to financial participation. The proceedings concerned the value of Weichert's licences and the question as to who had contributed most to Weichert's economic added value.

238 It must, however, be noted that the proceedings were issued by Del Monte, not by Weichert, against a background of the termination of the distribution agreement that was scheduled for 31 December 2002 and of parallel negotiations between the parties for the extension of a modified agreement. Del Monte's initiation, as a precautionary measure, of legal proceedings relating to the economic value of the undertaking, which was a partnership with the W. family, does not preclude the conclusion that decisive influence was exercised.

239 Third, the applicant relies on two letters sent to it by the general partners.

240 The first letter, dated 15 January 1999, informs Del Monte that lawyers have been appointed to defend Weichert's interests in relation to 'actions of [Del Monte] violating [the distribution agreement]' and requests that Del Monte comply with that agreement.

241 That document with its imprecise content, which predates the infringement period, was not issued by external lawyers. Nor, moreover, has the applicant shown that it was acted on.

242 On the contrary, the second letter, dated 30 October 2001, shows that Del Monte and Weichert's general partners continued to correspond directly about the continuation of their contractual relationship under a modified distribution agreement.

243 It is thus apparent that all the documents produced by the applicant attest to the tensions that existed in its relationship with the general partners, essentially on account of the changes envisaged in relation to the legal status of Weichert and in the distribution agreement. That situation indicates only that Del Monte did not have exclusive control, which is not asserted by the Commission, which found that there was joint control of Weichert. It is not inconsistent with the substantive and objective findings on which the Commission's conclusions regarding Del Monte's joint liability are based.

244 In the fourth place, the applicant relies on various pieces of documentary evidence predating the Commission's investigation and confirming that the applicant did not have decisive influence over Weichert's management. According to the applicant, the Commission did not examine any of that evidence, which was submitted during the administrative procedure, and its failure to do so constitutes in itself an infringement of Articles 81 EC and 253 EC.

245 With regard to the complaint relating to the statement of reasons for the contested decision, it will be recalled that, as set out in paragraphs 61 to 76 above, the Commission stated to the requisite legal standard its reasons for imputing Weichert's unlawful conduct to Del Monte.

246 It must be pointed out that the Commission examined and rejected Del Monte's various arguments concerning, inter alia, the rights and powers of the partners of the limited partnership, the content of the partnership agreement, the importance of the information supplied by Weichert to Del Monte, the terms of the distribution agreement, the influence of Del Monte's powers in relation to supply on its relationship with Weichert and the alleged lack of conformity of Weichert's pricing policy to Del Monte's expectations (recitals 394 to 433 to the contested decision).

247 The Commission also stated, in recital 419 to the contested decision, that '[t]he exclusion by Del Monte of Weichert from its consolidated financial statements [did] not demonstrate that Del Monte had no decisive influence on Weichert; or that Del Monte and Weichert [had] formed no undertaking for the purposes of the application of Article 81 [EC] and in respect of the infringement set out in this decision; or that liability for Weichert's market behaviour [could not] be attributed to Del Monte'.

248 It must be noted that [*confidential*] and the letter which a general partner sent to Del Monte on 10 January 1997 – documents to which the applicant referred in its arguments – dealt with the issue of the running of Weichert and the respective roles of the partners, which is clearly referred to by the Commission in its analysis of the provisions of the HGB and of the partnership agreement.

249 The report of Weichert's auditors and Del Monte's annual reports – documents referred to by the applicant – concern the question of consolidation of the accounts, which the Commission expressly addressed in recital 419 to the contested decision.

250 So far as the other documents cited by the applicant are concerned, and assuming that they were communicated to the Commission during the administrative procedure, it will be recalled that the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned; it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision. In particular, it is not required to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (see, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 61 above, paragraph 64; *Corsica Ferries France* v *Commission*, paragraph 62 above, paragraph 64; and *L'Air liquide* v *Commission*, paragraph 62 above, paragraph 64).

251 It follows from the foregoing considerations that the specific arguments of the applicant mentioned in paragraph 244 above do not invalidate the conclusion that the Commission has, in the present case, set out to the requisite legal standard the facts and legal considerations having decisive importance in the context of its decision, and that it cannot be criticised for any breach of its obligation to state reasons.

252 As regards the relevance of the documentary evidence adduced by the applicant, the applicant refers, first, to the negative conclusions in an opinion drawn up by a law firm, obtained in 1994, as regards the possibility of WAL exerting influence on Weichert, a conviction also expressed by Mr D. W. in a letter sent to the applicant on 10 January 1997.

253 The fact [*confidential*] and that it was pointed out [*confidential*] that there was no board of directors within Weichert with voting rights for Del Monte does not affect the Commission's analysis of Del Monte's ability to exert influence under the partnership agreement, which is, moreover, just one of the elements taken into account by the Commission to support its conclusion that Del Monte exercised decisive influence over Weichert's conduct.

254 It must be noted that the Commission clearly recalled and took account of the terms of clause 7(1) of the partnership agreement, according to which '[t]he partner with personal liability [Mr D. W.] shall be authorised and bound to represent and manage the company', the respresentatives of the W. family being described as the 'general managing partners' (recital 382 to the contested decision). The Commission did not claim that there was a board of directors of Weichert but concluded, correctly,

that a range of important acts necessarily having an – even indirect – impact on the management of Weichert could not be carried out without the consent of the limited partner, in the light of the terms of clause 7(2) and (3) of the partnership agreement.

255 Second, the applicant relies on an extract from a defence statement submitted by Weichert to a German court in 2002 in proceedings between Weichert and WAL. The applicant has already relied on that document in relation to the existence of evidence refuting Weichert's statements, with a view to challenging it (see paragraph 170 above).

256 It is important to note that mere claims by Weichert in a defence statement seeking to minimise Del Monte's contribution do not constitute proof of the fact that Weichert's economic added value was exclusively attributable to the contribution of the general partners, and, even assuming that to be the case, that would not be sufficient to contradict the Commission's overall assessment with respect to the specific legal issue of the decisive influence of one undertaking over another.

257 Third, the applicant relies on the reports of Weichert's auditors stating, in 2000, that '[Weichert did] not belong under the integrated management of the limited partner [WAL], and [was] therefore not an affiliated company', a finding corroborated by the fact that the applicant itself did not include Weichert in its accounts. The applicant claims that the Commission's view in recital 419 to the contested decision – in this case that the applicant's exclusion of Weichert from its consolidated financial statements was irrelevant – represents a manifest error of assessment, since the results of controlled subsidiaries are required to be consolidated.

258 That argument must be rejected.

259 As the Commission rightly explained in recital 382 to the contested decision, rather than being a subsidiary of Del Monte, Weichert was a partnership between Del Monte, the limited partner's parent company, and the W. family, the members of which had the status of general partners. Considerations concerning the necessary consolidation of the subsidiary's results with those of the parent company and the inferences drawn by the applicant from the absence of consolidation in this case are, therefore, entirely irrelevant.

260 In any event, while the Courts of the European Union have held that the consolidation of a subsidiary's accounts by the parent company 'pointed to the existence of a single economic entity' (judgment of 18 December 2008 in Case T-85/06 *General Química and Others* v *Commission*, not published in the ECR, paragraph 66, confirmed on appeal in *General Química and Others* v *Commission*, paragraph 58 above), the absence of such consolidation does not necessarily mean that, as the applicant claims, it is impossible to conclude, in any circumstances, that there is decisive influence.

261 Fourth, the applicant submits a press article published on 10 October 2002 confirming that, before selling its interest in Weichert, Del Monte did not have control in respect of its products in Northern European markets.

262 It must be observed that the applicant's assertion is based on an erroneous extrapolation from the wording of an article that essentially merely reproduces the applicant's statements that, following the transfer in question, it would be able to control the sales and 'direct' marketing of its products in Northern European markets. In any event, a vague journalistic comment is not liable to be inconsistent with the substantive and objective findings on which the Commission based its conclusion regarding the imputation to Del Monte of the infringement committed by Weichert.

263 Fifth, the applicant submits statements made by the Commission's agent in a procedure before the World Trade Organisation (WTO) panel, referring to Del Monte's 2002 annual report and confirming that the interest in Weichert was 'non-controlling', as well as the wording of that report which was taken into account by the Commission.

264 Although the truth of the alleged statements of the Commission's agent has not been substantiated, the Commission does not dispute that Del Monte's 2002 annual report was one of the documents attached to its submission in the procedure before the WTO panel.

265 The Commission rightly states that it was not the purpose of that submission to determine the existence of Del Monte's decisive influence over Weichert, and that the wording of the extract from that report, according to which the sale of Del Monte's interest in Weichert would enable Del Monte to control the 'direct' marketing of its products in Northern Europe, is not incompatible with the Commission's view in the contested decision, since it had never claimed that Del Monte had exclusive control over Weichert.

266 It follows from the foregoing considerations that, whether taken individually or collectively, the documentary evidence put forward by the applicant to establish that there was no exercise of decisive influence over Weichert does not invalidate the Commission's conclusion regarding the imputation to the applicant of the infringement committed by Weichert.

– Admissibility of Annex C 1 to the reply

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

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

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

270 Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34, and Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 154).

271 That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court also applies to the reply (*Microsoft* v *Commission*, paragraph 269 above, paragraph 95) and to the pleas in law and complaints referred to in the pleadings (Case

T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and Case T-340/03 *France Télécom* v *Commission*, paragraph 268 above, paragraph 166, confirmed on appeal in Case C-202/07 P *France Télécom* v *Commission*, paragraph 268 above).

272 In the present case the applicant merely alleges in general terms that the Commission's attempts to rebut the examples provided in order to show that the applicant was not capable of influencing Weichert in the way it wished to are 'on the whole unconvincing'. In the reply, the applicant submits observations in response to two of the Commission's arguments and refers, as to the rest, to Annex C 1 to the reply for a more detailed explanation than it is able to provide in the body of the pleadings because of 'page constraints'.

273 It must be noted that such a laconic formulation of the complaint does not enable the Court to give a ruling, if appropriate, without other information in support, and to allow the annexes to provide the detail of an argument which is not presented in a sufficiently clear and precise manner in the application would be contrary to their purely evidential and instrumental function (Case T-340/03 *France Télécom* v *Commission*, paragraph 268 above, paragraph 204).

274 Whilst the applicant's observations in response to the Commission's arguments concerning Weichert's conduct in the fixing of quotation prices in the light of Del Monte's expectations and the appointment of lawyers to issue proceedings against Del Monte must be, and have been, taken into consideration in assessing Weichert's conduct, the same cannot be said as regards Annex C 1 to the reply, which must be rejected as inadmissible.

275 It must also be emphasised that to describe as an annex what are just supplementary written observations of the applicant, amounting merely to an extension of the pleadings, is incompatible with the quality that defines an annex, that is its purely evidential and instrumental function.

276 It follows from all the foregoing considerations that the Commission was fully entitled to consider that Del Monte and Weichert formed a single economic unit and to impute to Del Monte the infringement committed by Weichert.

The incorrect nature of the operative part of the contested decision

277 The applicant maintains that Article 1(h) and Article 3 of the contested decision infringe Article 81 EC in so far as the Commission finds that the applicant infringed that provision 'by participating in a concerted practice' and not only that the applicant is held, 'jointly and severally', liable for the fine imposed on Weichert. The contested decision manifestly exceeds the Commission's powers under Article 7 of Regulation No 1/2003, in so far as the applicant is ordered to bring an end to an infringement in which it has never been involved. The provisions of the contested decision in question also infringe Article 253 EC, since there is an obvious contradiction between the operative part of the contested decision and the 'recitals' thereto, in which the Commission stated that it had not found that the applicant had infringed Article 81 EC. Owing to the erroneous nature of the operative part of the contested decision, the applicant submits that it may be exposed to an action for damages before a national court.

278 As regards the complaint alleging infringement of Article 253 EC, it must be borne in mind that the reasons on which a measure is based must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see, to that effect, *Elf Aquitaine* v *Commission*, paragraph 51 above, paragraph 151).

279 A contradiction in the statement of the reasons for a decision constitutes a breach of the obligation laid down in Article 253 EC such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain,

wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 42, and Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 85).

280 In the contested decision, the Commission analysed, first of all, the exchanges between Chiquita and Dole and between Dole and Weichert in the light of the prohibition in Article 81 EC. In recital 359 to the contested decision it concluded that:

'The undertakings Chiquita, Dole and Weichert committed a single and continuous infringement of Article 81 [EC] concerning the fixing of prices and the exchange of quotation prices affecting fresh bananas in [the] Northern European region. The entities liable for the infringement are listed in Chapter 6 of this decision.'

281 In the chapter in question, the Commission went on to apply settled case-law according to which the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them. The Commission observes that if a subsidiary does not determine its own conduct on the market independently, the undertaking which directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking (recitals 362 and 363 to the contested decision).

282 Having analysed and taken into account various aspects of the relationship that existed between Del Monte and Weichert, the Commission took the view that Weichert formed an economic unit with Del Monte, as Weichert did not determine independently its own conduct on the market (recital 432 to the contested decision). The Commission concluded that it held '[Del Monte] and [Weichert] jointly and severally liable for the involvement of Weichert in the infringement from 1 January 2000 until 31 December 2002' (recital 433 to the contested decision).

283 In the operative part of the contested decision, the Commission finds in Article 1(h) that Del Monte is one of the undertakings that 'infringed Article 81 [EC] by participating in a concerted practice by which they coordinated quotation prices for bananas'. In Article 3, which must be read in conjunction with Article 1(h), the Commission requests Del Monte to 'immediately bring to an end the infringement referred to in [Article 1], in so far as [it has] not already done so'.

284 That reminder of the wording of the contested decision does not reveal any internal inconsistency that would prevent a proper understanding of the reasons underlying that measure and specifically the fact that the Commission found Del Monte liable.

285 The complaint alleging infringement of Article 253 EC must therefore be rejected.

286 The applicant's claim of infringement of Article 81 EC is based on the same arguments as those set out in support of the complaint relating to breach of essential procedural requirements, that is the fact that the Commission concluded in the operative part of the measure that Del Monte had infringed Article 81 EC, when it had previously declared that it had not found that Del Monte had infringed that provision. The applicant adds that the Commission has thus manifestly exceeded its powers under Article 7 of Regulation No 1/2003 in that it orders the applicant to bring to an end an infringement in which it has never been involved.

287 Suffice it to note that those arguments are based on a false premiss and must be rejected.

288 The applicant was held individually liable for an infringement which it is deemed to have committed itself on account of its legal and economic links with Weichert and by which it was able to determine Weichert's conduct on the market (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraph 50 above, paragraph 141, and *Metsä-Serla and Others* v *Commission*, paragraph 54 above, paragraphs 28 and 34).

289 The applicant was, moreover, perfectly aware of that approach, the applicant itself having cited the relevant case-law mentioned in paragraph 288 above in its pleadings.

290 Last, it must be noted that the applicant claims that it is impossible for it to comply with Article 3 of the contested decision, as it cannot bring to an end infringements that may have been committed by Weichert.

291 In that regard it is sufficient to note that, contrary to what is claimed by the applicant, Article 3 of the contested decision does not require it to bring to an end infringements that may have been committed by Weichert if it no longer exerts control over Weichert. By requiring the undertakings which participated in the cartel to refrain from repeating and to bring to an end any act or conduct described in Article 1 of the contested decision, the Commission is merely indicating the consequences, regarding their future conduct, of the finding of illegality in Article 1 of the contested decision (see, to that effect, Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 193).

292 Moreover, the first paragraph of Article 3 of the contested decision states that it is only in the event that the undertakings have not yet brought the infringement to an end that they are required to do so. Consequently, if, at the date of the contested decision, the applicant had brought to an end its participation in the concerted practice by which quotation prices for bananas were coordinated, it is not caught by the direction issued in the contested decision.

Existence of a concerted practice having an anti-competitive object

293 The applicant, supported by the intervener, claims that the Commission misapplied Article 81 EC by concluding, in the present case, that there was a concerted practice having an anti-competitive object.

The concept of a concerted practice having an anti-competitive object

294 The intervener claims that, according to the case-law and the Commission's practice, an information exchange between competitors is not in itself prohibited. Referring to a judgment of the French Cour de cassation (Court of Cassation), Weichert maintains that it is incumbent on the Commission to demonstrate the actual anti-competitive effects of an information exchange, which it had failed to do in the present case. It also claims that the Commission did not establish to the requisite legal standard that Weichert was, together with Dole, party to a concerted practice, since the contested decision does not contain any mention of a meeting of minds between Weichert and Dole or of the existence of a common course of conduct.

295 It is evident from the terms of the contested decision that the Commission alleges that the addressees of that decision coordinated quotation prices for bananas by means of information exchanges, described in this case as bilateral pre-pricing communications, a situation that characterises a concerted practice concerning the fixing of prices and thus having as its object the restriction of competition within the meaning of Article 81 EC (see, in particular, recitals 1, 54, 261 and 271 to the contested decision).

296 In the first place, it should be borne in mind that the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 131).

297 With regard to the definition of concerted practice, the Court of Justice has made clear that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (*Suiker Unie and Others* v *Commission*, paragraph 151 above, paragraph 26; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 63; and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 26).

298 The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. In that regard, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 161 to 163, and *T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 51).

299 It is apparent from the case-law that an agreement within the meaning of Article 81(1) EC arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way (*Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraph 130).

300 Having regard to those definitions, the intervener's complaint that the contested decision does not mention a meeting of minds between it and Dole or the existence of a common course of conduct is irrelevant, since the conduct in question falls within the specific legal classification of a concerted practice and not of an anti-competitive agreement.

301 In the second place, with regard to the circumstances in which an exchange of information between competitors may be regarded as being incompatible with the competition rules, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (*Suiker Unie and Others* v *Commission*, paragraph 151 above, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 297 above, paragraph 63; Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 86; and *T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 32).

302 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 151 above, paragraph 174; *Züchner*, paragraph 301 above, paragraph 14; *John Deere* v *Commission*, paragraph 301 above, paragraph 87; and *T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 33).

303 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (*John Deere* v *Commission*, paragraph 301 above, paragraph 90; Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 81; and *T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 35).

304 As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the use of the conjunction 'or', means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, the analysis of the terms of the concerted practice does not reveal a sufficient degree of harm to competition, the consequences of the concerted practice should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see, to that effect, Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 15, and *T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 28).

305 In deciding whether a concerted practice is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 125; and *Beef Industry Development Society and Barry Brothers*, paragraph 304 above, paragraph 16). The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (*Beef Industry Development Society and Barry Brothers*, paragraph 304 above, paragraph 17, and *T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 29).

306 In order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages (*T-Mobile Netherlands and Others* paragraph 297 above, paragraph 31).

307 In the present case, since the Commission found that the pre-pricing communications between the undertakings concerned had given rise to a concerted practice having an anti-competitive object, it was not required, in accordance with the abovementioned case-law, to examine the effects of the impugned conduct in order to be able to find that there had been an infringement of Article 81 EC.

308 The intervener's claim that it was necessarily incumbent on the Commission to demonstrate the actual anti-competitive effects of the information exchange at issue must therefore be rejected, and it must be noted that the reference to a national court's decision – which, moreover, was not produced to the Court – is entirely irrelevant.

309 It is for the Court to ascertain that the bilateral pre-pricing communications between the undertakings in question and relating to quotation prices for bananas could be regarded as relating to the fixing of prices and establish a concerted practice having an anti-competitive object for the purposes of Article 81 EC.

The content of the communications concerned

310 The applicant states that the Commission argues that it 'assessed the object of the concerted practice taking into account its purpose and content', but is unable to point to any specific language in that regard. It adds that the Commission's assertion that the communications in question had the object of distorting prices is not plausible, as the discussions between Weichert and Dole were not of such a nature that they could have enabled any coordination on a weekly basis, relating 'on certain occasions' or 'rarely' to quotation price trends and the rest of the time to 'general conditions prevailing on the market' or 'market conditions', which included any topic from weather conditions in Europe to industry gossip.

311 In addition to the fact that the Commission does not, in the contested decision, distinguish the pre-pricing communications between Chiquita and Dole from those between the intervener and Dole, the intervener submits that there is no contemporaneous evidence describing the content of those communications, which were merely exchanges of views on general market conditions and related to general and publicly available information, no confidential, sensitive or individualised data having been exchanged. The Commission seeks to portray the communications as a concerted practice simply because such communications related to 'price-setting factors', which would mean that every legitimate information exchange would be assimilated to a concerted practice.

312 In the first place, it is not necessary to rule on the admissibility of the complaint relating to the absence of any specific analysis of the pre-pricing communications between Weichert and Dole, challenged by the Commission as allegedly altering the framework of the dispute as defined by the written pleadings of the main parties; it is sufficient to declare that there is no factual basis for that complaint (see, to that effect, Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 155).

313 In section 4.4.4 of the contested decision, the Commission describes and specifically distinguishes the content of the pre-pricing communications between, on the one hand, Dole and Chiquita (recitals 149 to 182 to the contested decision) and, on the other, Weichert and Dole (recitals 183 to 197 to the contested decision).

314 After stating that the bilateral communications at issue were conducted over the telephone and that the undertakings concerned informed the Commission that they had no notes or records of those communications, the Commission specifies that it relied on the statements of those undertakings and on contemporaneous documents in order to describe with sufficient precision the content of the bilateral communications at issue.

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

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

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

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

…

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

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

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

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

(190) … [I]n its reply to the statement of objections Dole also states that sometimes Weichert "requested the possible quotation trend for the following week as a yard stick against which [Weichert] could measure the accuracy of [its] own estimates" …

…

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

317 On the basis of the express statements of the undertakings concerned, the Commission was able to take the view that Dole and Weichert, like Dole and Chiquita, discussed, in the course of their various communications, demand and supply conditions or, in other words, price-setting factors, that is to say, factors relevant for the setting of quotation prices for the forthcoming week, and discussed or disclosed price trends and indications of quotation prices for the forthcoming week before quotation prices were set (recitals 148, 182 and 196 to the contested decision).

318 The Commission grouped those exchanges under the generic term of pre-pricing communications, whilst making it clear that those communications related 'on some occasions' to price trends and indications of quotation prices for the forthcoming week (recital 266 to the contested decision). A pre-pricing communication therefore corresponds to an exchange relating to one or other of the types of information at issue and, *a fortiori*, to both types of information.

319 It is appropriate in that regard to recall the words of the following statement by Dole: '… [b]ased on their discussions of market conditions, [the employees concerned] would also discuss the likelihood of a general market increase or decrease in banana prices or whether prices would generally remain at status quo. In conjunction with this, they might also discuss their opinions about how the Aldi price might change …' (recital 184 to the contested decision). That statement reveals the link between the discussions on price-setting factors and those on price developments, which enables the Commission to observe that the participants in all communications were aware that their communications could lead to such discussions or disclosures and nevertheless were willing to take part in them (recital 269 to the contested decision).

320 In the second place, it is evident from recitals 136, 149 and 185 to the contested decision that expected import volumes to Northern Europe were already exchanged before the pre-pricing communications took place. The volume of imports of the undertakings concerned was therefore not discussed in those communications, unless it appeared that there would be a significant variation or irregularity in expected imports, on account, inter alia, of a ship's being immobilised. That finding of the Commission is not challenged by the other parties to the proceedings.

321 In the third place, it must be noted that the topics covered by Dole and Weichert in their bilateral discussions include, according to Weichert, the level of demand on the market, the evolution of demand on the market, the sales situation at retail level and the sales situation at ripener level. Dole also stated that its exchanges with Weichert related to market conditions – that is current and expected developments – and specified that '[e]xpected market demand was assessed by discussing the market situation (such as whether there were anticipated left-over import stocks at the ports or whether ripeners' stocks of yellow bananas were not being ordered by supermarkets due to declining consumer demand)' (recital 183 to the contested decision). The applicant and the intervener have failed to establish that such exchanges related to information available on the market. The same applies with respect to the discussions relating to promotional activity or incidents affecting the transport of goods to Northern European ports.

322 In response to Dole's and Weichert's observations, it is true that the Commission itself accepted that information discussed by the parties 'could be obtained from other sources' (recitals 160 and 189 to the contested decision); such information may relate to weather conditions, which were referred to by Dole and Weichert in the context of the description of the bilateral communications.

323 The fact remains that Dole's or Weichert's point of view on certain information which was significant for the conditions of supply and demand, which could be obtained other than by means of discussions with the undertakings concerned, and its impact on the development of the market, does not by definition constitute publicly available information.

324 In any event, the Commission's finding in recitals 160 and 189 to the contested decision is not, in itself, incompatible with its conclusion that the practice at issue had an anti-competitive object, that conclusion being based on an overall assessment of the practice.

325 It follows from the foregoing considerations that the arguments of the applicant and of the intervener concerning the content of the communications in question are not such as to show that the contested decision is unlawful, and must be rejected.

The participants in the exchanges and common knowledge of them

326 The intervener claims that its communications with Dole were common knowledge in the market, both to ripeners and multiples, and that the Commission ignores in the contested decision the fact that market intelligence was shared with the intervener's customers. The Commission therefore does not take into account the fact that the exchange of information 'extended far beyond the parties' even though, according to the case-law, an information exchange that is also accessible to customers is more likely to strengthen competition than to weaken it.

327 In the first place, the intervener refers to paragraph 64 of its reply to the Commission's request for information of 10 February 2006, in which it refers to the communication of its quotation prices, once set, to other importers towards the end of Thursday mornings, conduct which was taken into account by the Commission in the contested decision but which cannot be confused with the pre-pricing communications that had taken place on Wednesdays, before those prices were established.

328 In the second place, the intervener refers to the letters from customers that were produced and submitted during the administrative procedure or written after the adoption of the contested decision, the admissibility of the latter being challenged by the Commission on the basis of case-law according to which the lawfulness of a measure must be assessed, in an action for annulment brought pursuant to Article 230 EC, on the basis of the matters of fact and of law existing at the time when the measure was adopted.

329 With regard to the letters written during the administrative procedure, it must be noted that they are all worded identically – with the exception of the letter from Mr D. on behalf of company I. – and are characterised by their lack of precision.

330 On the one hand, the customers in question state that it was widely known that Weichert and other banana importers exchanged volume information about banana arrivals and official prices over a number of years.

331 Not only is the knowledge of the information exchange between importers not, therefore, based on any direct statement but on public rumour alone, but it is evident from the customers' letters to which the intervener refers that that information exchange related in particular to official prices, a formulation that is capable of covering the exchanges of those prices that occurred on Thursday mornings after they had been set by the importers on the previous day.

332 On the other hand, the customers concerned claim that they had 'access to the information exchanged' without referring to discussions with importers and mentioning, as the only example, access to the weekly list of banana arrivals on Weichert's intranet site.

333 It should be recalled at this stage that the Commission noted, in recital 106 to the contested decision, that the addressees of that decision had stated that they communicated quotation prices to their customers on Thursday mornings and that those prices were rapidly transmitted throughout the trade and were subsequently reported in the trade press, which neither the applicant nor the intervener has disputed.

334 As regards the letter from Mr D. on behalf of company I., it contains no reference to discussions with Weichert about quotation prices. Mr D. merely confirms that he did not miss the information about weekly expected quantities of bananas for Europe, which in the past was obtained by consulting Weichert's website, as that information was only used to find out the 'names of the vessels' arriving at the various European ports and was now obtained by calling suppliers.

335 Leaving aside the fact that such a statement has little credibility given the nature of the information allegedly sought, it is significant to note that the person in question maintains that the total quantity or the quantities of the individual companies did not have any relevance in respect of the development of the market, whereas all the other customers claim that they used the information on weekly banana arrivals 'to better assess and compare the prices of suppliers, including Weichert'.

336 Moreover, it is common ground that one of the witnesses, Mr M., has been an employee of Weichert since 1 October 2002, was involved in the pre-pricing communications (recital 65 to the contested decision) and is the addressee of several customers' letters produced to the Court.

337 With regard to the letters written after the adoption of the contested decision, it must be noted that these were written by the persons who wrote the letters produced during the administrative procedure, including Mr M., and again are all identically worded, the evidence having clearly been reworded in order to challenge the Commission's findings more directly.

338 The customers concerned refer to the fact that there was an exchange of views between importers on 'trends and general market conditions', 'occasionally', on 'various days of the week, including Wednesday afternoons'. They state that those discussions did not have any influence on actual prices and were not harmful to customers.

339 The witnesses thus recount the fact that Weichert discussed or exchanged views with them about 'trends and general market conditions' on 'various days of the week, including Wednesday afternoons', and confirm that, in that context, Weichert always shared with them its understanding of the market, including what it may have been able to glean from conversations with other importers.

340 In addition to the assertions that there were no adverse consequences of the exchanges between importers – which can, at best, amount to nothing more than the expression of a mere conviction – it must be pointed out that the witnesses claim even to have received from Weichert information that it obtained during its discussions with other importers, even though their knowledge was based simply on what was supposedly common knowledge.

341 It follows from the foregoing considerations that the letters from customers of Weichert annexed to the statement in intervention do not offer all the requisite guarantees of objectivity and must be rejected, and there is no need to rule on the plea of inadmissibility raised by the Commission.

342 In any event, the mere assertion that it was well known that the importers occasionally spoke amongst themselves about general market conditions, which is based on general statements by customers which in turn are not founded on any direct statement but on public rumour alone, does not permit the inference that all market participants were aware of the exact scope of the pre-pricing communications identified by the Commission, and that banana suppliers other than Chiquita, Dole and Weichert were participating in those communications. It must be emphasised that the intervener itself acknowledges in the statement in intervention that not all banana importers were involved in pre-pricing communications.

343 Moreover, there is nothing in the letters produced from which it might be inferred that Weichert shared with its customers information relating to the pricing intentions of competitors, the sales situation at retail level, the existence of anticipated left-over import stocks at ports or ripeners' stocks, sales promotions, or incidents affecting the transport of goods to the ports of Northern Europe (see paragraph 321 above).

344 In that regard, the Commission is right to rely on the necessary distinction between, on the one hand, competitors gleaning information independently or discussing future pricing with customers and third parties and, on the other hand, competitors discussing price-setting factors and the evolution of prices with other competitors before setting their quotation prices (recital 305 to the contested decision).

345 Although the first type of conduct does not raise any difficulty in terms of the exercise of free and undisorted competition, the same cannot be said of the second type, which runs counter to the requirement that each economic operator must determine independently the policy which it intends to adopt on the common market, since that requirement of independence strictly precludes any direct or indirect contact between such operators with the object or effect either of influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, paragraph 151 above, paragraphs 173 and 174, and Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 89).

346 The individual assessment by a banana importer of a climatic event affecting a region of production, information which is public and available, should not be confused with the joint evaluation by two competitors of that event, in combination, as the case may be, with other information on the state of the market, and of its impact on the development of the sector, very shortly before their quotation prices are set.

347 The intervener cannot, in those circumstances, reasonably plead a system of generalised pro-competitive information, known to and shared by everyone operating on the banana market.

348 It follows from the foregoing considerations that the intervener's arguments concerning the participants in the information exchanges and common knowledge of them are not such as to show that the contested decision is unlawful, and must be rejected.

The timing and frequency of the communications

349 In the first place, the applicant maintains that Weichert's discussions with Dole were not of such a nature that they could have enabled any coordination on a weekly basis, if at all, and submits in that regard that the Commission's only evidence relating to the frequency of those discussions during the period of the infringement is evidence provided by Weichert which shows that the communications had not taken place more than once or twice a month. The evidence on which the Commission relies in order to try to establish more frequent conduct is evidence relating to the entire investigation period, that is to the period from 2000 to 2005, which is not correct.

350 The intervener claims that the communications with Dole were occasional, general conversations with no pre-defined agenda, and that communications relating to the possible evolution of official prices – in general, and not those of the undertakings concerned – were rare.

351 It must be borne in mind that, with respect to the conditions in which unlawful concerted action can be established in the light of the question of the number and regularity of the contacts between competitiors, it is apparent from the case-law that the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 60).

352 The Court of Justice has specified that what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to

determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraph 61).

353 It must be noted that, on the basis of the statements provided by Dole and Weichert, the Commission found, in recital 75 to the contested decision, that pre-pricing communications between them had taken place on Wednesday afternoons, thus shortly before their quotation prices were set, on Thursday mornings in this case. That Commission finding has not been challenged by the applicant or intervener.

354 As regards the frequency of communications, Dole first stated, in its reply to requests for information, that it communicated with Weichert 'almost weekly'. It explained that two of its employees, Mr G. and Mr H., had communicated with Weichert employees approximately 40 weeks per year, whereas a third employee, Mr S., had exchanges with Weichert employees only three to five times a year, when those two colleagues were not available (recital 87 to the contested decision).

355 Responding to the statement of objections, which expressly distinguished communications relating to volumes from communications 'on market conditions, price trends and indications of quotation prices', Dole stated that 'the market conditions exchange occurred approximately every other week, due to travel and other commitments', a reason that had already been put forward in the reply to requests for information to explain the alleged number of communications (recitals 88 and 89 to the contested decision).

356 In its reply to a request for information of 15 December 2006, Weichert itself drew a clear distinction between communications in relation to volumes and those relating to general conditions on the market and the evolution of official prices, and, moreover, stated that the latter had not taken place with Dole every Wednesday but on average once or twice a month. When asked by the Commission on 5 February 2007 to specify a number of weeks per year for the second type of exchange, Weichert submitted that its employees had communications with Dole approximately 20 to 25 weeks per year (recital 87 to the contested decision).

357 Weichert then went on to state, in the reply to the statement of objections, that the contacts with Dole took place 'on average no more than once or twice a month', without explicitly backtracking on the initial estimate. This led the Commission to estimate that the frequency of those contacts was approximately 20 to 25 weeks per year, which is consistent with Dole's statements (recitals 90 and 91 to the contested decision).

358 On the basis of the evidence thus gathered, the Commission concluded that the communications between Dole and Weichert were sufficiently consistent to form a pattern or a 'uniform pattern' of communications, which the undertakings were able to use according to their needs (recitals 91, 269 and 270 to the contested decision).

359 First, it must be noted that, in the statement in intervention, Weichert raises no objection regarding the figures for the estimated frequency of communications with Dole included in the contested decision. It merely states that communications relating to the possible evolution of official prices – in general, and not those of the undertakings concerned – were rare, which effectively isolates that type of information artificially, and disregards contacts relating to price-setting factors, even though both types of information make up the pre-pricing communications counted by the Commission on the basis of the statements supplied by the undertakings unequivocally involved.

360 Weather conditions, both in producer countries and in those to which the fruit is shipped for consumption, the size of stocks at ports and ripeners' stocks, the sales situation at retail level and at ripener level, and the existence of promotional campaigns are clearly very important factors in the determination of the level of supply in relation to demand, and reference to them during bilateral discussions between well-informed traders necessarily resulted in a sharing of understanding of the market and of its evolution in terms of prices.

361 It is necessary to recall at this stage the statements made by Dole during the administrative procedure on the content and purpose of the bilateral communications. Thus, Dole stated, first, that, '[b]ased on their discussions of market conditions, [the employees concerned] would also discuss the likelihood of a general market increase or decrease in banana prices or whether prices would generally remain at status quo', and that, '[i]n conjunction with this, they might also discuss their opinions about how the Aldi price might change …' (recital 184 to the contested decision); second, that '[t]he purpose of the contacts was to exchange information to allow each importer to better assess market conditions', and that, '[u]sing the general information/market opinions obtained from the contact, Dole would estimate the likely demand in the market place, the likely supply available to meet the demand, and whether Dole's initial price idea would match the real market conditions' (recital 195 to the contested decision); and, third, that it '[did] not contest that it indeed took into account the information received from its competitors, in conjunction with many other factors, in setting its own quotation prices', that statement by Dole concerning both its communications with Chiquita and with Weichert (recital 229 to the contested decision).

362 It thus appears that all the communications formed part of the same pattern and that the communications relating to price-setting factors had the same anti-competitive object as those relating to price trends or to indications of quotation prices. The Commission was fully entitled to consider that, when discussing or disclosing their views on price-setting factors, the undertakings in question had thereby disclosed the course of action which they were contemplating adopting or had at least enabled the participants to assess competitors' future behaviour with regard to the setting of quotation prices or to reduce uncertainty about it (recital 269 to the contested decision).

363 All of Dole's explicit statements on the content and purpose of the pre-pricing communications also rule out the possibility of a bilateral discussion that might be limited to mere harmless gossip on the industry in general, even if the employees of the undertakings concerned might have raised, on certain occasions, in addition to factors relevant to the setting of quotation prices, price trends or price indications, an innocuous subject concerning, in particular, the personnel of the undertakings which were active on the market.

364 It must be pointed out that particular probative value may be attached to statements which, first, are reliable; second, are made on behalf of an undertaking; third, are made by a person under a professional obligation to act in the interests of that undertaking; fourth, go against the interests of the person making the statement; fifth, are made by a direct witness of the circumstances to which they relate; and, sixth, were provided in writing deliberately and after mature reflection (see, to that effect, Case T-348/08 *Aragonesas Industrias y Energía* v *Commission* [2011] ECR II-7583, paragraph 104). This is true of the statements made by Dole in writing in reply to the requests for information or the statement of objections, which go against the interests of that undertaking, which disputes any infringement of Article 81 EC and which brought an action for annulment of the Commission's decision imposing on it – as well as on Del Monte and Weichert – a fine in that respect (Case T-588/08).

365 Second, it must be noted that the applicant criticises the frequency of communications – approximately 20 to 25 weeks per year – found by the Commission, claiming that it is linked to the investigation period, 2000 to 2005.

366 It is common ground, however, that the query addressed to Weichert in the request for information of 7 February 2007 was entirely unequivocal in that it related to the number of weeks of bilateral communications with Dole per year, and the period from 2000 to 2005 clearly incorporates the period ultimately identified by the Commission as establishing the duration of the infringement, that is the period from 2000 to 2002.

367 It must be concluded that the significant number of communications recognised by Dole and Weichert, the similar content of those communications, the fact that they regularly involved the same persons with a virtually identical *modus operandi* in terms of timing and means of communication, the fact that they continued for at least three years and that none of the undertakings claims that there was any interruption in the exchanges, and Dole's statements on the relevance of the information exchanged for the setting of quotation prices are all evidence from which it may be concluded that the Commission was right to find that there had been a pattern or system of communications to which the undertakings concerned were able to resort according to their needs.

368 That mechanism made it possible to create a climate of mutual certainty as to their future pricing policies (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 60), a climate that was further reinforced by the subsequent exchanges of quotation prices, once these had been set on Thursday morning.

369 Although certain information exchanged could be obtained from other sources, the exchange system established enabled the undertakings concerned to become aware of that information more simply, rapidly and directly (*Tate & Lyle and Others* v *Commission*, paragraph 368 above, paragraph 60) and to undertake an updated joint assessment of that information.

370 It must be concluded that the data exchanged were in themselves of sufficient strategic interest because they were highly topical and because of the short intervals between them over a long period.

371 That sharing, on a regular and frequent basis, of information relating to future quotation prices had the effect of artificially increasing transparency on a market where, as will be explained in paragraphs 380 to 391 below, competition was already reduced as a result of the specific regulatory context and earlier exchanges of information on volumes of banana arrivals in Northern Europe (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 281).

372 In the second place, the applicant claims that, in spite of the background of a broader set of communications between the parties, the Commission isolated a few communications in its decision and maintained that because they related to what it considered to be price-setting factors, and on rare occasions price trends, it could be assumed that the object of the behaviour was to influence prices.

373 As the Commission rightly noted, the fact that pre-pricing communications may have been the main purpose of the contact between competitors or may have formed part of a broader framework of general exchanges of information between banana suppliers is not relevant (see, to that effect, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 64) and does not justify the unlawful coordination.

374 It follows from the foregoing considerations that the arguments of the applicant and of the intervener concerning the frequency of the impugned communications are not such as to show that the contested decision is unlawful, and must be rejected.

The legal and economic context

375 Del Monte submits that the object of the conduct in question must be assessed in the economic context in which it took place and that the banana market had specific characteristics at the material time, in the light of which the arguments put forward by the Commission in relation to the object of the alleged concerted practice are unconvincing.

376 The intervener states that the Commission should have taken into account the nature of the information exchanged and the context in which the exchange took place, which it did not do, while the characteristics of the banana market render the allegations of an infringement by object wholly implausible.

– The regulatory framework and market supply

377 The applicant states that the banana market was highly transparent, in that all producers and customers had access to arrival volumes each week, and heavily regulated, with a licensing regime that predetermined the number of bananas imported into Europe each quarter. In its submission, '[t]hese arrangements effectively established the market shares of the players'.

378 The intervener explains that there could not be any effect on prices in the absence of a restriction of the output of bananas sold in Northern Europe, whereas such a restriction was not in place, and was not even possible, owing to the specific characteristics of the Community banana regime, in point of fact the existence of quotas and high prices during the relevant period, which provided an incentive to sell as many bananas as possible in the European Union. In support of those assertions the intervener refers to an economic report.

379 It is apparent from recitals 36 to 40, 129 to 137, 278 and 279 to the contested decision that the Commission examined and took into account the regulatory framework governing the banana sector at the material time when assessing whether Dole's conduct was consistent with Article 81(1) EC, namely Regulation No 404/93.

380 It is common ground that, during the relevant period, banana imports into the Community were covered by the licence regime. The Commission observed that, when submitting licence applications, operators had to lodge a security and that the vast majority of the licensed quantities went to traditional operators, as opposed to 'newcomers' or 'non-traditional operators' (from 1 July 2001 onwards), which reveals the existence of certain barriers to entry on the relevant market.

381 Import quotas of bananas were set annually and allocated on a quarterly basis with a certain limited flexibility between the quarters of a calendar year. The Commission specifies that, in view of the quota regime, the total amount of bananas imported into the Community as a whole in any given quarter during the relevant period was therefore determined, subject to some limited flexibility between quarters, given that there were strong incentives for anyone holding a licence to ensure that it would be used in the relevant quarter (recital 134 to the contested decision).

382 The importance of that legislation, which was applicable throughout the infringement period, with regard to the level of supply and the fact that it contributes to a certain degree of transparency on the market permits the conclusion that the formation of prices on the banana market did not answer completely to the free operation of supply and demand.

383 That finding is not, however, incompatible with the Commission's conclusion that the practice at issue had an anti-competitive object.

384 First, the Commission took due account of an essential feature of the banana industry, namely its organisation in weekly cycles.

385 The Commission stated, correctly, that the common organisation of the markets did not determine in advance the number of bananas imported and marketed in the European Union and even less in the relevant geographic area in any given week.

386 In a market organised in weekly cycles, the Commission was therefore entitled to find that banana shipments to Northern European ports were determined, for any given week, as a result of the production and shipping decisions taken by producers and importers (recitals 131 to 135 to the contested decision), who therefore had some latitude as regards the volume available on the market.

387 Second, the Commission also took account of a specific situation in relation to the quantity of bananas available during a given week in Northern Europe; that situation is described in recital 136 to the contested decision in the following terms:

'Various documents in [the] Commission's possession show that prior to setting their weekly quotation prices, on Monday-Wednesday the parties exchanged information, concerning banana arrivals to Northern European ports. These exchanges relayed parties' own volume data for bananas, usually arriving in the upcoming week. The parties admit that such exchanges took place. Additionally or alternatively, importers relied on banana arrivals information available from various public and private sources through market intelligence. Thus, when the parties had their pre-pricing communications, normally, they were already aware of competitors' banana volumes that would be arriving later at Northern European ports for the upcoming week.'

388 The Commission also stated that, while the undertakings concerned had not contested the finding in the statement of objections that exchanges of volume information took place regularly at the beginning of each week (from Monday to Wednesday morning) (footnote 179 to the contested decision), it considered, in the light of the arguments presented by those undertakings in response to the statement of objections, that the evidence in its possession did not lead to the conclusion that exchanges of volume information had an anti-competitive object or that they formed part of the infringement (recital 272 to the contested decision).

389 The Commission noted, however, that the participants in pre-pricing communications communicated in the light of decreased uncertainty concerning their competitors' supply situation and that, in combination with the transparency of the market generated by its regulatory framework, that reflected a lessened degree of uncertainty in the banana industry in Northern Europe, making it all the more important that the remaining uncertainty as to competitors' future pricing decisions should be protected (recital 272 to the contested decision).

390 It must be observed that the applicant does not put forward any specific arguments contradicting the Commission's findings on banana undertakings' latitude as regards the volume available on the market in a given week and those undertakings' awareness of forthcoming banana arrivals, prior to the pre-pricing communications, findings which mean that the applicant's claim regarding the predetermination of market shares is entirely unfounded. On the contrary, the applicant's statements correspond with some of the findings made in the context of the Commission's analysis of the regulatory framework.

391 In addition, the Commission was able to indicate in the defence and without being challenged by the applicant that the applicant had explained in its reply to the statement of objections how, in 2003, after the termination of the contracts with Weichert, Del Monte had [*confidential*], thereby acknowledging a certain flexibility of the market.

392 It must be noted that the intervener makes a specific complaint, in that it maintains that the impugned conduct was not capable of resulting in a restriction of competition since '[t]here cannot be any effect on prices in the absence of an output restriction', which, moreover, was not in place and was not even possible, owing to the specific characteristics of the Community banana regime.

393 Apart from the fact that the applicant did not claim in its written pleadings that, in order for a cartel to be effective, it had – in this case – to successfully reduce supply available to the market, it must be observed that, after stating that '[t]here cannot be any effect on prices in the absence of an output restriction', the intervener merely added that '[that was] explained in more detail in [an economic assessment annexed to the statement in intervention]'.

394 It will be recalled that the case-law relating to the interpretation of Article 44(1)(c) of the Rules of Procedure, as set out in paragraphs 268 to 271 above, is applicable, by analogy, to the statement in intervention (Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II-3029, paragraph 94). Furthermore, an infringement of Article 44(1)(c) constitutes an absolute bar to proceeding with a case, which the Court may consider at any time of its own motion in accordance with Article 113 of the Rules of Procedure (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 75, and Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraph 54).

395 In the present case, the intervener confines itself to stating its complaint and making a general reference to a document annexed to the statement in intervention. The arguments in that statement in intervention concern the impossibility or non-implementation of restrictions on volumes of bananas available in Northern Europe, and not the premiss on which the complaint is based, namely that, in order to be able to find a pricing cartel, it is necessary to establish that there has been a restriction of volumes. Such a laconic formulation of the complaint does not enable the Commission to prepare its defence and the Court to give a ruling, if appropriate, without other information in support, and to allow the annexes to provide the detail of an argument which is not presented in a sufficiently clear and precise manner in the application would be contrary to their purely evidential and instrumental function (Case T-340/03 *France Télécom* v *Commission*, paragraph 268 above, paragraph 204).

396 The complaint in question must therefore be rejected as inadmissible.

397 In any event, even on the assumption that the complaint in question may be considered admissible, it must be rejected.

398 First, the Commission did not find in the contested decision that there was collusive conduct to allocate markets or restrict volumes on the market.

399 As the Commission correctly points out, it is not necessary in order to establish a price cartel to find in addition a conspiracy to restrict volumes on the market (recitals 133 and 292 to the contested decision).

400 Second, the objection put forward by the intervener raises the issue of the effects of the collusion on actual prices and is based on a study of the economic impact of the impugned conduct on the European banana market. As stated in paragraph 304 above, an anti-competitive object and anti-competitive effects constitute conditions that are not cumulative but alternative for the purposes of applying the prohibition laid down in Article 81(1) EC. In deciding whether a concerted practice is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it is apparent that, as in the present case, its object is to prevent, restrict or distort competition within the common market.

401 Third, it must be noted that Weichert's position is contradictory.

402 It is thus expressly stated in the economic assessment produced to the Court by Weichert that the European banana market is characterised by substantial and largely unpredictable price variations on a 'weekly basis', due to underlying variations of demand and 'supply'.

403 Moreover, Weichert itself stated that 'in addition to the influence of Del Monte due to its majority shareholding, Weichert was, in particular, trying to accommodate the expectations of Del Monte since it feared that Del Monte would stop supplying Weichert or at least reduce supplies significantly, should Weichert's official price not be in line with Del Monte's expectations' (recital 390 to the contested decision).

404 That statement is supported by clear documentary evidence.

405 In a memorandum dated 12 June 2000, addressed to Mr A. W. and Mr H. W., Mr M. A. of Del Monte states the following (recital 390 to the contested decision): '… [i]f you cannot achieve these prices, our position, as clearly stated during our last week meeting in Miami, is to consequently reduce your banana volume to the level of Interfrucht's own licences … Please make sure to keep us informed, on a daily basis, of the outcome of your price negotiations with your customers' (recital 390 to the contested decision). Examination of the document reveals that Del Monte threatened to reduce supply to 60 000 boxes per week, whereas paragraph 2(a) of the distribution agreement linking Del Monte and Weichert provided for weekly deliveries of between 100 000 and 200 000 boxes.

406 On 12 December 2000 Del Monte sent the following message to Weichert (footnote 424 to the contested decision):

'Our message was clear and not ambiguous, if you are not able to sell at a range of … during the first quarter, you will not be able to build up a small profit reserve to compensate for the low prices in the last two quarters of the year, it will mean that 2001 will be a disaster in terms of banana results. To conclude, the volume reduction is the only way to stop this downslide.'

407 The possibility of suppliers influencing pricing through volumes is further demonstrated by an internal Chiquita email of 21 June 2000, referred to in recitals 113 and 135 to the contested decision, revealing a decision by that undertaking to compensate an unexpected reduction in quotation prices by an increase in volumes. The writer of the email states:

'… [i]ncreases in volumes will not compensate 100% of a reduction in price, but we need every extra [box] we can, as long as it does not impact us negatively in the long run.'

408 Weichert did not dispute the fact that it had exchanged information on banana arrivals at Northern European ports with the other undertakings in question, nor did it comment on the Commission's additional finding that that information on banana arrivals shows that importers' banana volumes arriving at those ports differed from week to week (recital 136 to the contested decision).

409 In so far as the assertions made by the intervener to demonstrate that banana importers were unable to reduce the volumes of bananas available in Northern Europe may be construed as a line of argument intended to challenge the Commission's findings with regard to the banana companies' discretion in respect of the volume available on the market in any given week in the relevant geographic area, they must be rejected.

410 That line of argument does not alter the fact that there were significant movements of volumes from the Northern European region to other parts of the Union, and vice versa, demonstrated by data from Eurostat, or the variability from one week to the next in volumes of bananas reaching Northern European ports, which were then allocated among the various countries of Northern Europe and other

countries, revealed by the exchanges of information on banana arrivals at those ports, exchanges which Weichert acknowledged during the administrative procedure and which were not challenged in the present proceedings.

411 The documentary evidence mentioned in paragraphs 405 to 408 above demonstrates the lack of rigidity of market supply and is corroborated both by Weichert's statements and by those of the applicant. In its arguments to demonstrate that it did not exercise decisive influence over Weichert, the applicant submits that if it had had such influence, it would have made sure that Weichert's import licences were used in its quarterly or weekly arbitrages to reallocate volumes to markets likely to have the best prices, in such a way as to maximise the Del Monte group's profits, which was not the case.

412 Weichert refers to specific constraints, pointing out that it was contractually bound to meet the expectations of its customers, virtually all of whom were based in Northern Europe, and to supply the territory covered by its exclusive distribution agreement with Del Monte, that is to say, 'essentially', Northern Europe.

413 It must be noted that the intervener acknowledges in its written pleadings that it had customers based outside the Northern European region and maintains that they '[accounted] only for a very negligible amount' without, however, providing any concrete, objective evidence to support that assertion.

414 With regard to the geographic scope of Weichert's exclusive distribution agreement with Del Monte, suffice it to note that Weichert itself states that the agreement covered Norway, Poland, Hungary and the former Czechoslovakia, countries that were not part of the relevant geographic market.

415 Furthermore, Weichert did not comment at all on the Commission's finding of a secondary market in licences enabling importers to increase the banana volumes allocated to them by purchasing licences (recital 132 to the contested decision).

416 Accordingly, it must be stated that the Commission was right to take account, in its assessment of Dole's conduct, of a lessened degree of uncertainty in the banana industry in Northern Europe and the corresponding need to protect the remaining uncertainty as to competitors' future pricing decisions (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 1088 and 1856).

417 Furthermore, the comments in the economic assessment produced to the Court by Weichert on the weekly variability in supply and demand underlying the variations in price are, in the context of a market that was also characterised by an information exchange system between importers on volumes of weekly banana arrivals in the ports, such as to justify the Commission's conclusions on the fact that price was a key instrument of competition in the relevant sector (recital 261 to the contested decision) and the overriding need to protect, in the context of the banana market, the remaining uncertainty as to competitors' future pricing decisions (recital 272 to the contested decision).

418 It follows from the foregoing considerations that the arguments of the applicant and of the intervener concerning the regulatory framework and the market supply in question are not such as to show that the contested decision is unlawful, and must be rejected.

– The specific nature of the relevant product

419 The applicant observes that, since bananas are a highly perishable product, '[a]ll importers had a strong incentive to liquidate stocks in any given week. As a result, importers sought as much information as possible about conditions on the market from their own intelligence, from customers, and in some cases other suppliers, so that they could make sure their prices were set at the right level to achieve rapid market clearance'.

420 It is apparent from recitals 278, 279, 290, 300, 303, 341 to 343 to the contested decision that the Commission examined the arguments of the addressees of that decision relating to the specific nature of the relevant product, namely its highly perishable nature.

421 The applicant's arguments seek to establish that the communications between importers pursued, in the light of the specific nature of the relevant product, a legitimate purpose, namely enhanced market efficiency.

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

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

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

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

425 Last, it must be borne in mind that, according to the case-law, it is immaterial whether the undertakings acted in concert for reasons that were partially legitimate. Thus, the Court of Justice has held that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (*Beef Industry Development Society and Barry Brothers*, paragraph 304 above, paragraph 21).

426 Accordingly, it must be held that the applicant, which disputes any infringement of Article 81 EC, has failed to put forward any arguments such as to call in question the Commission's assessment regarding the specific nature of the relevant product.

– The structure of the market

427 The intervener claims that the Commission failed to take account of the market structure and the market dynamics, and ignored the context in which the exchange of information had taken place and the fact that a large number of importers had not participated in the alleged 'pre-pricing communications'. That also constitutes an error of reasoning and assessment, since the degree of competition prevailing on the market is an important consideration when the legality of information exchanges under Article 81 EC is being assessed.

428 The issue of the structure of the market and its competitive nature was examined in recitals 25 to 31, 280, 281 and 324 to the contested decision, and the Commission contends that:

— the market structure is not relevant for the purposes of establishing an infringement in this case, the Court having pointed this out in *Tate & Lyle and Others* v *Commission*, paragraph 368 above, paragraph 113;

— in the case of a price cartel the relevance of the structure of the market surrounding the infringement is not the same as in cases of market sharing; in any event the parties had a substantial share of the market and were the suppliers of the three leading brands of bananas;

— the parties cannot justify their involvement in cartel arrangements by claiming that there is competition in the market, and there is no requirement that, in order to constitute an infringement by object, arrangements should exclude any competition between the parties.

429 It must be noted that the Commission's view that the market structure is not relevant for the purposes of establishing an infringement in the present case is based on a misinterpretation of *Tate & Lyle and Others* v *Commission*, paragraph 368 above, inasmuch as the passages of that judgment cited in recital 280 to the contested decision do not relate to the establishment of the infringement, but instead to the amount of the fine imposed.

430 It should be borne in mind that, according to the case-law, each economic operator must determine independently the policy which he intends to adopt on the common market and that, while it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraphs 32 and 33).

431 If supply on a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if supply is fragmented, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 58).

432 The Court of Justice has also made clear that an information exchange system may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market (*Thyssen Stahl* v *Commission*, paragraph 303 above, paragraph 86).

433 In the present case, the intervener merely claims that the Commission ignored the fact that a large number of importers had not participated in pre-pricing communications, without providing further details or specific evidence to support its allegations.

434 It must be pointed out that, in the contested decision, the Commission states that, in addition to Chiquita, Weichert and Dole, Del Monte (in relation to its own activities as a supplier of bananas), Fyffes and Van Parys had significant banana sales in Northern Europe and that, in addition to those

undertakings, a large number of other companies selling bananas were active in the Northern European region. Most of these were small companies that concentrated on a limited geographical area (particularly Germany) (recitals 21 and 24 to the contested decision).

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

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

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

438 In the contested decision, the Commission also assessed the share of sales by volume of the undertakings concerned in Northern Europe, on the basis of the data provided by them, in the light of the apparent consumption of bananas in volume resulting from official statistics published by Eurostat, and reached the conclusion that in 2002 sales of fresh bananas by Chiquita, Dole and Weichert, measured by volume, accounted for approximately 40% to 45% of apparent consumption of fresh bananas in Northern Europe, that estimate being slightly lower than the share by value of those sales (recital 31 to the contested decision).

439 The intervener did not comment in its statement in intervention on the Commission's estimates.

440 It follows from the foregoing considerations that the Commission did in fact take account of the structure of the market when assessing the impugned conduct, and that it was right to consider and take into account the fact that Dole, Chiquita and Weichert had a substantial – and not low, as Weichert merely claims – share of the relevant market, which, although it cannot be described as oligopolistic, cannot be characterised by supply of a fragmented nature.

– The specific role of Weichert

441 The applicant submits, in respect of the contextual factors that make the Commission's assessment of the anti-competitive object of the practice in question unconvincing, that Weichert played a unique role in this market, owing to the fact that it was responsible for gathering volume and quotation price information and sending that information to the Food and Agriculture Organisation of the United Nations (FAO) and to the Commission every week, together with a brief commentary on the state of the market.

442 The intervener maintains that the Commission's attempt to describe the impugned conduct as a concerted practice having an anti-competitive object is implausible, and observes in that regard that the Commission does not explain why the quotation prices were communicated to it during the relevant period.

443 It must be pointed out that the applicant and the intervener do not explain clearly the extent to which the intervener's specific role in the gathering of information about the relevant market and its transmission to public institutions is inconsistent with the Commission's conclusions regarding the existence of a concerted practice having an anti-competitive object.

444 The question of the information received by the FAO and the Commission was examined in recitals 307, 308 and 319 to the contested decision.

445 The Commission observed that the arguments of the addressees of the contested decision did not demonstrate that public institutions had been aware of the existence of pre-pricing communications and their content. The mere fact that Weichert openly exchanged official prices after they were set on Thursday mornings and communicated them to the Commission cannot call in question the anti-competitive object of the pre-pricing communications, which occurred on Wednesday afternoons, shortly before quotation prices were set.

446 It must be observed that neither the applicant nor the intervener has put forward any evidence to contradict the Commission's conclusion referred to above.

447 It follows from the foregoing considerations that the arguments of the applicant and of the intervener concerning the specific role of the intervener are not such as to show that the contested decision is unlawful, and must be rejected.

The relevance of quotation prices

448 The applicant asserts that the finding that there was a concerted practice having an anti-competitive object is based on a link between transaction prices and quotation prices, which was firmly disputed by Weichert throughout the procedure and which the Commission failed to establish in the contested decision.

449 The intervener claims that its quotation price was not a price which it expected to obtain, a starting point for negotiations, a price in which customers were interested or a price on which actual prices were dependent. Weichert's official price cannot, therefore, have been a signal to the market in respect of its actual prices.

450 In the first place, it must be noted that the issue of the setting and relevance of quotation prices in the banana sector was examined mainly in recitals 102 to 128 to the contested decision.

451 It is common ground that Chiquita, Dole and Weichert set their quotation prices for their brands each week, in practice on Thursday mornings, and announced them to their customers. The importers stated that the quotation prices were rapidly transmitted throughout the trade and afterwards reported in the trade press (recitals 34, 104 and 106 to the contested decision).

452 The Commission explains that transaction prices were either negotiated on a weekly basis – in practice on Thursday afternoon and Friday (or later in that week or at the beginning of the following week) – or determined on the basis of a pre-established pricing formula with a reference to a fixed price or with clauses linking the price to the quotation price of the seller or a competitor or to another indicator such as the 'Aldi price'. In particular, Chiquita had contracts which were based on the 'Dole plus' formula where the transaction price was actually dependent on the weekly quotation price set by Dole or on Chiquita's own quotation prices. For the customers concerned, there was a direct link between the prices they paid and the quotation prices (recitals 104 and 105 to the contested decision).

453 The Commission further states the following in recital 104 to the contested decision:

'… On Thursday mornings banana suppliers which sell to Aldi usually submitted their offers to Aldi. Usually by around 2 p.m. the "Aldi price" was set. The Aldi price is the price paid by Aldi to its banana suppliers. Aldi explains that every Thursday between 11.00 and 11.30 they receive offers from their suppliers. Aldi explains that its decision on its weekly offer to its suppliers was based on the offers received, the prices of the previous week and the price in the similar week of the previous year. About 30 minutes after the offers from the suppliers, Aldi sends a counter offer which is normally the same for all suppliers. Aldi states that it is unaware of the existence of a so-called Aldi price, and is

consequently unable to assess the importance of the price for transactions of others. From the second half of 2002, the Aldi price began to be used more as an indicator for banana pricing formulae in certain other transactions, including for branded bananas.'

454 The Commission concludes that quotation prices served at least as market signals, trends or indications as to the intended development of banana prices, and that they were relevant for the banana trade and prices obtained. Moreover, in some transactions actual prices were directly linked to quotation prices. The Commission considers that they were a sufficient means to achieve the anti-competitive object (recitals 115 and 128 to the contested decision).

455 Contrary to the intervener's claims, the Commission did not state that 'quotation prices were ... prices that could be expected to be obtained'. That assertion is based on a misreading of the last sentence of recital 109 to the contested decision, according to which 'documents in the file show that quotation prices were relevant for the banana trade and prices that could be expected to be obtained'.

456 It must be observed, moreover, that the intervener asserts that it had no contractual arrangements based on an official price, those arrangements being either based on a yearly fixed price or linked to the 'Aldi price'. In recital 104 to the contested decision, the Commission states that Weichert had either supply contracts with a fixed price formula or contracts with weekly negotiated prices.

457 In the light of all of the intervener's arguments, its assertion regarding the marketing of its bananas must be understood as meaning that its transaction prices resulted from the implementation of contracts providing for a fixed price that was predetermined for a year and weekly negotiations based not on its quotation prices but on the 'Aldi price'.

458 The Commission does not claim, either in the contested decision or in its pleadings, that Weichert was marketing its bananas by means of contracts containing price formulae based directly on a quotation price, whether its own or that of a competitor.

459 It must be observed at this stage that, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited. On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions' (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraphs 36 and 37).

460 Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. Therefore, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraphs 38 and 39).

461 In the second place, it must be pointed out that a number of items of documentary evidence corroborate the Commission's conclusions regarding the relevance of quotation prices in the banana sector.

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

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

463 The intervener states that that email merely reflects the interpretation of certain Chiquita employees and cannot demonstrate the relevance of the quotation price for Del Monte bananas.

464 It must be noted however that the document in question refers specifically to buyers of Del Monte-branded bananas, which were marketed by Weichert, and of Dole-branded bananas, which the intervener does not dispute. The fact that that email is from one of the main players in the banana market, one that is fully aware of how the market operates, merely strengthens its probative value.

465 As the Commission rightly states, that document shows that actual prices were dependent on quotation prices and that customers followed their development. It shows that customers reacted when quotation prices reached certain levels, but also that they perceived that quotation prices had a link to actual prices. Thus the document clearly states that if the quotes from Dole, Del Monte and Tuca reached 'DEM 36.00', 'the consumer price ha[d] to go over DEM 3.00/kg'. That document also reveals the existence of a certain interdependence between the quotation prices of the Chiquita, Dole and Del Monte banana brands and limits in differentials which could be sustained. The intervener's assertion that '[i]t is possible that Mr B. sought to justify to Mr P. why he could not set a higher official price' merely corroborates that last statement.

466 The intervener also offers an alternative explanation of the meaning of the Chiquita email as follows:

'Since Chiquita is said to have had contracts with some customers that were based on official prices, it is possible that some customers could have complained about Chiquita's official price. Mr B. may either have assumed that Weichert or Dole had the same problems and/or may have sought a reason to justify to his superior why he was unable to set a higher official price. If so, Mr B. clearly misunderstood the way in which Weichert's business was conducted, i.e. in a way materially different from how Chiquita may have chosen to conduct its business.'

467 It must be observed that Weichert's statement is based on a combination of supposition – that there were complaints from Chiquita customers – and pure guesswork in relation to the thoughts and behaviour of a Chiquita employee, all resulting in the peremptory and vague conclusion that there was a difference in the way in which Weichert and Chiquita conducted business. That statement cannot be accepted as it distorts the express wording of the message concerned and the Commission's objective findings on the setting and announcement by Weichert, each week, of a quotation price in the context of commercial negotiations in the industry.

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

469 Second, in recitals 112, 126 and 389 to the contested decision, the Commission mentions a fax of 28 January 2000, by which Mr A., a Del Monte employee, requested Mr A. W. to provide him with an explanation of the difference between the 'final price' and the 'expected price' in the following terms:

'To make matters worse, I talked on two distinct occasions with the person in charge in your company of the commercialisation of the bananas, to discuss about market conditions and prices … I was told that [Weichert] will keep its prices "very close" to the official price!!! … In any case, [that] is purely unacceptable.'

470 The applicant submits that all that that correspondence proves is that it wanted Weichert to sell at the highest price possible. The intervener maintains that that document does not establish that the official price was a price that importers expected to obtain and instead illustrates Del Monte's frustration at the fact that Weichert's actual prices were entirely disconnected from its official prices.

471 Apart from the fact that the Commission does not claim in the contested decision that 'the official price was a price that importers expected to obtain', it must be noted that the document in question shows the link between official price and actual price, since Del Monte clearly expected Weichert to obtain a final price which would be very close to the quotation price, which, in this instance, was not such as to satisfy it entirely.

472 Third, the Commission mentions an internal Chiquita email dated 8 August 2002, sent to Mr P. (Chiquita's Chief Executive Officer) by Mr K., who conveys his thoughts following a EUR 2 increase by Dole of its quotation price (recitals 111, 172 et seq. to the contested decision).

473 The Chiquita employee states as follows:

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

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

This morning, Dole did not take my call, and [without] consulting announced 2.00 (through [J.], so avoiding possible questions). What could be their motivation?

(1) … the Edeka promotion: Edeka is doing a one week 3rd label promotion "below the Aldi price" (normally their mix is 60 Dole, 30 CB, 20 DM plus some 3rds). They forced all their suppliers to help. Edeka had agreed with Dole to purchase 80K boxes at Aldi price. By moving the market and Aldi price up they [Dole] first get a better price for the 80K ... As we will participate with 50K CS, we might take some benefit out of this.

(2) Dole knows we [Chiquita] have a lot of Dole plus deals and is using this more and more to push our real price up, while staying much lower.

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

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

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

474 That document shows, first, that Chiquita found it unusual that Dole should take such a pricing decision 'without consulting [it]' and that it expected there to be such consultation between them before Dole would take such a pricing decision, and, second, that Dole had initially communicated with a more junior Chiquita employee – no doubt to avoid questions – and made a second telephone call to a senior manager at Chiquita to explain the price change and encourage Chiquita to follow their lead (recitals 173 and 174 to the contested decision).

475 That message dated 8 August 2002 also demonstrates the relevance of Dole's quotation price for the market, including for the actual prices obtained by Dole and Chiquita. Moreover, in this instance Dole's quotation price influenced the quotation price of Chiquita. This email indicates that, the day before, Chiquita was considering an upward move 'in the neighbourhood of 1.00 euro', but that that morning Chiquita had decided to increase its quotation price by EUR 1.5. Indeed, in its corporate statement Chiquita submits that, in the light of Dole's increase of its quotation price by EUR 2, it changed its quotation price by increasing it by EUR 1.5 'instead of changing its price only 1€ upwards as contemplated the day before' (recital 111 to the contested decision).

476 The Commission also mentions the fact that, on Thursday 2 January 2003, an employee of Atlanta, a ripener and distributor, sent an email to two Chiquita executives, Mr P. and Mr K. That email refers to a decision taken by Chiquita to increase its quotation price – which had, however, already been

sent to customers – by EUR 0.5, following an increase in Dole's quotation price which occurred on the same morning that that message was sent. In that email, the Atlanta employee directed to Chiquita's executive representatives a 'very critical remark' about such a pricing decision. Mr K. replied to this as follows: 'We thought it would stop the upward movement if we were to stay put, and jeopardise price evolution in the next weeks.' On the same day, 2 January 2003, in relation to the same matter, a Chiquita employee wrote to Mr K. that he had problems due to this upward revision after the price had already been announced to customers. Mr K. replied to that remark on 6 January in the following terms (recitals 110 and 176 to the contested decision):

'[Mr P.] [Chiquita's Chief Executive Officer for Europe] did not want Dole and Del Monte to feel we were letting them down by staying. I understand' (recitals 110 and 176 to the contested decision).

477 As the Commission correctly observes (recital 110 to the contested decision), the documents of 2 January 2003 show that customers clearly thought that a change in the quotation price had relevance for the prices they could expect to pay or receive. The decision of Chiquita's managing director to proceed with an increase even though the quotation price had already been announced to customers, in order 'not to let down' Dole and Del Monte, reflects Chiquita's genuine willingness to support increases in the quotation prices of its main competitors, if need be by taking the very unusual step of revising upwards a price that had already been announced, despite the difficulties that that would create with customers. In this respect, it was motivated by the prospect of not compromising an upward price development for the forthcoming weeks (recital 177 to the contested decision).

478 It is certainly common ground that the pricing decision to which that message relates was taken on 2 January 2003, just after the end of the established period of pre-pricing communications. However, the fact remains that, although that document is not in itself capable of establishing that the alleged anti-competitive conduct occurred, it corroborates the evidence gathered by the Commission on the relevance of the quotation price.

479 The intervener claims that the documents mentioned in recitals 110 and 111 to the contested decision are internal Chiquita documents which are silent as regards its pricing intentions or expectations. The email of 2 January 2003 could not be read as suggesting that the official prices were the prices which Weichert expected to achieve.

480 It should be borne in mind that the Commission does not claim in the contested decision that 'the official prices were the prices which Weichert expected to achieve', and it should be noted that the documents in question show the importance of quotation prices in the banana sector, in which Weichert was one of the players during the infringement period.

481 It must be pointed out that the infringement relates to a single product, the fresh banana, which has three levels of quality with corresponding price differences, and which falls within a single market characterised by a price fixing process consisting of an announcement each Thursday morning of Dole's, Chiquita's and Weichert's quotation prices to their customers, the first message to the market on importers' price expectations. Even though those quotation prices concerned only first and second category bananas sold by those undertakings, there was a link between those prices and those of thirds brands or those of unbranded bananas in so far as, each week, there was necessarily pricing positioning of the various qualities of bananas by reference to one another. The existence of a certain interdependence between the quotation prices of Chiquita, Dole and Del Monte banana brands is illustrated by Chiquita's internal emails of 30 April 2001 (recital 107 to the contested decision) and 8 August 2002 (recitals 111, 172 et seq. to the contested decision).

482 In that regard, mention must be made again of an email from Chiquita's Chief Executive Officer for Europe (recital 113 to the contested decision) dated 21 June 2000, sent to various colleagues, in which he comments on a decrease in the Chiquita quotation price following the decrease of DEM 2 in Dole's

quotation price as follows: '[w]ith a price differential that would have gone to DEM 9 with Dole, we had no other alternative. This is obviously a blow as there [is] little/no chance to raise prices in the summer, under normal production and market conditions.' In the same email, Mr P. further states:

'…this [is] why I am urging you, again, to look at every opportunity to increase volume. Increases in volumes will not compensate 100% of a reduction in price, but we need every extra [box] we can, as long as it does not impact us negatively in the long run.'

483 As the Commission rightly states, that email demonstrates just how much Chiquita was concerned about a downward revision of quotation prices, which was described as a 'blow', since there was 'little/no chance to raise prices in the summer', and about seeking a solution to cushion the negative consequences of that situation on price levels, in this case by acting on volumes. That email demonstrates, once again, the importance of the question of differentials between importers' quotation prices and of the acceptable or sustainable limits in those differences.

484 It represents additional documentary evidence of the relevance of quotation prices in the banana sector on which the intervener did not comment.

485 Fourth, the Commission refers to a letter sent by the Deutscher Fruchthandelsverband eV (DFHV, a German trade association) to a Member of the Commission dated 21 January 2005 in which this association states inter alia that '[t]hese "official" prices reflect only the starting position of the different operators for their weekly price negotiations' and that 'they are up to 50% higher than the truly agreed prices' (recitals 112 and 119 to the contested decision).

486 The applicant observes that the DFHV letter dates from 2005, whereas the alleged infringement ended in 2002. The intervener maintains that the letter has no evidential value in respect of the intervener itself. The letter does not state that the intervener's official prices and those of Dole and Chiquita were a starting point for price negotiations. In fact, the DFHV had confirmed that it did not know whether Weichert used official prices as a starting point for its price negotiations.

487 Although that document undeniably postdates the end of the infringement period and cannot by itself suffice to prove the infringement alleged, it reveals that, three years later, when no modification of the organisation of the banana market has been claimed or demonstrated, quotation prices were generally considered to be a starting point for weekly price negotiations.

488 The probative value of that document is not entirely undermined by the fact that, in a letter of 18 December 2008, the DFHV indicated that it could not confirm that Weichert used its official prices as a starting point for weekly price negotiations, which is merely an expression of uncertainty regarding the specific conduct of that banana supplier.

489 It must also be noted that the intervener itself relies on that letter from the DFHV of 21 January 2005 in order to make the point that official prices were up to 50% higher than the actual prices and that the size of that difference demonstrates that no importer could have expected to achieve that, which is not, in any event, contended by the Commission.

490 In the third place, the intervener asserts that the 'evidence' shows that it made no reference to the official price in price negotiations and refers, in particular, to its own statements during the administrative procedure.

491 It is common ground that, in reply to a request for information from the Commission of 10 February 2006, the intervener stated that there was no link between the official prices and the actual prices, and that divergences between official and actual prices were significant. The reference to paragraph 287 of the reply to the statement of objections is, by contrast, entirely irrelevant since that paragraph dealt with the question of volumes.

492 It must, however, be pointed out that, in the contested decision, the Commission stated that, between 2000 and 2002, Weichert sold bananas marketed under the Del Monte brand and that it determined the weekly quotation prices for those bananas on Thursdays in consultation, according to its statements, with Del Monte. The Commission also observed that, during the relevant period, quotation prices for Dole and Del Monte bananas (the latter were marketed by Weichert) were virtually identical. In order to substantiate that finding, the Commission recalls Weichert's statements that '[w]hile Del Monte did not formally instruct Weichert to have the same official price as Dole, it effectively expected Weichert to have an official price at least as high as that of Dole' (recital 104 and footnote 138 to the contested decision).

493 At the Commission's request, dated 5 February 2007, Weichert provided the following clarification:

'Del Monte regularly got involved in pricing discussions with Weichert. Del Monte required Weichert to report the official price to Del Monte on a weekly basis. Often, Del Monte was dissatisfied with the official price that Weichert had adopted because Del Monte considered that the Dole brand was the nearest to its own in terms of quality and reputation of bananas. It therefore expected Weichert to market Del Monte's bananas accordingly and to have the same official price as Dole. Having received the weekly figures, Del Monte frequently reverted to Weichert and requested Weichert to explain why it had not adopted a higher official price and/or achieved a higher actual price. On certain occasions, Del Monte even referred to the official price of Dole exceeding Weichert's official price and asked Weichert to justify the gap.'

494 Weichert also stated that it had sent Del Monte weekly reports concerning the banana market situation during the infringement period, and that those reports mention official prices, but also estimates of actual prices for the week concerned in the form, inter alia, of a price range for Del Monte-branded bananas (marketed by Weichert) and competitors' products (recital 392 to the contested decision). It must be noted that the maximum actual price regularly corresponds to the quotation price indication.

495 Collectively, those statements by Weichert, corroborated by documentary evidence, contradict the claim that its quotation prices were totally irrelevant.

496 Del Monte claimed in its reply to the statement of objections that quotation prices had no impact on actual prices, but also stated that the exchange of information on quotation prices was a way for importers 'to summarise the relevant information about demand, arrival volumes, and any stocks in a comprehensible "message" to the market' (recital 122 to the contested decision). Del Monte attached to that reply a document containing an economic assessment of an exchange of information on the Northern European supply of bananas (CRA International, 13/11/07), in which it is stated that, '[b]y exchanging information and communicating official prices to market participants, importers could at worst have coordinated on a "common" signal to send to the market (in the form of coordinated official prices)'. That reference, reproduced in recital 120 to the contested decision, is supplemented by the following observation:

'In contrast, it appears at least plausible that there may have been some potential efficiency benefits of using official prices as a summary signal about the supply and demand conditions in the market. … It is therefore not inconceivable that summarising all the relevant information for market participants in a single signal, in the form of coordinated official prices, is a simple and effective way to facilitate market efficiency.'

497 Furthermore, in its reply to the request for information of 5 February 2007, the applicant stated that '[r]eference prices were quickly known in the market' and that [*confidential*]. It also stated that '[c]ustomers would often disclose competitors' reference prices without being asked, particularly if they wanted to use them as an argument for lower prices, as the reference price was used by banana importers to indicate the development of the Aldi price that was expected that afternoon'.

498 It must also be noted that, in its reply to the statement of objections, Dole asserted that quotation prices were merely market indicators, one of many factors considered by customers, and only a guideline in customer negotiations. Dole stated that, '[i]n a very modest way, they help importers and customers assess the current state of the market and how it may evolve' (recital 116 to the contested decision), and that 'customers … sought to bargain for the best offer by publicly comparing competing quotation prices' (recital 114 to the contested decision).

499 It is therefore apparent that customers expected that higher quotation prices would result in higher transaction prices and that they used quotation prices as negotiating instruments for the setting of actual prices, thus demonstrating the interest that importers had in taking concerted action on those quotation prices. Those precise and consistent statements by Dole and Del Monte, which were provided in writing deliberately and after mature reflection, have considerable probative value (see, to that effect, *Aragonesas Industrias y Energía* v *Commission*, paragraph 364 above, paragraph 104) in relation to the role of quotation prices – referred to in general terms – as the importers' initial price request, and the relevance of those prices in commercial negotiations.

500 Dole also stated, in response to a request for information of 15 December 2006, for the period including 2000 to 2002, that 'Del Monte positioned its branded bananas as comparable to the Dole-branded bananas, and it was generally assumed in the industry that Del Monte would look to the Dole quotation price as a way to promote that similarity with customers' (recital 104 and footnote 138 to the contested decision). It is apparent from that statement that Dole's quotation price was regarded as a commercial instrument that enabled Del Monte to obtain the same pricing positioning as Dole's for its bananas.

501 The applicant made no comment in its pleadings on the statements made during the administrative procedure which are inconsistent with its assertion that there was no link between quotation prices and actual prices.

502 It must, on the contrary, be pointed out that, in the arguments it put forward to contest the exercise of decisive influence over Weichert, the applicant stated that [*confidential*], whereas Weichert favoured the opposite strategy, namely the sale of large volumes in order to use its licences and to maintain supply relationships with as many customers as possible. Weichert's strategy of always pricing at the Dole level was not in Del Monte's interest, which lay in seeing its bananas sold at the 'highest possible price', leading to an increase of the variable price component under the distribution agreement. Del Monte would thus have 'preferred quotation prices closer to Chiquita's', of which third parties were aware, as attested by Chiquita's statements noting that 'Dole and Del Monte started having different quote prices when Del Monte opened its own business in Germany in 2003', and similar statements by Dole that 'Del Monte sought to close the gap between the Chiquita quotation price benchmark (i.e., the highest quotation price) and Del Monte's quotation prices'.

503 Those explanations by the applicant and the statements of Chiquita and Dole referred to in paragraph 502 above merely confirm the evidence obtained by the Commission and the validity of its conclusion regarding the importance of quotation prices on the banana market, including those of Weichert.

504 In the fourth place, the intervener claims that the irrelevance of the quotation prices is demonstrated by the letters written by its main customers and produced to the Court. In its submission, those customers had confirmed that they were not interested in its official prices which played no part in the negotiation of actual prices, those customers being interested in the 'Aldi price'.

505 As stated in paragraph 341 above, that evidence does not offer all the requisite guarantees of objectivity and must therefore be rejected. In addition to the findings already made regarding the dependency of the authors of those letters on Weichert, the commercial links between them, and the form and substance of those letters, it must be stated with regard to the official prices that the customers

concerned indicate that those prices were not relevant in their negotiations with Weichert, but state that they knew, without further explanation, that 'Weichert regarded its own official price as meaningless'.

506 In any event, even on the assumption that those letters may be taken into account in the present proceedings, they do not in themselves allow the conclusion to be drawn that Weichert's quotation prices were of no relevance.

507 First, it must be observed that in all the letters drawn up during the administrative procedure, with the exception of the letter from Mr D. on behalf of company I., the customers concerned claim that they had access to the weekly list of banana arrivals on Weichert's intranet site and used it to 'better assess and compare the prices of suppliers, including Weichert', which necessarily applies to quotation prices, given the chronology of the weekly banana marketing process. Moreover, the statements corroborate those of the applicant and Dole, referred to in paragraphs 497 and 498 above.

508 Next, it is common ground that none of the customers concerned makes any reference to the 'Aldi price' as the only relevant reference for banana pricing during the relevant period, although the intervener claims that its customers were only interested in that price.

509 Finally and above all, the customers' letters which Weichert produced to the Court, written after the investigation and in some cases even after the adoption of the contested decision, are not sufficient to call in question the probative value of the documentary evidence concerning the relevance of quotation prices which predates the investigation and was corroborated by the statements of Dole and the applicant, those undertakings having, inter alia, clearly described the behaviour of customers using the quotation prices, referred to in general terms, as a negotiating instrument for the setting of transaction prices (see paragraphs 462 to 502 above).

510 In the fifth place, the intervener maintains that the Commission misrepresented the nature of the relevance of official prices by devaluing the importance of the 'Aldi price', which was the only benchmark for pricing during the relevant period, and made a manifest error of assessment in finding that the 'Aldi price' was of less significance in the period from 2000 to 2003.

511 In support of its assertions, first, the intervener merely refers to its own statements made in its response to the statement of objections, in which it refers to its conviction, and that of other addressees of the contested decision, as to the importance of the price set by Aldi, the largest purchaser of bananas in the European Union. Weichert states that Aldi 'became' an important player in the Northern European banana market from the early 1990s due to its increasing market share in Germany, which rose from 21.5% to 28.1% in 2005.

512 That evidence, assuming it is accurate, does not support the conclusion that the 'Aldi price' was 'the only benchmark for pricing' during the period 2000 to 2002, although it should be borne in mind that the Commission accepted the notion of the growing significance of that price on the relevant market.

513 Second, the intervener adds that the fact that the 'Aldi price' was set after the announcement of official prices does not, contrary to the Commission's conclusions, detract from its importance, since importers and the intervener in particular waited for the announcement of the 'Aldi price' before entering into any weekly price negotiations, and that price was the central benchmark used for calculating actual prices in long-term supply agreements.

514 In addition to the fact that Weichert has not provided proof of its use of long-term supply agreements in which pricing is based on the 'Aldi price', it must be noted that the Commission drew attention to an objective finding concerning the marketing of bananas in the context of the process of weekly

negotiation, namely a chronology of events inevitably beginning with the announcement by Chiquita, Dole and Weichert of their quotation prices to their customers, ripeners and retailers early on Thursday morning, before the 'Aldi quote' was issued.

515 That situation shows that, from a chronological point of view, the announcement of quotation prices marked the starting point of the commercial negotiations. The statements of the applicant and of Dole, submitted during the administrative procedure, on the conduct of customers in relation to the offers made by importers bear out the truth of that observation.

516 It is therefore apparent that the importers first set and announced their quotation prices signalling the intended development of banana prices, then ripeners formed an idea about the market development and submitted their offers to Aldi, and only then was the 'Aldi price' set (recital 122 to the contested decision).

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

'… the initial quotation prices, which some of the companies are voicing to the market on Thursday mornings after their pricing meetings, is a price trend – their expectation that the market might go up by 1 [e]uro, by 50 cents (always per box, per 18kg box) and ... that the ripeners who are crucial for the supply of yellow bananas are giving quotes to Aldi (the largest buyer of bananas) in the morning of Thursday and the ripeners form their idea about how the market price might develop during the morning hours, some time between 9 and 11 o'clock, then they send the faxes with their offers to Aldi and Aldi comes back some time after 1 o'clock; so what is happening very often is that the ripeners do expect the price of a box of bananas to go up by 1 [e]uro and Aldi is coming back and saying "Well, yes the market is getting better, we see our retail consumer offtake developing positively but we don't accept 1 [e]uro up, we accept 36 cents up" ... So ... the importers really have a feeling for the market only, they see a market trend emerging, and they think that the price might go up by 1 [e]uro (that's what they are voicing to the market) but then the crucial thing is what Aldi thinks ...'.

518 That assessment by Dole, which has always contested that it committed an infringement of Article 81 EC, does not call in question the relevance of the description of the process characterising what happened on Thursdays and the establishment of a link between quotation prices and the 'Aldi quote'.

519 In recital 122 to the contested decision, the Commission recalled the statements made by the applicant in its reply to the statement of objections, according to which the exchange of information on quotation prices was a way for importers 'to summarise the relevant information about demand, arrival volumes, and any stocks in a comprehensible "message" to the market'. It is undisputed that the applicant also stated the following in its reply to the request for information of 5 February 2007:

'Customers would often disclose competitors' reference prices without being asked, particularly if they wanted to use them as an argument for lower prices, as the reference price was used by banana importers to indicate the development of the Aldi price that was expected that afternoon …'

520 Those statements are consistent with the content of an internal Chiquita email, dated 8 August 2002, in which a Chiquita employee conveys his thoughts following a EUR 2 increase by Dole of its quotation price (recitals 111, 172 et seq. to the contested decision) in the following terms:

'… By moving the market and Aldi price up they [Dole] … get a better price …'

521 Responding to a request for information from the Commission, Aldi stated that its decision on its weekly offer to its suppliers was based on the offers received, the prices of the previous week and the price in the 'similar' week of the previous year. Aldi added that 'the prices in offers it received from ripeners reveal at least a tendency for the price development, which [did] not always have to be reflected in the formulation of the counteroffer, however' (recital 116 to the contested decision).

522 It thus appears that, contrary to the intervener's assertions, the Commission did not infer from the above chronology that the 'Aldi price' was not important but merely used it to support – correctly – its conclusion regarding the relevance of quotation prices in the banana industry.

523 Third, the intervener claims that no meaningful conclusion can be drawn from the rare adjustments of its quotation price after the 'Aldi price' was announced, and that the frequency of those adjustments was the same between 2000 and 2002 as in the period from 2002 onwards.

524 It should be borne in mind that the Commission stated that, from the second half of 2002, the 'Aldi price' began to be increasingly used as an indicator for banana pricing formulae in certain transactions other than those relating to the purchase of 'thirds' bananas corresponding to Aldi supplies, and in particular in transactions relating to branded bananas (recital 104 to the contested decision).

525 In addition to suppliers' statements regarding the 'growing' importance of the 'Aldi price', the finding in respect of the increasing proportion of 'Aldi plus' contracts – long-term supply agreements applying a fixed price formula based on the buying price set by Aldi – in Dole's sales, the Commission observes that it is significant that Dole and Weichert started to adjust their quotation prices following the announcement of the 'Aldi price' only at the end of 2002.

526 The Commission explains its view in recital 123 to the contested decision, which is worded as follows:

'Documents in the file show that Dole and Weichert, who during that period traded Del Monte[-branded] bananas, adjusted their quotation prices from late 2002 onwards after the Aldi price was announced on Thursday afternoons. However, such revisions were not common from 2000 until the second half of 2002. The quotation prices of Dole and Weichert were later adjusted downwards in relation to the initial quote in weeks 41, 44, 45, 47, 48, 49, 51 and 52 of 2002. However, the parties continued to set quotation prices on Thursday mornings before the Aldi price was set as well as to engage in bilateral communications before setting these (initial) quotation prices. Chiquita would not normally revise its quotation price after it is set (with a few exceptions). These parties did not provide explanations why they still set quotation prices, which according to these parties were "meaningless", even if they revised them after the Aldi price was set.'

527 The mere assertions of the intervener mentioned in paragraph 523 above, which are not substantiated in any way, cannot call in question the Commission's findings.

528 Furthermore and above all, Weichert did not provide any explanation in its pleadings as to the reasons for maintaining the quotation prices, either those established on Thursday mornings or those amended after the announcement of the 'Aldi price' in the afternoons, even though it claims that the latter was the 'only' benchmark for pricing in the banana sector.

529 More generally, neither the applicant nor Weichert put forward any plausible alternative explanation to that supported by the Commission as to the rationale for quotation prices, their establishment every Thursday morning, their announcement to all customers, their rapid dissemination throughout the industry and their transmission to the trade press and public institutions – all Commission findings that have not been challenged by those two undertakings.

530 In its reply to a request for information dated 10 February 2006, the applicant even indicated that, before 1993, banana importers' reference prices were comparable to a standard price list and were the starting point for individual negotiations with customers. With the introduction of the Common Market Organisation, reference prices lost that function and, increasingly, their relevance in the industry.

531 In addition to the fact that the causal link between the Common Market Organisation in the banana sector and the disappearance of the function of reference prices as a starting point for commercial negotiations is not made explicit, it must be noted that, for approximately 10 years at least, those prices nevertheless continued to be set every week by importers and announced to their customers.

532 At the hearing the intervener merely described its reference prices as a relic of the past and of no importance.

533 It is, however, doubtful that the determination of the pricing policy of an economic operator might be based solely on the observance of a defunct historical tradition rather than on an objective criterion of strict utility, especially in the context of a market characterised, according to the applicant's own statements, by a very tight marketing timetable, in view of the perishable nature of the relevant product, and the pursuit of maximum commercial efficacy.

534 Fourth, the intervener states that the criticism expressed by the Commission with regard to the economics report of 20 November 2007, which demonstrated the lack of any significant link between its official prices and its actual prices, is incorrect, as is explained in greater detail in a further report dated 2 April 2010.

535 The Commission submits that none of the pleas put forward in the application mentions defective reasoning in the contested decision with regard to the rejection of the economic report of 20 November 2007 and that therefore the intervener's arguments in that respect are unconnected with the subject-matter of the dispute and thus inadmissible.

536 The fourth paragraph of Article 40 of the Statute of the Court of Justice provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. Article 116(4) of the Rules of Procedure provides that the statement in intervention is to contain, in particular, a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, as well as the pleas in law and arguments relied on by the intervener.

537 Those provisions give the intervener the right to set out arguments as well as pleas independently, in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, as that would otherwise change the subject-matter of the dispute (see *Regione autonoma della Sardegna* v *Commission*, paragraph 312 above, paragraph 152 and the case-law cited).

538 It is thus for the Court, when determining the admissibility of the pleas and arguments put forward by an intervener, to determine whether they are connected with the subject-matter of the dispute, as defined by the main parties.

539 In the present case it is common ground that the applicant claims expressly that the Commission did not establish a link between the transaction prices and the quotation prices of Weichert and criticises the Commission's analysis in that regard of two items of documentary evidence, namely the letter which the DFHV sent to a Member of the Commission on 21 January 2005 and the fax of 28 January 2000 by which Mr A., a Del Monte employee, asked Mr A. W. to provide him with an explanation of the difference between the 'final price' and the 'expected price'.

540 In those circumstances, it cannot be concluded, contrary to the Commission's assertions, that the intervener's complaint is entirely unconnected with the issues expounded by the applicant in the present action, and that it is therefore inadmissible.

541 By contrast, a finding of inadmissibility of that complaint must be made in application of the case-law concerning an infringement of Article 44(1)(c), which constitutes an absolute bar to proceeding with a case, which the Court may consider at any time of its own motion in accordance with Article 113 of the Rules of Procedure (*Exporteurs in Levende Varkens and Others* v *Commission*, paragraph 394 above, paragraph 75, and *Honeywell* v *Commission*, paragraph 394 above, paragraph 54), since that case-law is applicable by analogy to a statement in intervention (*Diputación Foral de Álava and Others* v *Commission*, paragraph 394 above, paragraph 94).

542 It must be observed that, apart from some general assertions concerning the period covered by the initial economic report and the Commission's approach, the intervener confines itself to stating that '[the Commission's] criticisms are misconceived' and that '[t]his is all explained in more detail in section 4 of the RBB Report dated 2 April 2010'. Such a laconic formulation of the complaint does not enable the Commission to prepare its defence and the Court to give a ruling, if appropriate, without other information in support, and to allow the annexes to provide the detail of an argument which is not presented in a sufficiently clear and precise manner would be contrary to their purely evidential and instrumental function (Case T-340/03 *France Télécom* v *Commission*, paragraph 268 above, paragraph 204).

543 In any event, even on the assumption that the intervener's arguments may be taken into consideration, they should nevertheless be rejected.

544 Weichert refers to economic studies of the impact of the impugned conduct on the banana market in Europe. Those indicate that if the Commission's conclusions were correct, one would expect quotation prices and actual prices to be closely aligned. Yet, according to the intervener, the empirical findings show that the actual prices differ so substantially from its official prices that it cannot reasonably be concluded that those official prices could have provided a focal point for unlawful coordination.

545 Those studies tend to show that the communications referred to in the contested decision had no impact on the market, that is to say, on the actual transaction prices, and that consequently and retrospectively those communications were not liable to have an anti-competitive effect.

546 It will be recalled that an anti-competitive object and anti-competitive effects constitute conditions that are not cumulative but alternative for the purposes of applying the prohibition laid down in Article 81(1) EC. In deciding whether a concerted practice is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market.

547 A concerted practice having an anti-competitive object may not produce anti-competitive effects. Although the very concept of a concerted practice presupposes conduct on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition (*Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraphs 122 to 124; *Hüls* v *Commission*, paragraph 298 above, paragraphs 163 to 165; and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 123 to 125).

548 It must be borne in mind that, in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition and that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted. In addition, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only

the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraphs 31, 35 and 38).

549 In particular, the fact that a concerted practice has no direct effect on price levels does not preclude a finding that it limited competition between the undertakings concerned (see, to that effect, Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 140).

550 It must be noted in that regard that prices actually charged on a market are liable to be influenced by external factors outside the control of the members of the cartel, such as the evolution of the economy in general, changes in demand in that particular sector or the negotiating power of customers.

551 In the present case, it is apparent from paragraphs 313 to 533 above that the Commission has established to the requisite legal standard the relevance of quotation prices in the banana sector, a factor which, in combination with the other circumstances of the case taken into account by the Commission, makes it possible to establish the existence of a concerted practice having an anti-competitive object.

552 It is apparent from the case-file that Chiquita, Dole and Weichert, holders of a substantial share of the market, invariably set a quotation price for their bananas every Thursday morning for a period of at least three years, announced that price to their ripener and retail customers before entering into negotiations and, in bilateral contacts, exchanged the quotation prices set by each of them in order to monitor and verify directly the decisions taken by competitors, which establishes that the cartel was implemented and also that the arguments which Weichert bases on the level of its transaction prices are wholly implausible.

553 An analysis based on the level of Weichert's transaction prices and the fact that actual prices and quotation prices are not 'closely' correlated, as stated in recital 352 to the contested decision, are not sufficient to call in question the probative value of the evidence adduced by the Commission which enabled it to conclude that quotation prices served at least as market signals, trends or indications as to the expected development of banana prices and that they were relevant for the banana trade and the prices obtained.

554 The finding that there was a differential between quotation prices, which were the subject of the unlawful concerted action, and transaction prices certainly does not mean that quotation prices were not liable to have an influence on the level of transaction prices. The function of quotation prices is to lift market prices higher even if, ultimately, market prices are lower than announced prices. It should be borne in mind, in that regard, that the General Court has taken account of the fact that the recommended rates of an undertaking were higher than the market price in order to find that the pricing system of that undertaking had the object of increasing market rates (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 163).

555 It is therefore irrelevant whether the quotation price was the most decisive factor in terms of Weichert's actual price or to what extent its quotation prices and actual prices were connected, bearing in mind that quotation prices are announced prices in respect of which it has not been claimed that they could be obtained in weekly negotiations or even that they could serve as a basis for calculating the final prices charged.

556 It must also be pointed out that Weichert's economic arguments concern only the prices charged by Weichert itself, whilst the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating the cartel's effect on the market; account must only be taken of the effects of the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraphs 150 and 152). Those arguments do not prove that the impugned conduct did not enable the undertakings concerned to achieve a higher level of transaction price than that which would have

resulted from free competition, bearing in mind that, in order to assess the actual effect of an infringement on the market, it is necessary to take as a reference the competition that would normally exist if there were no infringement (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 150 and 151).

557 With regard, specifically, to the relevance of the economic reports which Weichert submitted, Weichert does not dispute that there is a correlation between quotation prices and actual prices in the sense that the two evolve together in parallel, but it attributes this entirely to seasonal variations affecting the banana market without, however, demonstrating it, the data in Figure 7 of the economic report of 2 April 2010 on the difference between the official price and 'Weichert's average actual price' being, in that respect, insufficient. Since those variations, including weather conditions, affect the two prices at issue in the same way, it is equally possible to regard that factor as neutral and unlikely to explain, by itself, the correlation between Weichert's quotation prices and its actual prices.

558 Furthermore, examination of Figures 1, 2 and 7 of the economic report of 2 April 2010 contradicts Weichert's assertion that 'extreme price differences are the norm rather than exceptions', and reveals that the most significant differences between quotation prices and actual prices appear only from the second half of 2002, when Dole and Weichert started to adjust their initial quotation prices after the announcement of the 'Aldi price'.

559 It follows from the foregoing considerations that the intervener was wrong to claim that the Commission had not established any link between actual prices and official prices in general, and the intervener's official prices and actual prices in particular, and that, by contrast, the Commission was right to find that quotation prices – including the intervener's own – were relevant in the banana sector, by observing that they served at least as market signals, trends or indications as to the intended development of banana prices and that they were relevant for the banana trade and the prices obtained.

560 Whilst the Commission's finding that in some transactions actual prices were directly linked to quotation prices does not apply to Weichert's situation, the fact remains that neither Weichert nor the applicant challenged its relevance in regard to Dole.

561 As the Commission rightly observes, even if it was the case that quotation prices were less important for an undertaking than to its competitors, in particular its main competitors, that does not justify that undertaking's participation in discussions which lead to coordination of such quotation prices (recital 127 to the contested decision).

562 It follows from the foregoing considerations that the arguments of the applicant and of the intervener concerning the relevance of the quotation prices are not such as to show that the contested decision is unlawful, and must be rejected.

The causal link between the collusion and Weichert's conduct on the market

563 The applicant maintains that the presumption as to the necessary causal link between the collusion and Weichert's conduct on the market, highlighted by the Commission, is refuted by the fact that, contrary to the applicant's own wishes, Weichert pursued a strategy of always setting its quotation price at the same level as Dole's and therefore merely followed the Dole price every week. The reality of that conduct is apparent from the actual wording of recitals 104 and 203 to the contested decision.

564 The fact that Weichert, according to the applicant, consistently pursued the same strategy each week, while its discussions with Dole did not follow the same pattern, taking place only once or twice a month and relating rarely to pricing factors, constitutes additional evidence of the fact that those discussions had no impact on Weichert's conduct on the market.

565 It must be noted that, as is clear from the very terms of Article 81(1) EC, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. It must be presumed, subject to proof to the contrary, which the economic operators concerned must adduce, that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period (*Hüls* v *Commission*, paragraph 298 above, paragraphs 161 to 163).

566 It is therefore for the undertakings concerned to prove that the concerted action did not have any influence whatsoever on their conduct on the market (*Hüls* v *Commission*, paragraph 298 above, paragraph 167).

567 The applicant observes that the Commission explicitly found that 'during the relevant period quotation prices for Dole and Del Monte bananas (the latter were traded by Weichert) were virtually identical' (recital 104 to the contested decision) and that, '[from] 2000 [to] 2002 Weichert would normally set its quotation price after having learned Dole quotation price set by Dole that Thursday morning' (recital 203 to the contested decision).

568 In addition to the disclosure in the first quotation of the existence of Dole's and Weichert's parallel conduct, more revealing of the fact that account was taken of information exchanged between competitors than of the fact that it was not, it must be noted that the second quotation from the contested decision cannot sustain the applicant's assertions, as it has been taken out of context.

569 Recital 203 to the contested decision is in a part of that decision which deals with exchanges of quotation prices after those prices were set on Thursday mornings, which formed an element of the undertakings' cartel arrangements since those exchanges served to monitor individual pricing decisions taken on the basis of the information exchanged in the pre-pricing communications, and did not therefore constitute a separate infringement, but a mechanism for monitoring the outcome that contributed to the same aim.

570 Having set out its position in recital 198 to the contested decision, the Commission recalls in subsequent recitals the statements made in that regard by the undertakings concerned.

571 It points out that, in its reply to a request for information of 6 June 2006, Weichert stated the names of its employees who had exchanged quotation prices both with Dole and with Chiquita (recital 202 to the contested decision).

572 Recital 203 of the contested decision is worded as follows:

'Weichert states that the communications with the parties did not take place at any prearranged point in time on Thursday morning but generally occurred at any time between 9 a.m. and 12 [noon]. [From] 2000 [to] 2002 Weichert would normally set its quotation price after having learned Dole quotation price set by Dole that Thursday morning. As regards information about the Dole quotation price in the period [from] 2000 [to] 2002, Weichert states that it obtained such information from customers, other importers and/or Dole employees. In its reply to the statement of objections Weichert argues that this information was available to it from a variety of sources. This does not contradict the Commission's findings.'

573 It is thus evident that the excerpt highlighted by the applicant appears between two sentences recounting Weichert's statements and includes express reference to a footnote stating that it corresponds to a Weichert reply to the request for information of 5 February 2007.

574 Furthermore, having noted that 'according to the settled case-law where communications concern future pricing policies, it is considered that the participant could not fail to take into account, directly or indirectly, the information obtained in order to determine the policy which it intends to pursue on the market', the Commission explicitly stated, in recital 233 to the contested decision, 'that none of the addressees [had] adduced evidence that it did not take information into account when setting its quotation prices'. Similarly, it clearly stated in recital 268 to the contested decision that, while Weichert had not admitted 'that it [had taken] into account the information obtained from competitors in setting its quotation prices', 'such an admission [was] not necessary', in the light of the case-law referred to above.

575 In those circumstances, it cannot reasonably be inferred from the terms of the contested decision, or more particularly from a combined reading of recitals 104 and 203 to that decision, that there is any proof of the fact that Weichert waited every week to find out what Dole's prices were before setting its own quotation price at the same level and did not therefore take into account the information obtained during the exchanges in question in order to determine its weekly conduct on the market.

576 The same applies to the applicant's assertion regarding the frequency of communications between Dole and Weichert and the rarity of discussions about pricing factors. Indeed, as has been stated in paragraph 367 above, the Commission was fully entitled to conclude in the light, in particular, of the regular recurrence of bilateral pre-pricing communications that there was a pattern or system of communications to which the undertakings were able to resort according to their needs. That finding is entirely compatible with the case-law relating to the presumption of a causal link between the collusion of the undertakings concerned and conduct on the market following that collusion, to which the Commission refers in the present case.

577 Furthermore, the applicant has not adduced any concrete, objective evidence to demonstrate Weichert's allegedly 'follow-my-leader' approach.

578 It must be noted in that regard that, in the arguments it put forward in order to challenge the exercise of decisive influence over Weichert, the applicant submits that Weichert had a strategy of selling large volumes in order to use all its licences and consequently always set its official price after Dole had set its own and at the same level as Dole's, whereas its own strategy was to achieve a premium price and a quotation price closer to that of Chiquita, of which even other market operators were aware.

579 In support of its claims the applicant refers to statements made by Weichert – such as those mentioned in recital 203 to the contested decision and set out in paragraph 572 above – as well as to those made by Chiquita and Dole in reply to the Commission's requests for information.

580 Chiquita merely stated that, '[d]uring the conversations on prices of the upcoming week, Dole sometimes made reference to the Del Monte prices', while nevertheless explaining that 'the Del Monte price was not important for Chiquita since at that time the Dole and Del Monte prices had always been identical each week' and pointing out that '[Dole had stated that] it was common knowledge in the industry that Del Monte would look to the Dole quotation price as a benchmark for its quotation price'. Those statements do not, however, suffice to sustain the applicant's claims that Weichert waited every week to find out what Dole's price was before setting its own quotation price at the same level.

581 It is thus evident that the applicant has failed to prove that the concerted action in question influenced Weichert's conduct on the market in any way, and that its associated claims regarding the 'undermining' of the Commission's position as regards its analysis of the exchanges of quotation prices must also be rejected.

582 Last, it must be pointed out that, contrary to the applicant's assertions, the Commission did not 'mainly' rely on that presumption of a causal link between unlawful collusion and conduct on the market in order to establish, in the present case, the existence of a concerted practice having an

anti-competitive object, since that conclusion was based on an assessment of the characteristics of the exchanges in question and of their legal and economic context, in accordance with the requirements of the case-law.

583 It follows from all the foregoing considerations that the Commission has established to the requisite legal standard that Dole and Weichert engaged in pre-pricing communications during which they discussed banana price-setting factors, that is to say, factors relevant to the setting of quotation prices for the forthcoming week, or discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week.

584 By means of the pre-pricing communications, Dole and Weichert, who were among the main suppliers of bananas, coordinated the setting of their quotation prices instead of deciding on them independently. During those bilateral discussions, the undertakings concerned disclosed the course of action which they contemplated adopting or at least enabled the participants to estimate competitors' future behaviour with regard to their quotation prices to be set and to anticipate their intended course of action. They therefore decreased uncertainty concerning competitors' future decisions on quotation prices, with the result that competition between undertakings was restricted.

585 The Commission was therefore right to conclude that the pre-pricing communications which took place between Dole and Weichert concerned the fixing of prices and that they gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.

The single infringement

586 The applicant, supported by the intervener, submits that the Commission erred in law in finding that there was a single and continuous infringement, since the Commission (i) acknowledges that Weichert was not aware of the communications exchanged between Dole and Chiquita and could not foresee it, and (ii) declares Weichert liable only for the part of the infringement in which it participated, a position which is incompatible with the description of a single and continuous infringement.

587 It must be borne in mind that the Court of Justice has held that an undertaking which has participated in a single and complex infringement by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement (*Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraph 203).

588 It is thus clear that the concept of single infringement can be applied to the legal characterisation of anti-competitive conduct consisting of agreements, of concerted practices and of decisions of associations of undertakings, but also to the personal nature of liability for the infringements of the competition rules (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraphs 159 and 160).

589 It is necessary, therefore, to verify the validity of the Commission's assessment in the light of both elements, the actual conduct of the undertakings concerned and their liability for that conduct.

The conduct in question

590 As regards the objective factor relating to the account taken of the role of the actual conduct of the undertakings concerned, it must be noted that an infringement of Article 81(1) EC may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision (*Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraph 81, and *Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraph 258).

591 It must be pointed out that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim (Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraphs 125 and 126, and *Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 3699). The fact that the various actions of the undertakings form part of an 'overall plan', because their identical object distorts competition within the common market, is decisive for the finding of a single infringement (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraphs 258 and 260).

592 In the present case, the Commission explained that all the bilateral pre-pricing communications, both those between Dole and Chiquita and those between Dole and Weichert, reduced uncertainty concerning the future setting of quotation prices, concerned the fixing of prices and had the same single economic aim, namely to distort the normal movement of prices for bananas in Northern Europe. It stated that the exchange of quotation prices, which enabled the undertakings concerned to monitor the pricing decisions taken by each of them, had contributed to that same single economic aim (recital 247 to the contested decision).

593 The Commission did not confine itself to establishing the existence of an identical anti-competitive object; it also demonstrated that the bilateral communications between Dole and Chiquita, as well as those between Dole and Weichert, were linked and complementary (see, to that effect, *BASF and UCB* v *Commission*, paragraph 588 above, paragraph 181).

594 First, the Commission indicated that the pattern of all bilateral pre-pricing communications was the same. In its view, the similar content of those communications, the fact that they regularly involved the same persons with a virtually identical *modus operandi* in terms of timing and means of communication, and the fact that they continued for the same lengthy period reveal a pattern of communication demonstrating the single nature of the infringement (recital 249 to the contested decision).

595 It is important in that regard to emphasise the specific circumstances of the present case, in that the unlawful conduct consists of two bilateral exchanges of information involving the same operator in each case, namely Dole. The claim that communications between Dole and Weichert should be regarded as a separate infringement is incompatible with the objective finding of Dole's involvement in the overall cartel, owing, inter alia, but most certainly, to its bilateral exchanges with Weichert.

596 The Commission also contended that the exchanges of quotation prices followed a consistent pattern, similar to that of the bilateral communications (recital 249 to the contested decision), and it is common ground that Weichert exchanged its quotation prices on Thursday mornings both with Dole and with Chiquita (recitals 200 and 202 to the contested decision).

597 The fact that the exchanges of quotation prices that occurred on Thursday mornings were not regarded by the Commission as a separate infringement of Article 81 EC did not, contrary to the intervener's assertions, preclude the Commission from taking them into account as a pattern that facilitated the operation of the cartel, in order to establish a single infringement in the present case.

598 Second, the Commission pointed out that Chiquita, Dole and Weichert were among the main players in the supply of bananas in Northern Europe. It contended that the collusive arrangements concerned the fixing of prices concerning the quotation prices of the undertakings in question, and that therefore the overall anti-competitive conduct formed the same infringement, and that it would be artificial to split up such overall continuous conduct or a series of acts – irrespective also of the fact that each instance of pre-pricing communications had an anti-competitive object, characterised by a single purpose – by regarding them as a series of separate infringements, when what was involved was a single infringement with a single economic aim (recitals 247 and 248 to the contested decision).

599 It must therefore be concluded that there was indeed an identity of purpose between the bilateral pre-pricing communications between Dole and Chiquita and those between Dole and Weichert (see, to that effect, *Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 3705).

600 In those circumstances, the Commission was fully entitled to conclude, in recital 251 to the contested decision, that all the collusive arrangements formed a single and continuous infringement united by a single economic aim, which was to restrict competition in the Community within the meaning of Article 81 EC.

601 That conclusion cannot be called in question by the applicant's assertion that Weichert was not in competition with Chiquita for the product in respect of which Weichert communicated information to Dole.

602 The applicant claims that Chiquita's quotation prices were for yellow bananas, that is to say, taking into account ripening costs, whereas Weichert's and Dole's quotation prices referred to so-called 'green' prices, relating to unripened green bananas that would come on the market only one and a half weeks later as yellow bananas. In support of its assertions, the applicant refers to the content of an email of 2 January 2003 from an employee of Atlanta, a ripener and distributor, to a Chiquita employee, which reads as follows:

'Although I realise that Chiquita in the last couple of weeks has always followed the Dole pricing (namely downwards), in this case the Dole recommendation could not and should not have been followed. The pricing of Chiquita is a yellow quote which is true for deliveries as of next week Monday. The Dole quote, that was originally increased by Euro 0.50 this morning, is a green quote which will be materialised in yellow only the week after next week, not before.'

603 Those arguments by the applicant cannot be upheld, since they are based on an unsubstantiated and incorrect premiss, according to which green and yellow bananas are entirely different products which fall within two separate markets on which Weichert and Dole, on the one hand, and Chiquita, on the other, operated exclusively.

604 In the light of the replies of the undertakings concerned to the request for information and to the statement of objections, the Commission, in the contested decision, clearly defined the relevant sector and, in particular, the relevant product as fresh bananas – having already done so in the statement of objections – and specified that both unripened (green) bananas and ripened (yellow) bananas are covered by the contested decision (recital 4 to the contested decision).

605 The Commission stated that bananas, which were shipped green, were green on arrival at the ports and needed to be ripened before they could be consumed. Bananas were either delivered directly to buyers (green bananas) or ripened and then delivered approximately one week later (yellow bananas), which reflected the fact that ripening could be organised by the buyer or carried out by the importer or on his behalf. Importers' customers were generally ripeners or retail chains (recital 34 to the contested decision). According to the Commission, Chiquita, Dole and Weichert set their quotation prices each week, in practice on Thursday mornings, and communicated them to their customers (recitals 34 and 104 to the contested decision). The expression 'quotation prices' usually referred to quotation

prices for green bananas (green quote). Quotation prices for yellow bananas (yellow quote) were normally the green quote plus a ripening fee (recital 104 to the contested decision), quotation prices for green bananas determining quotation prices for yellow bananas (recital 287 to the contested decision).

606 It must be observed that the applicant and the intervener did not produce any evidence in the present proceedings to contradict the Commission's findings concerning the operation of the banana market thus described.

607 In the first place, the applicant confines itself to claiming, without any justification, that Weichert marketed only green bananas. Its arguments actually contain an inherent contradiction, in that it maintains that Chiquita had discussions and shared information with Dole concerning yellow bananas, while stating that Dole – like Weichert – only had quotation prices in relation to green bananas.

608 It is common ground that Dole, via its German subsidiary, sold green bananas to German retailers who had their own ripening capacity and to European ripeners (recital 12 to the contested decision).

609 Describing its business during the administrative procedure, Chiquita stated that, '[w]ithin Europe, the fruit is distributed either to wholesalers/ripeners like Atlanta (Germany) or directly to retailers (doing their own ripening)', which corresponds to sales of green bananas (corporate statement No 13, Annex I 3).

610 Yet the statements of Dole and Chiquita on the significance of their quotation prices, corroborated by documentary evidence, and their description of the content of their exchanges (see recitals 104, 140 to 143 to the contested decision), reveal a situation in which two undertakings communicated, with perfect mutual understanding, about the price of green bananas for the Northern European region.

611 An internal Chiquita email dated 30 April 2001, referred to in recital 107 to the contested decision, shows the existence of sales of green bananas by Chiquita. The email is worded as follows:

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

612 The applicant, moreover, did not express any objection, either in the reply or at the hearing, to the Commission's statement that Chiquita's internal price reports, which were included in the investigation file to which Del Monte had had access, showed that Chiquita had a green quotation price during the period of the infringement.

613 In the second place, it is apparent from the case-file that the quotation price of green bananas is decisive for that of yellow bananas.

614 The Commission recalled, in the defence, the statements made by Weichert in reply to the request for information of 10 February 2006, whereby Weichert explained that '[t]he price for yellow bananas [was] determined on the basis of the average green price plus a surcharge for ripening and in some instances a surcharge for freight'.

615 Del Monte also acknowledged the link between yellow prices and green prices during the administrative procedure. Thus, it explained that, in practice, the price of yellow bananas was determined by the 'Aldi price', which was a green price plus a fee for ripening, handling and transport, the amount of which had remained stable over the past few years at EUR 3.07. Del Monte added the following:

'When selling yellow bananas to other customers, ripeners individually negotiate this amount on the basis of the green price plus ripening, handling and transport costs. The Aldi standard, again, serves as a reference.'

616 In addition to stating its express complaint regarding the composition of the yellow quotation price, Del Monte confirmed at the hearing that when a ripener calculates the price asked of a retailer, he takes into account, inter alia, what he paid to buy the green banana, and that there is therefore a certain link between a green banana sold in any given week and the same banana resold yellow by another operator a week later.

617 In the third place, the applicant states, without further explanation, that the green bananas marketed by Weichert and Dole were put on the market 'only one and a half weeks later as yellow bananas' sold by Chiquita.

618 The mere production of the email dated 2 January 2003 is not sufficient to establish that there was a systematic time-lag, as suggested by the applicant in its written pleadings, between the process of marketing Dole's and Weichert's bananas and the process of marketing Chiquita's, resulting in the desynchronisation of the activities of those undertakings.

619 The situation referred to in that email necessarily falls within the single time pattern of a market relating to a product – fresh bananas – that is organised in weekly cycles, as the Commission pointed out in recital 33 to the contested decision, without being challenged by the other parties.

620 Chiquita (corporate statement No 13, Annex I 3) describes a chronology of marketing of bananas that corresponds to a three-week cycle, with the setting and announcement to clients of quotation prices on the Thursday of the first week, the arrival of the ships at European ports, unloading of bananas and their transport to ripening centres at the beginning of the second week or sometimes at the end of the first week, and the distribution of the yellow bananas to retailers at the beginning of the third week or sometimes at the end of the second week.

621 That timetable is consistent with the Commission's finding in recital 34 to the contested decision, according to which bananas were either delivered directly to buyers, in the case of green bananas, or ripened and then delivered approximately one week later, in the case of yellow bananas, a formulation which summarises the distribution process and highlights the fact that the ripening period for all bananas could not readily be reduced.

622 That objective finding as to the single nature of the ripening process rules out any possibility of the activities of Dole and Weichert being totally desynchronised from those of Chiquita.

623 In its reply to the statement of objections, Del Monte stated that the ripening process ideally takes 5 to 6 days and could be slowed down to a maximum period of 8 days. It added that the ripening process was not 'sufficiently flexible to allow a fruit that was scheduled to be sold as a yellow banana in week B to be sold in week A or C instead' (Annex A 5). Weichert indicated in reply to a request for information that, in view of the extremely perishable nature of bananas and the fact that a fresh supply of bananas arrived each week, it was imperative for importers to sell the bananas quickly, before they arrived in Europe (Annex I 6).

624 Those considerations concerning the time pattern of banana marketing and the ripening process must be taken in conjunction with the various methods of distribution of bananas mentioned by the Commission in recital 34 to the contested decision, where it refers to the fact that ripening may be carried out by the importer or on his behalf or organised by the buyer.

625 Whether an importer refers to a yellow price or to a green price depends, in those circumstances, on the way in which it organises its sales of bananas: if it sells them to ripeners green, or to retailers which organise the ripening of the fruit themselves, it will communicate a green quotation price, whilst if it arranges for the ripening itself by using an external ripener or ripens the fruit in the facilities of its subsidiaries or similar companies and then sells the bananas ripe to retailers, it will use a yellow quotation price.

626 The email of 2 January 2003 relates to a situation in which Chiquita markets fruit by organising the ripening through Atlanta, a ripener and distributor, whose affiliation to Chiquita is apparent from the actual wording of that email.

627 The writer of the email mentions an upward movement in the yellow quotation price of Chiquita-branded bananas distributed by Atlanta, which was set and announced on the Thursday of the second week for fruit in the process of ripening, which had arrived green on the Monday of the second week and had to be delivered yellow at the beginning of the third week, following an increase in the quotation price for Dole's green bananas, which was set and communicated on the same Thursday of the second week for fruit in the process of being transported before arriving green on the Monday of the third week and being delivered yellow two weeks later, at the beginning of the fourth week.

628 The situation thus described must be assessed not in isolation but set in the context of a continuously operating market, with a shipment of green bananas arriving at Northern European ports at the beginning of each week, the bananas being placed in ripening centres for the same period of approximately one week, and then yellow Dole-, Del Monte- and Chiquita-branded bananas being put on the market. Both the Dole- and Del Monte-branded bananas and those of Chiquita were initially green before becoming yellow after ripening and appearing on the same supermarket or other retailers' shelves for final consumers throughout the year, in accordance with the same time pattern.

629 Thus, the yellow Chiquita bananas referred to in the email from the Atlanta employee were part of a green banana shipment arriving in Northern European ports at the beginning of the second week and for which a green price had been set on the Thursday of the first week. Within the same timeframe, there would be a shipment of green Dole bananas and a quotation price would be set for them.

630 All those bananas were intended to be placed on the market for consumption within the same period of time, that is approximately a week after their discharge and placement in ripening centres, in accordance with various arrangements, and thus at the beginning of the third week.

631 That last point must be read in conjunction with another observation of the Atlanta employee.

632 In his email of 2 January 2003, that employee criticises the increase in the yellow quotation price which had already been communicated to customers. He states that that decision is a commercial error, since 'the price difference in the market has risen' and that it 'will be more difficult for next week to find and keep Chiquita customers'.

633 That statement attests, in addition to the importance of the issue of price differentials between the various banana brands, to the existence of a competing supply of yellow bananas during the third week. That is precisely the time when Dole- and Del Monte-branded bananas – which arrived at the ports at the beginning of the second week and were distributed yellow by ripeners, independent companies or subsidiaries of those undertakings – were placed on the retail market.

634 In addition to those chronological considerations, which are apparent from the analysis of the document relied upon by the applicant, it should be borne in mind that the first step in the marketing of an arrival of bananas for a given week consisted in the setting of a green price by all importers on the same day, Thursday, which represented both the quote for green bananas addressed to ripener/distributors or to retailers who themselves organised the ripening of the fruit, and the basis for the yellow price announced to retail customers.

635 Last, it can be observed that the email in question also corroborates the existence of a variety of activities by Chiquita and of its green quote. Thus, the Atlanta employee argues that the criticism made in the case of an increase in the Dole quotation price does not apply in the event of a price reduction. He observes that price reductions are always 'true' not only for the 'coming week green' but also for the fruit which is in the ripening rooms.

636 It follows from the foregoing considerations that the applicant's arguments that Weichert was not in competition with Chiquita, a situation that would preclude the conduct in question from being described as a single infringement, must be rejected.

Subjective intent

637 As regards the issue of the undertakings' liability, it should be borne in mind that where the infringement of Article 81(1) EC results from a series of acts or from continuous conduct forming part of an 'overall plan', because they had the same object of distorting competition within the common market, the Commission is entitled to attribute liability for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraph 258), even if it is established that the undertaking concerned directly participated in only one or some of the constituent elements of the infringement (*BASF and UCB* v *Commission*, paragraph 588 above, paragraph 161).

638 The fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole.

639 As regards the evidence of subjective intent on the part of each of the undertakings involved, it is for the Commission to establish that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraph 87, and *Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraph 291).

640 In the present case, it must be noted that Article 1 of the contested decision asserts that the addressees, including Weichert, participated over various periods in a concerted practice by which they coordinated quotation prices for bananas, the infringement covering Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.

641 In so far as that wording may be construed as meaning that the Commission wished to attribute liability for the whole infringement, in all its aspects, to each of the undertakings involved, such a reading is not corroborated by the grounds of the contested decision.

642 In recitals 252 to 257 to the contested decision the Commission considered the question of the attribution to Chiquita and Weichert of liability for the single and continuous infringement, bearing in mind that Dole had exchanges with them.

643 The Commission stated that, although Chiquita was aware of the collusive arrangements between Dole and Weichert, or at least foresaw them, was prepared to take the risk and was aware of or could reasonably have foreseen conduct concerning the overall cartel and its common objective, the Commission did not have sufficient evidence to conclude that Weichert was aware of pre-pricing communications between Chiquita and Dole or to establish that Weichert could reasonably have foreseen them (recitals 253 to 255 to the contested decision).

644 At the end of its analysis, the Commission concluded as follows (recital 258 to the contested decision):

'[T]he Commission considers that all collusive arrangements described in Chapter 4 of this decision form a single and continuous infringement having an object of restricting competition in the Community within the meaning of Article 81 [EC]. Chiquita and Dole shall be held responsible for the whole single and continuous infringement, while Weichert, given the evidence at the Commission's disposal, shall be held responsible for the part of the infringement in which it participated, that is for the part of the infringement which concerns collusive arrangements with Dole.'

645 It should be borne in mind that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

646 In the light of the clear terms of recital 258 to the contested decision, the contested decision must be interpreted, as the Commission stated at the hearing, as meaning that it does not attribute to Weichert responsibility for the infringement as a whole, unlike in the case of Dole and Chiquita.

647 In those circumstances, and contrary to the assertions of the applicant and of the intervener, the Commission did not misapply the concept of a single infringement, as interpreted by the case-law.

648 In that regard, it must further be observed that the fact that an undertaking has not taken part – like the undertaking comprising Weichert and Del Monte in the present case – in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Such a factor must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (*Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraphs 86 and 292).

649 It must be noted that the Commission granted Weichert, on account of mitigating circumstances, a reduction of 10% of the basic amount of the fine, because Weichert had not been aware of pre-pricing communications between Chiquita and Dole or could not reasonably have foreseen them (recital 476 to the contested decision).

650 It follows from this that the complaint referred to in paragraph 586 above must be rejected.

651 In those circumstances, it must be held that the Commission cannot be criticised for any infringement of Article 81 EC or Article 253 EC.

2. *The plea alleging breach of the rights of the defence*

The failure to disclose evidence

652 The applicant submits that the Commission refused to disclose to it other undertakings' responses to the statement of objections and that that refusal to grant access to relevant evidence placed the applicant in a position in which it was unable to defend itself adequately against the Commission's findings that the applicant had had decisive influence over Weichert and, moreover, that Weichert had infringed Article 81 EC.

653 It is common ground that, after access to the file was granted to the undertakings concerned on 30 July 2007, the applicant lodged a request on 27 June 2008 for access to various documents and, in particular, to the 'other parties' replies to the statement of objections', which was refused by letter of 17 July 2008. The applicant renewed its request by letter sent on 21 August 2008 to the hearing officer, who rejected the request on 5 September 2008. The applicant then invited the hearing officer to reconsider her decision on 26 September 2008; that request also was refused on 6 October 2008.

Loss of rights

654 The Commission contends that the applicant's request for access was not sufficiently precise, as it did not specifically refer to the response from Dole concerning the allegedly 'exculpatory' evidence or mention Weichert's reply, and that, according to the case-law of the General Court, the failure to make such a request during the administrative procedure has the effect that the right of access to the file is barred in a subsequent action for annulment.

655 It should be recalled, first of all, that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, the other parties' replies to the statement of objections are not, in principle, included in the documents of the investigation file that the parties may consult (*Hoechst* v *Commission*, paragraph 291 above, paragraph 163).

656 Paragraph 8 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7) states, moreover, that the 'Commission file' in a competition investigation consists of all documents which have been obtained, produced or assembled by the Commission Directorate-General for Competition during the investigation.

657 Next, it is apparent from the case-law that, in a proceeding finding an infringement of Article 81 EC or of Article 82 EC, the Commission is not required to make available, of its own initiative, documents which are not in its investigation file and which it does not intend to use against the parties concerned in the final decision. Consequently, an applicant who learns during the administrative procedure that the Commission has documents which might be useful for its defence must make an express request to the Commission for access to those documents. If the applicant does not do so during the administrative procedure, his right to do so is barred in any action for annulment brought against the final decision (*Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 383, and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 340).

658 In the present case it is common ground that, during the administrative procedure and more precisely on 27 June 2008, the applicant expressly requested access to 'the other parties' replies to the statement of objections', documents which are not in the investigation file and which, strictly speaking, encompass the replies of Dole and of Weichert, as well as the documents provided by Weichert on 28 February 2008 to supplement its reply.

659 In the context of a request for access to documents which were not in the investigation file and were not, therefore, contained in a detailed summary list addressed to the undertakings concerned, it must be held that the applicant's request was sufficiently clear (see, to that effect, Case T-175/95 *BASF* v *Commission* [1999] ECR II-1581, paragraphs 49 to 51), given that the documents sought were clearly identified or identifiable.

660 It must be added that, in its letter of 27 June 2008, the applicant recalled the terms of paragraph 27 of the notice referred to in paragraph 656 above, according to which a party will be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence – 'whether of an incriminating or of an exculpatory nature' –, pertaining to the allegations concerning that party in the Commission's statement of objections.

661 It cannot, in those circumstances, be contended that the applicant's rights of access are barred as a result of a failure to act during the administrative procedure.

The failure to disclose incriminating evidence

662 As regards the failure to disclose alleged incriminating evidence which was not in the investigation file, it must be noted, first of all, that the observance of the rights of the defence constitutes a fundamental principle of European Union law which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure. It requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 39).

663 Article 27(1) of Regulation No 1/2003 states:

'Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.'

664 Next, it should be borne in mind that, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances, the passage in question constitutes incriminating evidence against the various undertakings alleged to have participated in the infringement (see *Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 386, and *Avebe* v *Commission*, paragraph 56 above, paragraph 50 and the case-law cited). Those principles also apply when the Commission relies on a passage from a reply to a statement of objections to hold an undertaking liable for an infringement (*Avebe* v *Commission*, paragraph 56 above, paragraph 51).

665 A document cannot be regarded as an incriminating document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of the rights of the defence, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as evidence of an infringement in which the undertaking participated (Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraph 158).

666 Since documents that have not been communicated to the undertakings concerned during the administrative procedure are not admissible evidence, it will be necessary to exclude those documents as evidence if it should prove that the Commission relied in the decision on documents that were not in the investigation file and were not communicated to the applicants (*Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 382).

667 If there is other documentary evidence of which the undertakings concerned were aware during the administrative procedure that specifically supports the Commission's findings, the fact that an incriminating document not communicated to the person concerned is inadmissible as evidence does not affect the validity of the objections upheld in the contested decision (*Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraph 72).

668 It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraph 73).

669 In the present case, in the first place, the applicant claims that the Commission took into account, in recitals 90, 98, 396, 412 and 422 to the contested decision, statements made by Weichert in its reply to the statement of objections which impute liability for the infringement to the applicant.

670 It must be observed that the applicant merely lists the recitals to the contested decision in which Weichert's reply to the statement of objections is mentioned and reproduces part of the content. Such arguments are not sufficient to satisfy the applicant's obligation to show that the result at which the Commission arrived in its final decision would have been different if the documents at issue had been disallowed as evidence against it (see, to that effect, judgment of 8 July 2008 in Case T-52/03 *Knauf Gips* v *Commission*, not published in the ECR, paragraph 49, confirmed on that point in Case C-407/08 P *Knauf Gips* v *Commission*, paragraph 104 above, paragraph 14).

671 In any event, it cannot be concluded from an examination of recitals 90, 98, 396, 412 and 422 to the contested decision that Weichert's reply to the statement of objections may be described as incriminating evidence.

672 Recital 90 to the contested decision is in a part of the decision that deals with the description of the organisation of the cartel and, specifically, the question of the frequency of communications between Dole and Weichert. It is stated there that, '[i]n its reply to the statement of objections, Weichert submits that calls with Dole took place "on average no more than once or twice a month while Weichert was part of the Del Monte group"'. In addition to the fact that that statement by Weichert concerns the infringement itself and not its imputation to the applicant, it is common ground that the Commission did not rely on that statement but found that the frequency of communications was equivalent to 20 or to 25 weeks a year (see recital 91 to the contested decision), which Weichert had initially indicated in its reply to a request for information, which is part of the Commission's file to which the applicant had access (see footnote 106 to the contested decision).

673 In recital 98 to the contested decision, which relates to the duration of the cartel, there is reference to the fact that, '[i]n its reply to the statement of objections, Weichert claims that occasions when it exchanged views with Dole as to "the possible evolution of official prices" occurred only when it was part of the Del Monte group (2000-2002)', a statement which does not seek to impute the infringement to the applicant but to clarify one of the cartel's constituent elements. It is apparent from recital 98 to the contested decision that that information corroborates the statements made by Weichert in reply to a request for information, statements to which the applicant had access and according to which communications with Dole began in 2000 and ended altogether when a Dole employee retired, which occurred in December 2002.

674 It must be observed that while the Commission changed its assessment of the duration of the period of the infringement in the contested decision from that made in the statement of objections, which mentioned a period from 2000 to 2005, it was to reduce that period, the period ultimately determined – from 2000 to 2002 – being fully included within that referred to in the statement of objections.

675 Recitals 396, 412 and 422 to the contested decision are in a part of the decision that concerns the presentation and rebuttal of the arguments put forward by the undertakings concerned in response to the statement of objections.

676 The applicant observes that, in recital 396 to the contested decision, it is stated that 'Weichert considers that in the statement of objections the Commission has rightly acknowledged that Del Monte exercised decisive influence over Weichert during the period [from] 2000 [to] 2002'.

677 As the Commission rightly points out in its defence, without being significantly challenged by the applicant, the reference to Weichert's reply to the statement of objections merely confirms the statements Weichert made during the administrative procedure on the influence which the applicant exerted over it, as recorded in the Commission's investigation file – to which the applicant had access – and expressed at Weichert's oral hearing in the presence of the applicant. Weichert thus declared that it was 'dependent' on the applicant's supply and 'had to follow [the applicant's] requests' (see recital 422 to the contested decision).

678 The same applies to the references to Weichert's reply to the statement of objections contained in recitals 412 and 422 to the contested decision relating, respectively, to Weichert's activities in drawing up reports for the attention and at the request of the applicant, already described by Weichert during the administrative stage in the terms recalled in recital 392 to the contested decision, and to the applicant's status of sole supplier to Weichert, a fact already noted in recital 383 to the contested decision on the basis of statements by Weichert and the applicant itself in reply to a request for information.

679 The Commission also observes that the Weichert representative stated at the oral hearing, at which the applicant was present, that 'Del Monte had an exclusive sale and purchasing agreement with Weichert: Del Monte was Weichert's sole supplier … and Weichert had to follow Del Monte's requests' (see footnote 447 to the contested decision).

680 Last, it is clear from recital 422 to the contested decision that, in view of the contradictory nature of the applicant's and Weichert's statements, the Commission principally relied on contemporaneous documentary evidence in order to reach its conclusions.

681 In the second place, in addition to the reference to the abovementioned recitals to the contested decision, the applicant states that the Commission's entire analysis in the contested decision, including that of the relevant provisions of German commercial law, 'appears' to be influenced by Weichert's arguments, on which the applicant has not had the opportunity to be heard or to defend itself.

682 A breach of the rights of the defence cannot be founded on just a general and hypothetical assertion but must be examined in relation to the specific circumstances of each particular case (*Atlantic Container Line and Others* v *Commission*, paragraph 657 above, paragraph 354, and Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 33). Furthermore, the discussion in recitals 387, 399 to 410 to the contested decision as to whether the applicant had decisive influence over Weichert's conduct in the light of Weichert's legal form and the provisions of the HGB makes no reference to Weichert's reply to the statement of objections and falls within the scope of a legal analysis carried out by the Commission.

683 In the third place, as regards specifically the particular circumstances of the present case, the applicant maintains that the Commission took no account of the special situation in which the applicant found itself during the administrative procedure, namely that of a company which found itself held liable for the conduct of an undertaking with which it had severed all links some considerable time before the investigation began.

684 That fact is unlikely to affect the observance of the applicant's rights of defence. It should be borne in mind that, by virtue of a general duty of care attaching to any undertaking, the applicant was required to ensure, even in the circumstances of the sale of its interest in Weichert, the proper maintenance of records in its books and files of information enabling details of its activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 87, and *Hoechst* v *Commission*, paragraph 291 above, paragraphs 170 and 171).

685 Nor can any relevance be attached to the applicant's assertion that the Commission takes no account of the special situation in which the applicant found itself as a result of the inadmissibility of the action for annulment brought by Weichert and the fact that it was impossible for Weichert to provide the Court with evidence of its conduct. That situation, which arose after the administrative procedure, cannot reasonably serve as the basis for a complaint of a breach of the rights of the defence allegedly committed by the Commission during that procedure.

686 Last, it must be pointed out that the applicant claims that it has not had the opportunity to comment on the arguments put forward by Weichert with a view to shifting liability for the infringement to the applicant, although it states in the application that, from the very beginning of the Commission's investigation, 'Weichert has sought to share the burden of its liability', and pages 34 to 58 of its reply to the statement of objections are devoted to a denial of any liability for Weichert's conduct.

The failure to disclose exculpatory evidence

687 It must be noted at the outset that the applicant may not rely on the grounds of the judgment in *Aalborg Portland and Others* v *Commission*, paragraph 371 above (paragraph 126), according to which it cannot be for the Commission alone to determine the documents of use in the defence of the undertaking concerned. Those grounds, relating to documents within the Commission's file, cannot apply to the replies to the statement of objections given by other undertakings concerned. It should be borne in mind that the Commission is not required to make available, of its own initiative, documents which are not in its investigation file and which it does not intend to use against the parties concerned in the final decision.

688 Where an exculpatory document has not been communicated, it is settled case-law that the undertaking concerned must establish that its non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is thus sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have

been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the fine. In that context, the possibility that a document that had not been disclosed might have had an influence on the conduct of the procedure and the content of the Commission's decision can be established only after a provisional examination of certain evidence showing that the undisclosed documents might have had – from the aspect of that evidence – a significance which ought not to have been overlooked (see *Aalborg Portland and Others* v *Commission*, paragraph 371 above, paragraphs 74 to 76 and the case-law cited).

689 Applicants who have raised a plea alleging infringement of their rights of defence cannot be required to set out in their application detailed arguments or a consistent body of evidence to show that the outcome of the administrative procedure might have been different if they had had access to certain documents which were in fact never disclosed to them. Such an approach would in effect amount to requiring a *probatio diabolica* (*Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 161).

690 It is nevertheless for the applicant to adduce *prima facie* evidence that the undisclosed documents would be useful to its defence (*Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraphs 409, 415 and 421).

691 In the present case, the applicant maintains that, as a result of the non-disclosure of the documents concerned, it was not in a position to defend itself adequately against the Commission's finding that Weichert infringed Article 81 EC. It claims that, in so far as the Commission concludes that Weichert participated in an infringement solely because of its contacts with Dole, the document most likely to contain exculpatory evidence is therefore Dole's reply to the statement of objections, while the contested decision, moreover, contains a number of indications of the existence of such evidence to which the applicant did not have access. It thus points out that the Commission refers to evidence in Dole's reply to the statement of objections concerning the frequency of communications with Weichert (recital 88 to the contested decision), the nature of quotation prices and the fact that they were unconnected to actual prices (recital 116 to the contested decision).

692 The applicant requests that the Court take the measures of organisation of procedure required in order for the Commission to produce Dole's and Weichert's replies to the statement of objections and the documents submitted by Weichert on 28 February 2008, so that the applicant can review them and make the necessary further observations to the Court in support of the plea for annulment alleging breach of the rights of the defence.

693 In response, the Commission contends, in general terms, that when Weichert submitted its reply to the statement of objections and contested the very existence of the infringement and its involvement therein, Weichert had at its disposal all the information requested by the applicant and, since Weichert's arguments have been convincingly refuted, it is for the applicant to explain why the Commission should have reached a different conclusion if the applicant had had access to the documents in question for the purpose of raising similar arguments.

694 That statement by the Commission is based on an assessment that is incomplete, in that Weichert's reply is not the only document referred to by the applicant in support of its allegation of breach of the rights of the defence, since Dole's reply is actually regarded as the document most likely to contain exculpatory evidence. However when Weichert submitted its reply to the statement of objections it did not have Dole's reply to that statement and did not therefore have at its disposal all the information requested by the applicant, contrary to the Commission's contention. The Commission's arguments are, therefore, based on a false premiss and must be rejected.

695 With regard specifically to the frequency of communications with Weichert and the nature and role of quotation prices, the Commission states that Dole's reply to the statement of objections was not likely to contain exculpatory evidence, in view of the evidence already in its possession and the precise conclusions on which it based the finding of the infringement. It refers in that regard to recital 88 to the contested decision.

696 Recital 88 to the contested decision recalls Dole's reply to the statement of objections, in which it corrected its estimate of the frequency of bilateral communications with Weichert, indicating that the exchanges at issue had taken place not 'almost weekly', as initially stated, but 'every other week'.

697 The Commission did in fact take that correction by Dole into account and ultimately found that the frequency of the bilateral communications in question was 20 to 25 weeks per year, which is consistent with the statements made by Dole and by Weichert (recital 91 to the contested decision). In addition, in the contested decision it relied on the finding that communications between Dole and Weichert were sufficiently consistent in order to conclude that they formed a pattern of communications (recital 91 to the contested decision).

698 As regards the nature and role of quotation prices, Dole's position is summarised in recital 116 to the contested decision, according to which quotation prices were of no significance to the actual prices obtained on the market and could not therefore have been coordinated unlawfully.

699 It must be noted, however, that those arguments are also expounded by the applicant in its reply to the statement of objections (recital 120 to the contested decision) and, moreover, that the Commission specifically rejected the arguments of Dole and of the applicant in recitals 102 to 128 to the contested decision, relying in particular on the direct documentary evidence contained in the Commission's file. The mere fact that Dole put forward substantially the same arguments as the applicant with regard to the alleged irrelevance of quotation prices on the banana market, already taken into account by the Commission in its decision, cannot constitute exculpatory evidence (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 353 to 355).

700 It follows from this that the applicant has not adduced any evidence that Dole's reply to the statement of objections would be useful to its defence.

701 It must be noted that the applicant made no comment on Weichert's reply to the statement of objections so far as concerns a breach of the rights of the defence as a result of the non-disclosure of exculpatory evidence.

702 In those circumstances, it must be concluded that even if the applicant had been able to rely on those documents during the administrative procedure, the Commission's findings could not have been influenced by them (see, to that effect, Case C-407/08 P *Knauf Gips* v *Commission*, paragraph 104 above, paragraph 25), and the plea alleging breach of the rights of the defence must be rejected.

703 As the applicant has not adduced any evidence to show that the documents in question would have been useful to its defence, the Court also rejects its application for an order for their disclosure in the proceedings before this Court (see, to that effect, *Cimenteries CBR and Others* v *Commission*, paragraph 416 above, paragraph 415).

The alleged discrepancy between the statement of objections and the contested decision

704 The applicant observes that in the statement of objections the Commission distinguished three distinct types of information exchange, and that the Commission's main argument in the statement of objections was not that some of the communications described infringed Article 81 EC individually

but that all the contacts, taken together, had reached a density that was equivalent to price-fixing. The Commission dropped that argument in the contested decision and the position maintained in that decision bears very little resemblance to the statement of objections.

705 Indeed, the applicant was deprived of the possibility of making its view known on the Commission's new position, which constitutes a breach of its rights of defence. Furthermore, the Commission's assertion that it merely reduced the scope of the infringement cannot be reconciled with the fact that it dropped its case against three of the six undertakings to which it had addressed the statement of objections, and that fact also confirms the existence of a qualitative, and not just a quantitative, difference between the Commission's case as set out in the statement of objections and that contained in the contested decision.

706 It should be borne in mind that, according to the case-law, the Commission's final decision is not necessarily required to be an exact replica of the statement of objections (Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 68). The Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections. In that regard, it must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 92; see also, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 151 above, paragraphs 437 and 438). Thus it is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts that there will be an infringement of the rights of the defence (*ACF Chemiefarma* v *Commission*, paragraph 94; see also, to that effect, Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraphs 49 to 52).

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

708 It is common ground that three collusive practices were alleged in the statement of objections, namely:

— exchanges of information concerning arrival volumes of bananas into Northern Europe;

— bilateral communications on banana market conditions, price trends and/or indications of quotation prices before those prices were set;

— exchange of banana quotation prices.

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

710 That conclusion follows a separate examination of each type of conduct complained of, in particular, in paragraphs 404 and 412 to 416 of the statement of objections, in which the Commission referred to 'a complex of bilateral communications on banana market conditions, price trends and/or indications of quotation prices before quotation prices were set, by which parties influenced price setting, ultimately amounting to price fixing' and stated that 'such collusive arrangements had an anti-competitive object'.

711 In the contested decision, after analysing the replies to the statement of objections and the statements made by the undertakings concerned at their respective hearings, the Commission ultimately withdrew, first, its objections relating to exchanges of information on volumes and those relating to the exchanges of quotation prices, as separate infringements, maintaining only the objection in respect of the concerted practice relating to what it called the pre-pricing communications, and, second, the objections addressed to Fyffes, Van Parys and Del Monte, in its capacity as a supplier of bananas.

712 That last point merely articulates a simple difference between the addressees of the statement of objections and those of the contested decision from which the applicant cannot infer that there was a new complaint in respect of which it has not had the possibility of making its view known.

713 The applicant cannot, in those circumstances, reasonably invoke a breach of its rights of defence.

714 Last, in so far as the arguments concerning the discrepancy between the contested decision and the statement of objections may also be construed as amounting to support for the denial of the existence of an infringement, as they underline the 'absurdity' of the Commission's approach, it follows from the foregoing considerations that those arguments must, in that respect also, be rejected.

The arguments of the intervener

715 The intervener states that it supports the applicant in its plea alleging breach of its rights of defence, in so far as it demonstrates that the Commission breached essential procedural requirements during the investigation and when it allegedly established an infringement of Article 81 EC.

716 The intervener accuses the Commission of having failed to draw up disclosable records of hearings of witnesses who were important to the investigation and of having left it to Chiquita to conduct interviews with key witnesses and to produce a record of their statements.

717 The fourth paragraph of Article 40 of the Statute of the Court provides that an application to intervene is to be limited to supporting the form of order sought by one of the parties. Article 116(4) of the Rules of Procedure provides that the statement in intervention is to contain, in particular, a statement of the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, as well as the pleas in law and arguments relied on by the intervener.

718 Those provisions give the intervener the right to set out arguments as well as pleas independently, in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, as that would otherwise change the subject-matter of the dispute (see *Regione autonoma della Sardegna* v *Commission*, paragraph 312 above, paragraph 152 and the case-law cited).

719 It is thus for the Court, when determining the admissibility of the pleas and arguments put forward by an intervener, to determine whether they are connected with the subject-matter of the dispute, as defined by the main parties.

720 It must be noted in the present case that the intervener's complaint concerns the conduct of the investigation stage of the administrative procedure, on which the applicant made no comment in its written pleadings, the plea alleging breach of its rights of defence being founded on a failure to disclose documents after the undertakings concerned were granted access to the file and on an alleged contradiction between the statement of objections and the contested decision.

721 It thus appears that the complaint raised by the intervener is entirely unconnected with the issues set out in support of the plea put forward by the applicant in the present action, and that it therefore changes the subject-matter of the dispute, as established by the applicant and defendant. Consequently, it must, as the Commission contends, be rejected as inadmissible.

722 For the sake of completeness, even if the complaint could be deemed admissible, it would none the less have to be rejected.

723 First of all, it is common ground that the Commission's investigation file, to which Del Monte and Weichert had access, contains all the statements submitted by Chiquita in support of its leniency application, in accordance with point 11(a) of the Leniency Notice, on the basis of which the Commission relied, inter alia, in establishing an infringement of Article 81 EC.

724 Next, it must be borne in mind that there is no general duty on the part of the Commission to draw up minutes of discussions in meetings with the other parties which take place in the course of the application of the Treaty's competition rules. Nevertheless the fact remains that if the Commission intends to use in its decision inculpatory evidence provided orally by another participant in the infringement, it must make it available to the undertaking concerned so as to enable the latter to comment effectively on the conclusions reached by the Commission on the basis of that evidence. Where necessary, it must create a written document to be placed in the file (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraphs 66 and 67).

725 It must be held that the intervener's arguments are, in the light of that case-law, ineffective. Weichert merely claims that, owing to the absence of minutes, like Del Monte, it did not have access to potentially exculpatory evidence, which it confirmed at the hearing.

726 In those circumstances, it must be concluded that the Commission cannot be criticised for any breach of the rights of the defence.

727 It follows from the foregoing considerations that the applicant's claim for annulment of the contested decision must be dismissed.

The claim for a reduction of the fine

728 The applicant, supported by the intervener, raised two pleas in law, alleging a manifest error of assessment on the part of the Commission in setting the amount of the fine, and infringement of Article 23 of Regulation No 1/2003 as well as of Weichert's legitimate expectations.

729 It is evident from the written pleadings of the applicant and of the intervener that they put forward different complaints regarding the Commission's analysis of the gravity of the infringement, the additional amount, mitigating circumstances, the account taken of Weichert's cooperation and a specific complaint concerning the Commission's breaches of the principle of equal treatment.

1. *Preliminary observations*

730 It is common ground that, when setting the amount of the fine imposed on Del Monte and Weichert, the Commission applied the Guidelines (recital 446 to the contested decision), which have established a two-step calculation method (point 9 of the Guidelines).

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

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

…

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

…

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

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

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

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

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

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

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

…’

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

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

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

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

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

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

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

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

2. *Contested decision*

734 It will be recalled that the Commission stated that the basic amount of the fine consists of an amount of between 0% and 30% of an undertaking's relevant sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of the undertaking's sales, irrespective of duration (recital 448 to the contested decision).

735 In the contested decision, the value of Weichert's sales of fresh bananas in 2002 is estimated as EUR 82 571 574 (recitals 451 and 453).

736 In accordance with points 20 and 22 of the Guidelines, the Commission examined and took into account, when setting the proportion of the value of sales by reference to the degree of gravity of the infringement, various factors relating to the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether the infringement had been implemented, as is apparent from recitals 454 to 460 to the contested decision.

737 The Commission pointed out that the undertakings concerned had participated in a single and continuous infringement by a concerted practice by which they coordinated their quotation prices for bananas in Northern Europe and which therefore concerns the fixing of prices, practices relating to prices being by their very nature among the most harmful restrictions of competition, as they distort competition on a key parameter of competition (recital 455 to the contested decision).

738 The Commission also took into account the combined market share of the undertakings in respect of which the infringement could be established, estimated at around 40% to 45% (recital 457 to the contested decision), and the geographic scope of the infringement, which covered Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden (recital 458 to the contested decision).

739 On the basis of those factors, and the finding that the infringement had indeed been implemented, the Commission decided on the same proportion of the value of sales, that is 15%, determined by reference to the gravity of the infringement, for all the addressees of the contested decision (recital 460 to the contested decision).

740 Taking into account an infringement period from 1 January 2000 to 31 December 2002 and applying point 24 of the Guidelines, the Commission decided on a multiplier of 3 in respect of the duration of the infringement (recitals 461 and 462 to the contested decision).

741 In order to determine the additional amount provided for in point 25 of the Guidelines, the Commission referred, by means of a reference to section 8.3.1.1 of the contested decision, to its assessment of the abovementioned factors. It considered that the percentage to be applied in respect of the additional amount should be 15% (recitals 463 and 464 to the contested decision).

742 It will be recalled that point 25 of the Guidelines provides that, for the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, including, in particular, those referred to in point 22 of the Guidelines.

743 At the end of that first step, the Commission set the following basic amounts (recital 465 to the contested decision):

— EUR 208 000 000 for Chiquita;

— EUR 114 000 000 for Dole;

— EUR 49 000 000 for Del Monte and Weichert.

744 The basic amount of the fine to be imposed was reduced, on account of mitigating circumstances, by 60% for all the addressees of the contested decision, in view of the specific regulatory regime in the banana sector and on the ground that the coordination related to the quotation prices (recital 467 to the contested decision). A reduction of 10% was granted, also on account of mitigating circumstances, to Weichert, which had not been informed of the pre-pricing communications between Dole and Chiquita (recital 476 to the contested decision).

745 Furthermore, the Commission took the view that Weichert had not cooperated beyond its legal obligation to do so, and stated, in that regard, that Weichert's replies to the requests for information, which were provided within the time-limits laid down, were within the scope of the undertaking's obligation to cooperate actively, which implied that it had to make available to the Commission all information relating to the subject-matter of the investigation. The Commission decided not to apply the fourth indent of point 29 of the Guidelines, taking the view that the infringement in the present case fell within the scope of the Leniency Notice (recital 474 to the contested decision).

3. *Gravity*

746 The applicant claims that, although the Commission correctly acknowledges that Weichert's substantially limited role constitutes a mitigating circumstance under the Guidelines, it failed to take account of the fact that Weichert's alleged infringement was less serious than Dole's and Chiquita's

when it determined the basic amount of the fine and set the same amount for all three undertakings, contrary to the case-law referred to in recital 245 to the contested decision and points 20 to 23 of the Guidelines. The Commission's error in calculating the fine is said to stem from its misconception that there is a single infringement in the present case.

747 According to the intervener, the Commission breached the principle of proportionality by mischaracterising the gravity of the infringement, first, by relying on the fact that the concerted practice concerned the fixing of prices (recital 455 to the contested decision) while recognising that 'the cartel arrangement concerned quotation prices' (recital 456 to the contested decision), as opposed to actual prices; second, by asserting, without supporting evidence, that its conduct amounted to one of the most harmful restrictions of competition (recital 455 to the contested decision), despite a series of factors demonstrating the opposite; and, third, by failing to take into account the fact that the alleged infringement did not concern a large number of importers or a significant share of the market, that is 40% to 45%, or even 20% to 30%, having regard to the fact that the Commission does not hold Weichert or Del Monte responsible for the pre-pricing communications between Chiquita and Dole.

748 In the first place, it is appropriate to examine the complaint raised by the applicant together with the intervener's third argument mentioned above, in so far as it relates to the Commission's finding that there was a single infringement.

749 It has consistently been held that the gravity of an infringement is assessed in the light of numerous factors, in respect of which the Commission has a margin of discretion (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 43), such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (*Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraph 241, and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 68).

750 As has been stated above, the Commission determined the amount of the fines in the present case by applying the method laid down in the Guidelines.

751 It must be borne in mind that, according to the case-law, although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see *Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraph 209 and the case-law cited).

752 It is clear from points 19 to 26 of the Guidelines that, first of all, those guidelines provide for an assessment of the gravity of the infringement as such, which is used for the determination of the proportion of the value of sales and, subsequently, the basic amount of the fine.

753 Next, points 27 to 29 of the Guidelines provide for a variation in the basic amount of the fine on the basis of certain aggravating or mitigating circumstances, which are unique to each undertaking concerned.

754 Points 27 to 29 of the Guidelines reflect the case-law according to which, where an infringement has been committed by several undertakings, it is appropriate to consider the relative gravity of the participation of each of them (*Suiker Unie and Others* v *Commission*, paragraph 151 above, paragraph 623; *Commission* v *Anic Partecipazioni*, paragraph 296 above, paragraph 150; Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 184), so that it may be established whether aggravating or mitigating circumstances are applicable to them.

755 That conclusion follows logically from the principle that penalties must be appropriate to the offender and the offence, so that an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under

European Union competition rules (see, as regards the imputation of a fine, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63, and *Cheil Jedang* v *Commission*, paragraph 754 above, paragraph 185).

756 In the present case, the Commission conformed fully to the Guidelines and to the case-law referred to above in determining the amount of the fine imposed on Weichert.

757 As a first step, the Commission assessed the gravity of the infringement, viewed objectively, and was entitled in that respect to take into account the single nature of an infringement relating to the fixing of prices, involving undertakings representing almost half of the sector and covering eight Member States, which represented a substantial part of the European Union, including Germany, a very important market for bananas in Northern Europe.

758 As explained in paragraphs 590 to 650 above, the Commission was fully entitled to take the view that all the collusive practices in question constituted a single infringement, which resulted from the collective conduct of all the addressee undertakings, and all of them, including the undertaking comprising Weichert and the applicant, contributed to it.

759 It is, however, common ground that the undertaking comprising Weichert and the applicant did not contribute to the overall cartel to the same extent as Dole or Chiquita.

760 That is why, in a second step, the Commission assessed the relative gravity of Weichert's participation in the infringement by taking into account in this instance the fact that Weichert had participated in only one of the two aspects of the cartel, which justified a 10% reduction of the basic amount of the fine to be imposed, on account of mitigating circumstances.

761 It is thus apparent that the Commission took account of the fact that the unlawful conduct of the undertaking comprising Weichert and the applicant was of a less serious nature than that of Dole and Chiquita, and the Commission cannot therefore be criticised for any discrimination of the undertaking comprising Weichert and the applicant.

762 In those circumstances, the arguments of the applicant and of the intervener that the Commission was wrong to set the same basic amount of the fine for all the undertakings concerned as a result of the – equally erroneous – finding that there was a single infringement must be rejected.

763 In the second place, it must be observed that the arguments which the intervener put forward in support of its claim that the Commission breached the principle of proportionality by mischaracterising the gravity of the infringement, mentioned in paragraph 747 above, are entirely unfounded and must be rejected.

764 As regards the fact that the concerted practice penalised concerned prices that had been announced and not actual prices, which, according to the intervener, does not amount to price-fixing, it must be noted that that argument is intended, in fact, to contest the very existence of an infringement of Article 81(1) EC.

765 However, as has been stated in paragraph 585 above, the Commission was right to conclude that the pre-pricing communications which took place between Dole and Weichert and which related to the coordination of quotation prices for bananas concerned the fixing of prices and that they gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC.

766 In so far as the intervener's argument may be construed as an assertion of the lesser gravity of the infringement owing to the fact that it concerned prices that had been announced and not transaction prices, it must be pointed out that the Commission granted Weichert two reductions of the fine in

respect of mitigating circumstances, one of which (60%) was based on the existence of a specific regulatory regime and the fact that the cartel related to the quotation prices (recital 467 to the contested decision). The size of that reduction rules out any breach of the principle of proportionality by the Commission.

767 Neither the applicant nor the intervener submitted specific comments on the way in which the Commission took the two aforementioned factors into account when calculating the fine, or on the exact amount of the percentage reduction applied by the Commission.

768 As regards the assertion that the Commission took the view that Weichert's conduct amounted to one of the most harmful restrictions of competition even though Weichert's customers had confirmed that there was no harm, it is important to bear in mind that the first example of a cartel given in Article 81(1)(a) EC, expressly declared incompatible with the common market, is precisely that which 'directly or indirectly [fixes] purchase or selling prices or any other trading conditions'. The practice that was the object of the cartel is expressly prohibited by Article 81(1) EC, as it involves inherent restrictions on competition in the common market.

769 Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. Therefore, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices (*T-Mobile Netherlands and Others*, paragraph 297 above, paragraphs 38 and 39).

770 The system of penalties for infringement of the competition rules, as established by Regulations No 17 and No 1/2003 and interpreted by the case-law, shows that, by reason of their very nature, cartels merit the severest fines. The effect of an anti-competitive practice is not in itself a decisive factor for determining the level of fines (Case C-554/08 P *Carbone-Lorraine* v *Commission* [2009] ECR I-189, paragraph 44).

771 Point 23 of the Guidelines must be read in the light of those considerations and is worded as follows:

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

772 It must be noted that the expression 'horizontal price-fixing agreements' includes concerted practices within the meaning of Article 81 EC and, moreover, that the Guidelines do not mention any taking into account of an actual impact of the infringement on the market in the context of the determination of the proportion of the value of sales by reference to the gravity of the infringement.

773 In accordance with points 20 and 22 of the Guidelines, the Commission in this case examined and took into account, when setting that proportion, various factors relating to the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether the infringement had been implemented, as is apparent from recitals 454 to 459 to the contested decision, and there was no examination of the restrictive effects on competition of the practice in question.

774 In response to Weichert's argument that the infringement had no actual effect on the market, the Commission merely stated, in recital 472 to the contested decision, that the infringement was implemented and that 'effects could be expected' from the anti-competitive conduct, in so far as 'the coordination in the setting of quotation prices was by its nature liable to have effects on the market in the circumstances of this case'. As the Commission correctly points out in the same recital, 'actual effects of the conduct could be relevant only under point 31 of the … Guidelines, which provides for

the Commission to increase the fine that would otherwise be applied in order to exceed the amount of "gains improperly made as a result of the infringement".' It is, however, undisputed that the Commission did not apply that provision in the contested decision.

775 In those circumstances, the reference to the letters from Weichert customers purporting to demonstrate the absence of any harm as a result of the anti-competitive conduct of the undertaking comprising Weichert and the applicant is entirely irrelevant.

776 It must be stated that, by setting an amount of 15% of the value of Weichert's sales, the Commission applied a proportion 50% lower than that which may be generally applied in horizontal agreements or concerted practices fixing prices, that is 30%. Point 23 of the Guidelines indicates clearly that the proportion to be applied in respect of horizontal agreements or concerted practices fixing prices will generally be at the 'higher end of the scale', the rate of 15% set by the Commission being in the lower part of the 'higher end of the scale'.

777 That rate of 15% of the value of Weichert's sales cannot be considered disproportionate in the light of an infringement concerning price-fixing, involving undertakings representing almost half of the industry and covering eight Member States that represented a substantial part of the European Union, including Germany, a very important market for bananas in Northern Europe.

778 It follows from this that the arguments of the applicant and of the intervener that the Commission erred in its assessment of gravity for the purposes of determining the basic amount of the fine must be rejected.

4. *The additional amount*

779 The intervener claims that the Commission misapplied its Guidelines on the method of setting fines by imposing an 'entry fee' pursuant to point 25 of the Guidelines, which refers only to 'agreements', a characterisation not applied in the contested decision.

780 That argument must be rejected as being based on a partial – in both senses of the term – reading of the Guidelines.

781 Point 25 of the Guidelines provides that the basic amount will include a sum of between 15% and 25% of the value of sales in order to deter undertakings from entering into 'horizontal price-fixing, market-sharing and output-limitation agreements', an expression which also appears in point 23 of the Guidelines, which refers to footnote 2, in which it is specified that the concept of agreements includes 'concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty'.

782 A systematic and consistent interpretation of the Guidelines permits the conclusion that the clarification provided in footnote 2 relates just as much to the same concept of agreements used in point 25 of the Guidelines.

783 The intervener's argument, attributable to point 25 of the Guidelines being read in isolation, is inconsistent with the wording of that provision. The additional amount provided for in that provision is a proportion of the value of sales of the undertaking, as defined under the heading 'A. Calculation of the value of sales' in the Guidelines, just like the amount determined by reference to the gravity of the infringement, and the proportion to be taken into account depends on the Commission's assessment of factors, 'in particular those referred [to] in point 22', which relate to the determination of the share of the value of sales fixed by reference to the gravity of the infringement.

784 It must be noted that mention of the fact that 'the Commission may also apply such an additional amount in the case of other infringements', in point 25 of the Guidelines, allows concerted practices to be included within the scope of that provision in any event.

785 Last, it must be noted that, in reply to a question from the Court concerning the effect on the amount of the fine of characterisation as a 'single infringement', the intervener put forward two complaints relating to the additional amount applied in the contested decision.

786 First, the intervener maintained that there was no further basis on which to apply that amount since a 'bilateral' infringement cannot be described as a horizontal price-fixing agreement or even as a price-fixing infringement.

787 In doing so, the intervener reiterates, in particular, the arguments put forward by the applicant in disputing any infringement of Article 81 EC.

788 It will be recalled, however, that the Commission correctly found that the pre-pricing communications between Dole and Weichert concerned price-fixing and constituted one of two aspects of the overall cartel, to which the undertakings concerned had contributed.

789 The complaint mentioned in paragraph 786 above must therefore be rejected.

790 Second, the intervener submitted that there was no justification for imposing an additional amount of 15% of the value of sales. The imposition of the minimum percentage which does not take account of the specific circumstances of the infringement is contrary to the principle of proportionality.

791 That new complaint must be declared inadmissible as being unconnected with the subject-matter of the Court's particular inquiry concerning, specifically, the concept of a single infringement and its effects on the amount of the fine. It must be noted that, having set out its arguments in response to the Court's question, the intervener stated that, even if the Court did not accept that argument, there was no justification for imposing an additional amount of 15%, since the mere fact that the Guidelines lay down that minimum percentage is not decisive.

792 Furthermore, in raising a new complaint in the course of proceedings, the intervener disregarded Article 48(2) of the Rules of Procedure. The complaint is not based on new matters which have come to light in the course of the procedure, nor is it an amplification of a complaint previously made, expressly or by implication, in the application and closely linked to the application. It must, therefore, be declared inadmissible (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraphs 156 and 157, confirmed by order of the Court of Justice of 27 September 2002 in Case C-204/02 P *Joynson* v *Commission*).

793 For the sake of completeness, that complaint must, in any event, be rejected as being based on a false premiss.

794 It must be observed that the Commission, in accordance with points 20 and 22 of the Guidelines, examined and took into account when setting the proportion of the value of sales by reference to the degree of gravity of the infringement, various factors relating to the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether the infringement had been implemented, as is apparent from recitals 454 to 459 to the contested decision. In order to determine the additional amount provided for in point 25 of the Guidelines, the Commission referred, by an express reference to section 8.3.1.1 of the contested decision, to its assessment of those factors, as can be seen in recital 463 to the contested decision.

795 It will be recalled that point 25 of the Guidelines provides that, for the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, including, in particular, those referred to in point 22 of the Guidelines.

796 It is thus apparent that the Commission took into account various factors specific to the unlawful conduct in question and, by merely alleging that there was no justification for imposing an additional amount of 15%, the intervener has not relied on any evidence that is inconsistent with the Commission's findings.

5. *Mitigating circumstances*

797 In the first place, the intervener maintains that the reduction of 10% granted by the Commission is insufficient to reflect its minor weight and role in the alleged infringement, which is characterised by various factors: first, by comparison with pre-pricing communications between Chiquita and Dole, those between Dole and the intervener are less important, as follows from recitals 76 et seq. and 93 to 99 to the contested decision; second, the intervener played a passive role, since it was almost always a Dole employee who contacted the intervener; and, third, the Commission does not hold the intervener and Del Monte responsible for the pre-pricing communications between Chiquita and Dole.

798 The applicant also pleads the fact that pre-pricing contacts between Weichert and Dole were significantly less intense and frequent than those between Dole and Chiquita.

799 It should be noted that, under the third indent of point 29 of the Guidelines, in order to benefit from a reduction in the amount of the fine on account of mitigating circumstances, the undertaking concerned must '[provide] evidence that its involvement in the infringement is substantially limited' and 'thus [demonstrate] that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market'.

800 The mere fact that Weichert may have had a minor or passive role does not demonstrate that it adopted competitive conduct on the market. The conditions for the application of the third indent of point 29 of the Guidelines are not, therefore, satisfied in the present case.

801 That conclusion does not mean that Weichert's minor or passive role, assuming it is established, cannot give rise to a reduction in the amount of the fine. The list of circumstances set out in point 29 of the Guidelines is only indicative, as is confirmed by the use of the expression 'such as'. Furthermore, the Commission's discretion and the self-imposed limits on it do not prejudge the exercise, by the Courts of the European Union, of their unlimited jurisdiction (Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 226 and 227, confirmed on appeal in *Erste Group Bank and Others* v *Commission*, paragraph 91 above).

802 It has consistently been held that a passive role implies that the undertaking will adopt a 'low profile', that is to say, not actively participate in the creation of any anti-competitive agreements (*Cheil Jedang* v *Commission*, paragraph 754 above, paragraph 167, and Case T-73/04 *Carbone-Lorraine* v *Commission*, paragraph 749 above, paragraph 163, confirmed on appeal in Case C-554/08 P *Carbone-Lorraine* v *Commission*, paragraph 770 above).

803 Among the factors likely to demonstrate an undertaking's passive role in a cartel, a significantly more sporadic participation at meetings than that of the other ordinary members of the cartel can be taken into account, as well as its late entry on the market which is the subject of the infringement, independently of the duration of the undertaking's participation, or even the existence of statements

dealing specifically with that point coming from other representatives of undertakings which participated in the infringement (see Case T-73/04 *Carbone-Lorraine* v *Commission*, paragraph 749 above, paragraph 164 and the case-law cited).

804 First of all, the intervener maintains that it is apparent from recitals 93 to 99 to the contested decision that communications between Mr B., a Chiquita employee, and Mr H., a Dole employee, were the 'central axis' of the infringement. That argument is irrelevant in so far as the recitals referred to relate only to the duration of the infringement, which covered the same period so far as concerns Dole and Weichert, from 1 January 2000 to 31 December 2002, the infringement period having ended one month earlier in Chiquita's case.

805 Next, Weichert and Del Monte claim that there was a greater frequency of pre-pricing communications between Chiquita and Dole, by comparison with communications with Dole.

806 The information contained in the contested decision does not reveal a significantly higher frequency of communications between Dole and Chiquita than those between Dole and Weichert.

807 According to the telephone records of Chiquita's outgoing calls to Dole, there were 55 calls between Chiquita and Dole on Wednesdays (recital 76 to the contested decision), 53 on Thursdays (recital 77), and Dole estimates that the number of weeks in which the parties communicated both on Wednesday and on Thursday morning was 20 (recital 86). Moreover, Dole estimates the frequency of calls as about 20 per year, with fewer calls towards the end of the period concerned (recital 79).

808 As regards the communications between Dole and Weichert, in respect of which no telephone records are available, Dole first stated, in its reply to requests for information, that it communicated with Weichert 'almost weekly', that is approximately 40 weeks per year, before submitting, in the reply to the statement of objections, that 'the market conditions exchange occurred approximately every other week, due to travel and other commitments', a reason that had already been put forward in the reply to requests for information to explain the alleged number of communications (recitals 87 and 88 to the contested decision).

809 In its reply to a request for information of 15 December 2006, Weichert stated that communications with Dole did not take place every Wednesday but on average once or twice a month. When asked by the Commission on 5 February 2007 to specify a number of weeks per year, Weichert submitted that its employees had communications with Dole approximately 20 to 25 weeks per year (recital 87 to the contested decision).

810 Weichert then went on to state, in the reply to the statement of objections, that the contacts with Dole took place 'on average no more than once or twice a month', without explicitly backtracking on the initial estimate. This led the Commission to estimate that the frequency of those contacts was approximately 20 to 25 weeks per year, which is consistent with Dole's statements (recitals 90 and 91 to the contested decision).

811 While it is true that the figures stated in relation to the contacts between Dole and Chiquita do not take into account calls from Dole to Chiquita, it must nevertheless be borne in mind that the Commission was fully entitled to conclude that, given their number and consistency, the bilateral communications between Dole and Weichert constituted an established pattern of dissemination of information which the undertakings used according to their needs, just like communications between Dole and Chiquita.

812 Last, the intervener submits that it was almost always a Dole employee who called it, and refers in that respect only to its statements in reply to a request for information of 15 December 2006.

813 It must, however, be noted that Dole stated during the administrative procedure that communications were initiated either by Dole itself or by Weichert (recital 68 to the contested decision). Furthermore, Weichert does not claim, much less provide proof, that it refused a single contact with Dole on a Wednesday afternoon or that it interrupted its communications with Dole during the three years of the infringement. It appears therefore that Weichert was fully engaged, for three years, in collusive contacts with Dole, which is not consistent with its claim to have had a passive role.

814 Nevertheless Weichert participated in only one aspect of the overall cartel, which justified the grant of a 10% reduction of the basic amount of the fine.

815 As the applicant and the intervener submit, that reduction and the resulting amount of the fine do not adequately reflect the relative gravity of Weichert's participation in the overall cartel and are thus contrary to the principle of proportionality.

816 Weichert's contribution to the overall cartel on account of its bilateral pre-pricing communications with Dole were less harmful to competition than that of Dole and Chiquita in view of Chiquita's economic strength. As the Commission pointed out in the contested decision, Chiquita is the largest supplier of bananas in Europe and the value of sales of fresh bananas in 2001 was estimated as EUR 365 800 000, a figure which was revised to EUR 347 631 700 after subtracting bananas purchased from the other addressees of the contested decision (recitals 451 to 453 to the contested decision).

817 In those circumstances and in its unlimited jurisdiction the Court considers that the amount of the reduction to be applied to the basic amount of the fine should be raised to 20%, in order that appropriate account may be taken of the relative gravity of Weichert's participation in the overall cartel.

818 By contrast, it is necessary to rule out any suggestion that the fact that Weichert was not aware of the unlawful communications between Dole and Chiquita has been taken into account twice, in the form of a reduction of the rate of 15% applied in determining the share of sales, and a reduction in the basic amount granted in respect of mitigating circumstances, which would represent a disproportionate advantage for Weichert.

819 In the second place, the intervener claims that the Commission failed to take into account its legitimate expectations that the conduct in question was lawful. It shared information relating to official prices and other market information with its customers, the Commission and other public authorities, such as the FAO. It states that it had no reason to distinguish between the various communications taking place on Tuesdays, Wednesdays or Thursdays; the Commission itself regarded those communications, in the statement of objections, as an indistinguishable 'network' of 'complex bilateral arrangements'.

820 It should be noted that the last indent of point 29 of the Guidelines provides that '[t]he basic amount may be reduced … where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation'.

821 In so far as the intervener's arguments are designed to secure a reduction of the fine on the basis of that provision, the conditions for its application are not satisfied.

822 In support of its assertions the intervener merely refers to paragraph 244 of its reply to the statement of objections, in which it states that it collected the banana arrivals information initially for a German Government delegation and the FAO. There is no reference to the Commission as a recipient or to the transmission of information relating to quotation prices.

823 Weichert does not rely on any concrete, objective evidence to show that the Commission or another public institution was aware of its quotation prices and of the circumstances in which they were set from 2000 to 2002 or, moreover, authorised or encouraged the anti-competitive conduct governing the setting of those prices.

824 In so far as the intervener's arguments may be construed as confirmation of a lack of awareness that Article 81 EC was being infringed inasmuch as the cartel was not secret, it must be borne in mind that the earlier version of the Guidelines provided for the possibility of a reduction of a fine on account of mitigating circumstances owing to the existence 'of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement'.

825 The fact that that provision is no longer included in the Guidelines does not mean that the circumstance referred to can no longer give rise to a reduction of a fine on account of mitigating circumstances.

826 In support of its claims, the intervener refers to the letters from customers which have been found (see paragraph 341 above) not to offer all the requisite guarantees of objectivity or, moreover, sufficient probative value for it to be concluded that the full extent of the cartel was known to the public (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 801 above, paragraph 506, confirmed on appeal in *Erste Group Bank and Others* v *Commission*, paragraph 91 above, paragraph 241).

827 Even if the intervener's arguments include the allegation of a breach of the principle of legitimate expectations, it should be borne in mind that the right to rely on such a principle extends to any person in a situation in which it is apparent that the administration has caused that person to entertain justified hopes (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-153, paragraph 26). Moreover, a person may not plead breach of that principle unless he has been given precise assurances by the administration (see Case C-67/09 P *Nuova Agricast and Cofra* v *Commission* [2010] ECR I-9811, paragraph 71, and Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59 and the case-law cited).

828 In the present case, it is sufficient to note that Weichert has not provided any concrete, objective evidence to prove that precise assurances were given by the Commission as to the lawfulness of the pre-pricing communications with Dole. Mere vague and unsubstantiated claims that Weichert shared information with the Commission on official prices and banana arrivals are of no evidential value in that respect.

829 Last, the intervener's reflections on the allegedly indistinguishable nature of the various types of collusive contact, which are inconsistent with the wording of paragraph 429 of the statement of objections (see paragraph 709 above), are entirely irrelevant as they do not warrant the benefit of a mitigating circumstance being attributed on any one of the three grounds mentioned above.

830 It follows from this that the Court cannot, so far as Weichert is concerned, recognise any mitigating circumstances other than those accepted by the Commission, in respect of one of which the Court has applied an increase.

6. *Cooperation*

831 The applicant maintains that the Commission misinterpreted the Leniency Notice and the Guidelines and thus deprived Weichert of the benefits resulting from its cooperation. The Commission infringed Article 23 of Regulation No 1/2003 and Weichert's legitimate expectations.

832 The applicant, supported by the intervener, states that it is incorrect to assert that Weichert did not effectively cooperate beyond its legal obligation to do so, since it responded to requests for information that sought self-incriminating statements. The applicant emphasises that Weichert also did not substantially contest the facts and that its contribution therefore went beyond the 'scope of the undertaking's obligation to cooperate actively'.

833 The applicant claims that the Commission was wrong to assert that the alleged infringement fell within the scope of application of the Leniency Notice and that it could therefore not take into account the extent of the applicant's and Weichert's cooperation as a mitigating circumstance, since the present application demonstrated that the exchanges in question did not amount to price-fixing. The Commission also erred by not considering whether the cooperation provided represented significant added value within the meaning of point 21 of the Leniency Notice, as it had done in a previous decision for an undertaking which had not made an application pursuant to that notice.

834 In the first place, it is necessary to recall the terms of Article 18 of Regulation No 1/2003, which is worded as follows:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

…'

835 Requests for information were previously governed by Article 11 of Regulation No 17, which already provided for a distinction between a request for information and a decision calling for information. The case-law relating to that provision and clarifying the Commission's powers to make such requests is applicable by analogy in the interpretation of Article 18 of Regulation No 1/2003.

836 Therefore, it must be concluded that although, in order to preserve the effectiveness of Article 18(2) and (3) of Regulation No 1/2003, the Commission is entitled to compel an undertaking to provide all the necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish the existence of anti-competitive conduct by it or another undertaking, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned (see, to that effect and by analogy, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 34, and *Erste Group Bank and Others* v *Commission*, paragraph 91 above, paragraph 271). Thus, the

Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove (*Orkem* v *Commission*, paragraph 35).

837 Taking into account the case-law referred to above, recital 23 of Regulation No 1/2003 states that '[w]hen complying with a decision of the Commission', undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

838 In the present case it is common ground that the requests for information sent, inter alia, to Weichert in the course of the investigation were sent pursuant to Article 18(2) of Regulation No 1/2003 (recital 46 to the contested decision) and are not, therefore, decisions calling for information, which are covered by Article 18(3).

839 In those circumstances, the applicant and the intervener cannot properly rely on the fact that, in view of the scope of the Commission's questions and the answers given by Weichert, the latter went beyond its legal obligation to cooperate by incriminating itself.

840 By contrast, it is appropriate to consider whether Weichert's voluntary cooperation may justify a reduction of the fine, having regard to the terms of the Leniency Notice, as the applicant claims.

841 It must be borne in mind that the Commission has a wide discretion as regards the method of calculating fines and that it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned (*SGL Carbon* v *Commission*, paragraph 749 above, paragraph 81, and Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 219).

842 The reduction of fines in the event of cooperation from undertakings which have participated in infringements of European Union competition law is based on the consideration that such cooperation facilitates the Commission's task of establishing an infringement and, where relevant, of bringing it to an end (*Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraph 399, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363), the conduct of the undertaking being required also to reveal a genuine spirit of cooperation (*Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraphs 395 and 396). In view of the rationale for the reduction, the Commission cannot disregard the usefulness of the information provided, which necessarily depends on the evidence already in its possession (*Gütermann and Zwicky* v *Commission*, paragraph 841 above, paragraph 221).

843 In the Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from a fine, or may be granted a reduction in the amount of that fine.

844 In the latter case, the undertakings concerned must, to that end, provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate their involvement in the suspected infringement no later than the time at which they submit the evidence (point 21 of the Leniency Notice).

845 The Commission stated, in the defence, that the information provided by Weichert had not represented significant added value, as it already had information concerning the pre-pricing communications between Weichert and Dole from the beginning, Chiquita having indicated that Dole would report to it the intended pricing development for Del Monte-branded bananas, which were marketed by Weichert.

846 Although Chiquita did indeed indicate in the statement in question that Dole had 'sometimes' referred in their conversations to Del Monte's price, it explained that that price was not important for Chiquita, since at that time the Dole and Del Monte prices were always identical each week.

847 In addition to the relatively low inherent probative value of information from Chiquita regarding the existence of a collusive practice between Dole and Weichert, the clarification provided by Chiquita might also suggest that Weichert merely adopted a 'follow-my-leader' approach in relation to Dole's pricing policy.

848 It must be observed that the Commission did not rely on any other evidence to demonstrate its awareness, when it issued its request for information to Weichert, of the anti-competitive nature of the bilateral contacts with Dole, it being noted that, significantly, the Commission has changed its stance and contends in the rejoinder that it already knew about 'the possible' anti-competitive nature of the communications between Dole and Weichert when it sent the requests for information.

849 The applicant, by contrast, correctly points out that on 6 June 2006 the Commission inquired for the first time about Weichert's contacts with Dole and asked Weichert 'what was typically discussed', to which Weichert replied that it 'occasionally … also spoke with Dole on Wednesday afternoon in relation to "official" prices'. The Commission sent Weichert a second request for information on 15 December 2006, containing the following question: 'Please explain what is meant by "spoke with Dole on Wednesday afternoon in relation to 'official' prices."' Weichert answered as follows: 'On some occasions Dole called Weichert on Wednesday to exchange views about general conditions prevailing on the market … and rarely also the possible evolution of official prices prior to the communication of official prices'.

850 It is common ground that the Commission relied on Weichert's reply in concluding that there were bilateral pre-pricing communications between Weichert and Dole and a concerted practice having an anti-competitive object (see recitals 189, 191, 193, 196, 266 and 298 to the contested decision).

851 According to point 22 of the Leniency Notice, the concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature or its level of detail, the Commission's ability to prove the facts in question.

852 The information provided by Weichert, which relates directly to the facts in question, is particularly significant in the context of unlawful conduct consisting of exchanges of information on a bilateral and oral basis, the undertakings concerned having moreover provided neither notes nor records of those communications. The content, timing and frequency of communications between Dole and Weichert are evident only from the undertakings' statements.

853 Such a situation justifies the grant, on account of Weichert's cooperation during the administrative procedure, of a reduction of the fine the appropriate quantum of which it is for the Court, in the exercise of its unlimited jurisdiction, to determine.

854 It must be borne in mind in that regard that it falls to the Court, in reviewing the legality of the contested decision, to verify whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and the Leniency Notice and, to the extent to which it establishes any departure therefrom, to verify whether that departure is legally justified and supported by a statement of reasons to the requisite legal standard. However, the Commission's discretion and the

self-imposed limits on it do not prejudge the exercise, by the Courts of the European Union, of their unlimited jurisdiction (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 801 above, paragraphs 226 and 227, confirmed on appeal in *Erste Group Bank and Others* v *Commission*, paragraph 91 above).

855 While the information provided by Weichert unquestionably enabled the Commission to establish the existence of an infringement with less difficulty, the significance of Weichert's cooperation must nevertheless be placed in context in the light of the continuous denial of any infringement throughout the administrative procedure.

856 In those circumstances, Weichert must be granted a reduction of 10% of the amount of the fine on account of its cooperation during the administrative procedure.

857 In the second place, as regards the claim made on the basis that the facts were not contested, it must be observed that, unlike the earlier, 1996 version, the Leniency Notice makes no express provision for a reduction of the fine in a simple case of non-contestation of the facts. That finding does not in any way preclude the possibility of that aspect giving rise to a reduction of the fine to take account of Weichert's cooperation.

858 As stated in paragraph 854 above, the Commission's discretion and the self-imposed limits on it do not prejudge the exercise, by the Courts of the European Union, of their unlimited jurisdiction.

859 It must be pointed out that in order to receive a reduction in the fine on the ground of not contesting the facts, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 303, confirmed on appeal in Case C-411/04 P *Salzgitter Mannesmann* v *Commission* [2007] ECR I-959, paragraph 71), which is not even claimed with regard to Weichert.

860 In the present case, the applicant merely claims that Weichert also did not 'substantially' contest the facts, the wording in itself reflecting the lack of precision of the claim. The applicant does not set out any other arguments to demonstrate in concrete terms that the alleged non-contestation of the facts enabled the Commission to identify and penalise the infringement more easily and that that assistance therefore represented significant added value with respect to the evidence already in the Commission's possession.

861 The applicant also refers to the decision of 20 October 2005 in Case COMP/C.38.281/B.2 – Raw Tobacco Italy, in which the Commission granted an undertaking a 50% reduction of the fine, in respect of mitigating circumstances, for its effective cooperation outside the scope of the Leniency Notice, an outcome which, in the applicant's view, should be applied to Weichert which provided the Commission with the 'decisive elements for the establishment of the objections'.

862 It must be borne in mind that the Court of Justice has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (*JCB Service* v *Commission*, paragraph 91 above, paragraph 205). The Commission enjoys a wide discretion in setting the amount of fines and is not bound by assessments made by it in the past. It follows that the applicant cannot invoke the Commission's decision-making policy as an argument before the Courts of the European Union (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 82, and *Erste Group Bank and Others* v *Commission*, paragraph 91 above, paragraph 123).

863 The same conclusion must be drawn in the light of the claim for a reduction of the fine on the basis that the Commission has granted reductions in other decisions on account of 'exceptional circumstances'. The mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure. In fixing the amount of fines, the Commission has a discretion which allows it to raise the general level of fines at any time, within the limits set out in Regulation No 1/2003, if that is necessary to ensure the implementation of the European Union competition policy (*Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraphs 190 and 191).

864 It must also be noted that the infringement established in the present contested decision does indeed fall within the scope of the Leniency Notice, which relates to secret cartels consisting in fixing prices, production or sales quotas and sharing markets, including bid-rigging, or restricting imports or exports. The applicant cannot therefore validly complain that the Commission failed to take into account the extent of Weichert's cooperation as a mitigating circumstance outside the legal framework of the Leniency Notice (see, to that effect, Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 609 and 610, confirmed on appeal, in particular on that point, in *Dansk Rørindustri and Others* v *Commission*, paragraph 54 above, paragraphs 380 to 382; and Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 586).

865 Last, the applicant asserts that the present case demonstrates that undertakings that legitimately defend themselves by maintaining that the practices found by the Commission do not infringe Article 81 EC are in a worse position than undertakings involved in practices that are clearly serious infringements, as the former cannot receive a reduction either under the Leniency Notice, since they maintain that their conduct is legal, or under the Guidelines, since the Commission apparently takes the view that their conduct falls within the scope of the Leniency Notice.

866 Those general and imprecise considerations are not such as to show that there has been an infringement of any provision, and of Article 23 of Regulation No 1/2003 in particular, or of a general principle of law that would prove that the contested decision is unlawful and warrant a reduction of the fine. As the Commission points out, the only meaningful comparison in the context of a proceeding under Article 81 EC is that between those entities which cooperate voluntarily and those undertakings which refrain from any cooperation, since the latter cannot claim to be disadvantaged in relation to the former.

7. *Breaches of the principle of equal treatment*

867 The intervener maintains that the Commission granted immunity to Chiquita for conduct that did not satisfy the requirements of the Leniency Notice, as that conduct was not secret. It submits that, according to the case-law, the principle of equal treatment requires that where the unfairness cannot be remedied by increasing the unfairly low level of fines imposed on one party, the only remedy is to reduce the level of fines imposed on the other party to the same level. It claims that the Commission breached the principle of equal treatment by closing the investigation in respect of Fyffes without imposing a fine, contrary to the treatment of Del Monte and Weichert for the same conduct.

868 Those arguments must be rejected as being entirely unfounded.

869 First, such arguments are based on an unproven premiss that the cartel was not secret. Further, even if the Commission did wrongly grant Chiquita immunity from fines by misapplying the Leniency Notice, it must be borne in mind that respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225,

paragraph 14; *SCA Holding* v *Commission*, paragraph 63 above, paragraph 160, confirmed on appeal in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 367).

870 Second, it must be observed that where an undertaking has acted in breach of Article 81 EC, it cannot escape being penalised altogether on the ground that one or more other traders have not been fined, when those traders' circumstances are not even the subject of proceedings before the Court (*Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 297 above, paragraph 197, and Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 56). This is true of Fyffes, which is not an addressee of the contested decision and was not, therefore, penalised.

The Commission's request for an increase in the fine

871 In its arguments in response to those of the applicant on the account taken of Weichert's cooperation, the Commission asks the Court to increase the amount of the fine by reassessing the reduction granted in respect of the mitigating circumstances relating to the specific regulatory regime of the banana sector at the material time, and the fact that the collusive contacts related to the quotation prices (recital 467 to the contested decision). The Commission contends that that request is justified by the applicant's statements during the administrative procedure regarding the possible fragmentation of supply on the relevant market and the greater importance of quotation prices than that attributed in the contested decision.

872 It must be borne in mind that, in the exercise of their unlimited jurisdiction, the Courts of the European Union are empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 61).

873 In the present case, the Commission's request for an increase in the fine cannot be approved, as the imprecise arguments put forward in support of that request are not such as to alter the assessment of the gravity of the infringement.

874 It must be pointed out that the Commission found that as a result of the quota regime the total amount of bananas imported into the Community as a whole in any given quarter during the relevant period was determined *a priori*, subject to some limited flexibility between quarters, given that there were strong incentives for anyone holding a licence to ensure that it would be used in the relevant quarter (recital 134 to the contested decision). It supplemented and clarified its position, however, rightly emphasising importers' discretion as to the volume available on the market in any given week and the fact that there was flexibility as a result of the secondary market in licences (recitals 131 and 132 to the contested decision).

875 Del Monte's statements during the administrative procedure concerning the acquisition of licences from other undertakings on that market were taken into account by the Commission for the purposes of its findings on the legal and economic context of the exchanges in question, and there is no need to reduce, on that ground alone, the reduction granted in recital 467 to the contested decision.

876 The same applies to the statements which the applicant made during the administrative procedure on the role of quotation prices, which the Commission took into account for the purposes of its findings on the relevance of those prices in the banana sector and the growing importance of the 'Aldi price' from the second half of 2002.

877 Even on the assumption that the applicant's statements could demonstrate a close link between the quotation prices and the 'Aldi price', that finding would merely reinforce the finding concerning the importance of quotation prices on the relevant market, without changing the degree of gravity of the infringement.

878 It follows from all the foregoing considerations that the applicant's request for a reduction of the fine must be granted, and the action dismissed as to the remainder.

879 In the exercise of the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003, the Court must determine the amount of the fine payable under Article 2(c) of the contested decision.

880 It is appropriate in those circumstances, to apply two reductions to the basic amount of Weichert's fine (EUR 49 000 000): a reduction of 60% to take account of the specific regulatory regime in the banana sector and coordination in relation to the quotation prices, and a reduction of 20% on account of the fact that Weichert participated in only one aspect of the overall cartel. This establishes a basic amount of the fine of EUR 9 800 000, to which a 10% reduction must be applied in respect of Weichert's cooperation during the administrative procedure, which produces a final amount of EUR 8 820 000.

Costs

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

882 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than those mentioned in the second subparagraph of that provision to bear his own costs.

883 Since the action has been only partly successful, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear its own costs and to pay three quarters of the costs incurred by the Commission. The Commission is to bear one quarter of its own costs. The intervener is to bear its own costs, no order having been sought by the Commission that the intervener should pay the costs of the intervention.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Sets the amount of the fine imposed under Article 2(c) of Commission Decision C(2008) 5955 of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39188 - Bananas) at EUR 8.82 million;**

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

3. **Orders Fresh Del Monte Produce, Inc. to bear its own costs and to pay three quarters of the costs incurred by the European Commission, and the Commission to bear one quarter of its own costs;**

4. **Orders Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG to bear its own costs.**

Truchot Martins Ribeiro Kanninen

Delivered in open court in Luxembourg on 14 March 2013.

[Signatures]

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