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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15 X 2008
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COMMISSION DECISION

of 15 X 2008

relating to a proceeding under Article 81 of the EC Treaty

Case COMP/39188 - Bananas

(ONLY THE ENGLISH AND GERMAN TEXTS ARE AUTHENTIC)

Parts of this text have been edited to ensure that confidential information is not disclosed;
those parts are marked as [...].

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COMMISSION DECISION

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relating to a proceeding under Article 81 of the EC Treaty

Case COMP/39188 - Bananas

(Only the English and German texts are authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 14 June 2007 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions³,

Having regard to the final report of the hearing officer in this case⁴,

Whereas:

1. INTRODUCTION

¹ OJ L 1, 4.1.2003, p. 1.

² OJ L 123, 27.4.2004, p. 18.

³ To be published in the Official Journal.

⁴ To be published in the Official Journal.

- (1) This decision relates to a concerted practice between certain banana suppliers by which they coordinated quotation prices for bananas which they each set weekly.
- (2) The infringement which is the subject of this decision relates to the supply of bananas to the Northern European region of the Community. For the purpose of this decision, "the Northern European region" comprises Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.
- (3) The duration of the infringement is from 1 January 2000 to 31 December 2002 (for the duration for specific undertakings see sections 4.3 and 7.1).

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

- (4) The product subject to the proceedings is bananas (fresh fruit).⁵ Both un-ripened (green) bananas and ripened (yellow) bananas are covered by this decision.
- (5) There is a certain level of differentiation through brand preference (see section 2.3.1). Bananas are a 52-week product, the demand for which is slightly higher in the first half of the year and lower in the second part of the year, notably during the summer period. Bananas imported into the Northern European region are grown mostly in the Caribbean region, Central America and some African countries. They are carried in refrigerated ships to European ports.
- (6) On the basis of official statistics, apparent consumption⁶ of bananas in the geographic area covered by this decision is estimated to be slightly less than 90 million boxes in 2002 (see section 2.3.1).

2.2. The undertakings subject to the proceedings

- (7) The undertakings which took part in the contacts between competitors which are described in this decision are hereinafter collectively referred to as "the parties". The addressees of this decision are collectively referred to as "the addressees".

2.2.1. Chiquita

- (8) The Chiquita group is an international marketer and distributor of bananas and other fresh fruit sold under the brand Chiquita and other brand names (the best known of these other brands for bananas in the Northern European region is Consul) in over 60 countries. The company is one of the largest banana producers in the world and the

⁵ In the context of this decision, sales of fresh bananas are defined as sales of bananas minus dried bananas and plantains.

⁶ Apparent consumption in volume is calculated by adding the Eurostat figures for import of bananas into the Northern European region and subtracting exports. The Commission assumes that there is no production of bananas within the Northern European region. For the figures on which the calculation is based see Eurostat Comext database (<http://epp.eurostat.ec.europa.eu>). The Eurostat figures do include dried bananas and plantains, which are not the subject of this decision. However dried bananas and plantains are of very limited importance compared to fresh bananas. By adding the Eurostat figures for import of bananas into the Northern European region and subtracting exports, the Commission obtains a figure of 1 578 697 000 kg for 2002, which would be equivalent to 87 028 500 boxes of 18.14 kg.

largest supplier of bananas in Europe. Chiquita's overall turnover in 2007 amounted to EUR 3 402 million worldwide.⁷

- (9) Chiquita Brands International, Inc. (CBII) is the ultimate parent company of the group and is publicly listed on New York Stock Exchange. Chiquita group is involved in sales and marketing of bananas in Europe via several [...] subsidiaries including Chiquita International Ltd., Chiquita International Services Group N.V. and Chiquita Banana Company B.V. [...]⁸
- (10) The Chiquita entities involved in the banana business in Europe are hereinafter jointly referred to as "Chiquita". The individuals representing Chiquita in the contacts with competitors described in this decision are identified in section 6.2.1.

2.2.2. *Dole*

- (11) The Dole group is the world's largest producer of fresh fruit, fresh vegetables and fresh cut flowers, and one of the world's largest producers of bananas. Dole sources and sells over 200 products in more than 90 countries.⁹ In 2007, Dole's overall turnover was EUR 5 057 million worldwide.¹⁰
- (12) Dole Food Company, Inc., the ultimate parent company of the Dole group, is a privately held company owned by [...]¹¹. The Dole group is involved in sales and marketing of bananas in Europe via numerous subsidiaries including Dole Fresh Fruit Europe OHG, an entity located in Hamburg, Germany, and involved in the import and sale of bananas and other fruits in Europe. It sells mainly green bananas to German retailers who have their own ripening capacity and to European ripeners. Dole Fresh Fruit Europe OHG is indirectly 100% owned subsidiary of Dole Food Company, Inc.¹²
- (13) The Dole entities involved in the banana business in Europe are hereinafter jointly referred to as "Dole". The individuals representing Dole in the contacts with competitors described in this decision are identified in section 6.2.2.

2.2.3. *Weichert*

- (14) Internationale Fruchtimport Gesellschaft Weichert & Co. KG (hereinafter "Weichert"; Weichert is also known in the trade as InterWeichert) is a German limited liability partnership company, which is primarily involved in the marketing of bananas,

⁷ [...] reply to the Commission's questionnaire of 9 April 2008, dated 30 April 2008. Dollar figures are converted to Euro using the average exchange rate of the European Central Bank for 2007 (EUR 1 = USD 1.3705).

⁸ See file p. 50519-50524 ([...] reply to the Commission's questionnaire of 30 March 2007, annexes 1 and 2) [...]

⁹ See <http://www.dole.com>

¹⁰ [...] reply of 25 April 2008 to the request for information. Dollar figures are converted to Euro using the average exchange rate of the European Central Bank for 2007 (EUR 1=USD 1.3705).

¹¹ Mr [...] took the company private in 2003. From 1 January 2000 through 28 March 2003, shares of the capital stock of Dole Food Company, Inc. were traded on the New York Stock Exchange during which period Mr [...] was the Chairman of the Board and Chief Executive Officer of Dole Food Company, Inc. See file p. 42886 ([...] reply to the request for information of 10 February 2006) and "All about Dole – 2005" at <http://www.dole.com>.

¹² See file p. 42880-42886 and 42938 et seq. ([...] reply to the request for information of 10 February 2006 and Annex, Volume I).

pineapples and other exotic fruits in Northern Europe, with bananas accounting for a substantial part of its revenues.¹³ The overall turnover of Weichert in 2007 is confidential.

- (15) From 24 June 1994 until 31 December 2002 Fresh Del Monte Produce Inc. (hereinafter "Del Monte") held an indirect shareholding as a limited partner in Weichert. Del Monte's participation in Weichert was held through its German based wholly owned subsidiary Westeuropa-Amerika-Linie GmbH (hereinafter "WAL"), which Del Monte acquired in 1994 (through its subsidiary Global Reefer Carriers Ltd., Liberia). The capital contribution of WAL in Weichert equated to approximately 80% of the total partnership contribution and since [...] the holdings in the remaining partnership contribution of some [...]% were divided between by [...] and [...].¹⁴ Weichert was an exclusive Northern European distributor¹⁵ of Del Monte until 31 December 2002 for Del Monte bananas traded under "Del Monte" brand. It was granted the exclusive right to use the Del Monte brand and it conducted all marketing and advertising activities on behalf of Del Monte in the Northern European region.¹⁶
- (16) On 30 September 2002 [...], a wholly owned subsidiary of Fyffes Plc (hereinafter "Fyffes")¹⁷, entered into an agreement with WAL to acquire the 80% limited partnership interest in Weichert. The effective date of the transfer of the limited partnership was 1 January 2003.
- (17) The general partners of Weichert are the legal representatives and the managers of the company. Mr [...], Mr [...] and Mr [...] were the general partners of Weichert in 2000-2002. The individuals representing Weichert in the contacts with competitors described in this decision are identified in section 6.2.3.

2.2.4. *Del Monte*

- (18) The Fresh Del Monte Produce 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, US, the Middle East and Africa. Fresh Del Monte Produce group markets its products (including bananas) worldwide under the Del Monte brand. For the business year 2007, Del Monte's net sales were EUR 2 455 million worldwide.¹⁸
- (19) Fresh Del Monte Produce Inc. is the holding company and ultimate parent company of the Fresh Del Monte Produce group. The Fresh Del Monte Produce group is involved

¹³ See file p. 38095 ([...] reply to the request for information of 10 February 2006).

¹⁴ See file p. 38095-38096 ([...] reply to the request for information of 10 February 2006) and file p. 40488-40489 ([...] reply to the request for information of 10 February 2006). [...]

¹⁵ The following countries were covered by the [...] between Weichert and Del Monte during the period concerned by this Decision: [...] See file p. 38095 ([...] reply to the request for information of 10 February 2006) and file p. 40490-40491 ([...] reply to the request for information of 10 February 2006).

¹⁶ See file p. 38095 and 38102 ([...] reply to the request for information of 10 February 2006) and p. 40490-40491 ([...] reply to the request for information of 10 February 2006).

¹⁷ Fyffes plc owns [...] See file p. 38014 ([...] reply to the request for information of 10 February 2006, Annex 1, Chart 3).

¹⁸ See <http://www.freshdelmonte.com> and [...] reply to the request for information of 3 April 2008, dated 15 May 2008.

in sales and marketing of bananas in Europe via numerous wholly owned subsidiaries including Del Monte Fresh Produce International Inc., Del Monte (Germany) GmbH¹⁹, Del Monte (Holland) BV.²⁰

- (20) During the period 2000-2002 this decision finds that Del Monte exercised a decisive influence over Weichert (see section 6.2.3).

2.2.5. *Other suppliers of bananas*

- (21) In addition to the addressees of this decision, there are other undertakings which had significant banana sales in the Northern European region, and which were addressees of the Statement of Objections. These include Del Monte (in relation to its own activities as a supplier of bananas), Fyffes and Leon Van Parys. This decision does not find Fyffes or Leon Van Parys liable for any infringement of Article 81 of the EC Treaty.
- (22) Fyffes plc is a publicly owned company which is quoted on the London and Dublin stock exchanges and is the ultimate parent company in the Fyffes group. From 1 January 2003, Fyffes was selling bananas in the Northern European region also via Weichert, following the acquisition of an 80 % shareholding in Weichert from Del Monte.
- (23) The company Leon Van Parys N.V. (hereinafter "LVP" or "Pacific") and its subsidiaries carried out the import and sale of Bonita branded bananas in the Northern European region.
- (24) In addition to the companies mentioned in recitals (8)-(23) 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). Among the most important of these players, Cobana Fruchtring, Atlanta AG (hereinafter "Atlanta") (purchased by Chiquita in 2003²¹), Van Wylick and Cordis should be mentioned.

2.3. **Description of the sector**

2.3.1. *The supply*

¹⁹ Del Monte (Germany) GmbH was acquired by Fresh Del Monte Produce NV (Netherlands Antilles), a subsidiary of Fresh Del Monte Produce Inc., and incorporated to the Fresh Del Monte Produce group on 11 January 2001 under the name TAMO 81 Vermögensverwaltung mbH. In May 2001 its name was changed into Del Monte Fresh Produce (Germany) GmbH and in September 2005 the name was changed into Del Monte (Germany) GmbH. See file p. 40523-40524 ([...] reply to the request for information of 10 February 2006, Annex 2). Del Monte (Germany) GmbH has been active in the sale of bananas from 1 January 2002. See file p. 42857-42858 ([...] reply to the request for information of 22 May 2007, Annex 1 in p. 1-2). Concerning Del Monte Fresh Produce International Inc., see also <http://www.freshdelmonte.com/tradepartners/europeafrica.aspx>.

²⁰ See file p. 40502-40550, 51082-51084. Until February 2005 Del Monte (Holland) BV appears in the group organisation charts as Del Monte Fresh Produce (Holland) BV ([...] reply to the request for information of 10 February 2006, annexes 1, 2 and 3).

²¹ See file p. 50352 [...]

- (25) The EU-15 volume of bananas (including imported bananas and EU bananas) was approximately 225 million boxes in 2002.²² On the basis of Eurostat figures on import and export of bananas, the Commission estimates that the business for bananas in the Northern European region in 2002 accounted for slightly less than 90 million boxes or approximately 40 % of the total EU-15 banana volume.²³
- (26) In order to estimate the combined presence of the addressees of the Statement of Objections in the supply of bananas the Commission has made estimates of their combined shares of banana sales by value, on the basis of information obtained from the addressees of this decision and from other banana importers Fyffes and LVP. On the same basis, the estimated shares of sales by value of bananas in the Northern European region in 2002 were as follows: Chiquita 20-25 %, Dole 15-20 % and Weichert 5-10 %²⁴, and the combined share of sales by value of Chiquita, Dole and Weichert in 2002 accounted for approximately 45-50 %.²⁵
- (27) In their replies to the Statement of Objections, Dole and Del Monte cast doubt on the Commission's estimates for the market shares of the parties. According to Dole, "*[t]he SO's claimed shares should be viewed with caution. It is unclear whether these numbers include ACP and EU bananas brought in by other importers*".²⁶ Dole also argues that the Commission cannot arbitrarily rely on a single year to determine the market shares, that the Commission fails to explain how (or if) it reconciled the inconsistent information furnished by the addressees of the Statement of Objections, that the Commission inflates Dole's market position by using green and yellow bananas sales, that the Commission omits unbranded bananas (which is a major component of the market) and that the Commission fails to assess specific countries. Dole argues that the turnover relevant for the case should not include unbranded bananas and bananas for which the price is not negotiated on a weekly basis. Del Monte makes similar arguments concerning the relevant turnover. In particular, in its reply to the Statement of Objections Del Monte submits that "*[...]the conduct reported in the [Statement of Objections] only relates to the sale of branded bananas. Del Monte only has Official Prices for the bananas that it sells under its Del Monte brand. [...]It would be therefore inappropriate to determine the relevant turnover on the*

²² According to statistics from the Commission's Directorate General for Agriculture (see file p. 49812) the total EU-15 banana sales in 2002 amounted to 4 078 557 000 kg., which would be equal to 224 837 760 boxes of 18.14 kg.

²³ By adding the Eurostat figures for import of bananas into the Northern European region and subtracting exports the Commission obtains a figure of 1 578 697 000 kg for 2002, which would be equivalent to 87 028 500 boxes of 18.14 kg - see Eurostat Comext database (<http://epp.eurostat.ec.europa.eu>). The Eurostat figures do include dried bananas and plantains, which are not the subject of this decision. However, dried bananas and plantains are of very limited importance compared to fresh bananas, and any overestimate of the number of bananas imported would result in an underestimate of the market shares of the parties. In 2004 the worldwide volume of bananas distributed and marketed accounted for approximately 700 million boxes of 18.14 kg. See file p 50228 [...].

²⁴ Sales between the addressees of this decision have been deducted in making this estimate (see recital (452)).

²⁵ This Commission's estimate was based on information provided by [...], in particular (i) [...] (file p. 50898-50909); (ii) reply to request for information of 27 February 2007, annex 2 [...] (file p. 42772); (iii) reply to request for information of 11 May 2007, annex 2 [...] (file p. 45155-45156); (iv) reply to request for information, 15 March 2007, annex 1 [...] (file p. 38597); (v) reply to request for information, 27 February 2007, annex 1 [...] (file p. 48301) and (vi) reply to request for information 15 March 2007, annex 3 [...] (file p. 38631).

²⁶ [...] reply to the Statement of Objections page 41.

basis of Del Monte's entire banana sales in the relevant territory during the relevant time."²⁷ The Commission makes the following observations: that the Commission's estimate of the market shares in the Statement of Objections was based on figures for banana turnover for each of the Member States in the Northern European region provided by the addressees of this decision and LVP and Fyffes, combined with estimates for each of the Member States in the Northern European region of the importance of other suppliers. These figures have taken into account the situation in specific Member States, and include ACP, EU and unbranded bananas; that the Commission has taken into account the turnover information provided by the addressees of this decision and LVP and Fyffes; and that the estimated market shares concern sales of fresh bananas, whether supplied already ripened (yellow) or unripened (green), whatever the method of pricing, and regardless what is their country of origin (see also recital (287)).

- (28) Dole in its reply to the Statements of Objections explains that it has had a survey made by an independent market research company monitoring German households' purchases by brand measured in volume. Dole argues that the market share estimate it provided in reply to the Commission's request for information of 10 February 2006 is incorrect because it includes sales by its [...], which does not [...]. Dole argues that [...].²⁸ The new market share calculated by the independent market research is slightly more than half the figure previously provided by Dole. According to the figures from the independent market research company, the combined market shares of the addressees of this decision plus LVP and Fyffes in Germany is considerably lower than the Commission's estimates based on the information provided by the addressees of the Statement of Objections.
- (29) The Commission wishes to make the following remarks. First, it is important to understand that the Commission's market share estimate for Germany in the Statement of Objections was based on the turnover figures and estimates of sales by other banana suppliers provided by the addressees of this decision plus LVP and Fyffes. The Commission's estimate in the Statement of Objections was value based not volume based. Even if the estimate of the independent market research company were correct, a large part of the difference between this estimate and the Commission's estimate could likely be explained by the difference in price between branded bananas and non-branded bananas. Second, the market research company measures bananas consumed in Germany while the Commission's estimate measures bananas sold in Germany. Not all bananas supplied by importers in Germany are necessarily consumed there. Third, regarding the sales by [...], the scope of this decision includes all bananas, whether they are sold green or yellow. Dole's arguments that the sales of its [...] should not be counted as part of Dole's sales [...] should therefore be rejected. Likewise, the argument that only sales by one division of Dole or only branded bananas or only bananas for which contracts are negotiated on a weekly basis should be considered cannot be accepted either. The scope of this decision is fresh bananas. All sales of fresh bananas must be taken into account, whether branded or unbranded and not depending on how prices were negotiated.

²⁷ [...] reply to the Statement of Objections page 58.

²⁸ [...] reply to Statement of Objections page 42.

- (30) The Commission recognises the complexity of estimating market shares for fresh bananas, and in particular, the difficulties of estimating the size of the market. The Commission has therefore compared data provided by the parties regarding their volumes of sales in the Northern European region with the apparent consumption of bananas in volume resulting from official statistics published by Eurostat (see footnote 6).
- (31) The Commission estimates that in 2002, Chiquita's sales of fresh bananas measured in volume accounted for 25-30 % of the apparent consumption of fresh bananas in the Northern European region, Dole's sales measured in volume is estimated to account for 10-15 % of Northern European apparent consumption while Weichert's sales in volume is estimated to account for 5-10 % of Northern European apparent consumption. The Commission concludes that in 2002 sales of fresh bananas by Chiquita, Dole and Weichert measured in volume accounted for approximately 40-45 % of apparent consumption of fresh bananas in the Northern European region.²⁹ The Commission notes that this combined share of sales by volume using this methodology is only slightly lower than the combined share by value indicated in recital (26).
- (32) The banana business distinguishes three "tiers" of bananas brands: premium "Chiquita" brand bananas, second-tier bananas ("Dole" and "Del Monte" branded bananas) and third-brand bananas (so called "thirds" which includes a number of other banana brands). This brand-division is reflected in the banana pricing. Chiquita normally quotes the highest price for its bananas marketed with "Chiquita" brand, followed by bananas traded under "Dole" and "Del Monte" brands; the thirds were at the lower scale.³⁰ The "Chiquita" brand was perceived as a leading brand in the banana business followed by Dole and Del Monte.³¹ Chiquita, Dole and Del Monte also had "third" brands for bananas.³² Bananas are also sold unbranded.
- (33) During the relevant period the banana business in the Northern European region was organised in weekly cycles. Banana shipping to Europe from Latin American ports approximately takes 2 weeks. Bananas shipped to Northern European ports mainly arrived on a weekly basis, according to regular shipping schedules. There may also be trading volumes arriving in the Northern European region on vessels without pre-established regular schedules. To import bananas to the Northern European region the parties mainly used the following ports: Antwerp (Belgium), Hamburg (Germany), Gothenburg (Sweden), Bremerhaven (Germany), Zeebrugge (Belgium). Northern European bound ships also to some extent served various ports in the United Kingdom (for example, Dover, Felixstowe, Portsmouth, Sheerness, Southampton) or Ireland (for

²⁹ The estimate of the importance of Chiquita and Dole in the market is based on their sales of imported bananas in volume in relation to the Commission's calculation of the apparent consumption of bananas in the Northern European region based on Eurostat figures for imports and exports. Weichert is a trading company primarily involved in the marketing of imported bananas. The estimate of its importance in the market is based on its sales of bananas in volume in relation to the Commission's calculation of the apparent consumption of bananas in the Northern European region (see recital (6)).

³⁰ See for example file p. 50228 [...], file p. 50363-50364 [...], file p. 45102-45105 [...] reply to the request for information of 24 November 2006). See also file p. 42697 [...] reply to the request for information of 24 November 2006).

³¹ See for example file p. 23889 [...]. See also file p. 50228 and 51027 et seq.

³² See for example file p. 50363 [...].

example, Waterford). From the North European ports bananas were transported to various Member States in the Northern European region, and also to other parts of the Community, to Eastern Europe and to EFTA States.³³

- (34) On Thursday mornings the parties set their banana quotation prices. Quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices. Moreover, in some transactions actual prices were directly linked to quotation prices. (See section 4.4.2.1). On Thursday afternoons and Fridays (or also later in the ongoing week/ early next week) banana importers negotiated prices with customers, when transactions are based on weekly negotiated prices. Importers' customers are generally ripeners or retail chains. Bananas are shipped and arrive green at the ports. Before they can be consumed they need to be ripened. Ripening may be carried out by the importer or on his behalf or organised by the buyer. Bananas are either delivered directly to buyers (green bananas) or are being ripened, and then delivered approximately a week later (yellow bananas).³⁴ The yellow price is the price for ripened bananas, whereas the green price is the price for un-ripened bananas.³⁵

2.3.2. *The demand*

- (35) Bananas are seen in the trade as a 52-week product, the demand of which is slightly higher in the first half of the year and lower in the second part of the year, notably during the summer period.

2.3.3. *Regulatory framework*

- (36) The import of bananas into the European Community was regulated under Council Regulation (EEC) No 404/93³⁶ of 13 February 1993 on the common organization of the market in bananas. From 1 July 1993 until 1 January 2006, the regime was based on import quotas and tariffs. Banana import quotas were set annually and allocated on a quarterly basis with certain limited flexibility between the quarters of a calendar year. Since 1 January 2006 the banana import arrangement has been based on a tariff-only system.
- (37) Up to 2006 three tariff quotas applied³⁷. So-called tariff and additional tariff quotas ("A/B quota" as of 1 July 2001) subject to a tariff of 75 Euro/tonne applied to non-ACP³⁸ bananas, while ACP-bananas were duty free under this quota. A tariff-free quota (so-called "C-quota" as of 1 July 2001) was reserved for ACP bananas. In total the quotas made it possible to import 3 410 700 tonnes into the Community in 2000

³³ See file p. 33714-33716 [...]. See also recitals (135), (136) and (131).

³⁴ See for example replies to requests for information of 10 February 2006, file p. 50258 et seq. [...], file p. 50290 et seq. [...], file p. 50346 et seq. [...], file p. 50352 et seq. [...], file p. 50359 [...].

³⁵ See file p. 50280 [...].

³⁶ OJ L 47, 25.2.1993, p. 1. Repealed by Council Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299, 16.11.2007, p. 1.

³⁷ Under Regulation 1964/2005 the system was changed to a tariff-only system from 1 January 2006. The tariff rate is EUR 176/tonne, however an autonomous tariff quota of 775 000 tonnes net weight subject to zero-duty is opened for imports of bananas originating in ACP countries.

³⁸ The African, Caribbean and Pacific group of states, which are signatories to the Lomé Convention (in 2000 replaced by Cotonou Agreement).

and 3 403 000 tonnes in 2001 and 2002. The large majority of the licensed quantities went to "traditional operators".³⁹ The reference quantity for each traditional operator was established on the basis of the average of its primary imports in previous years⁴⁰. When submitting licence applications, operators had to lodge a security.⁴¹ Licences were normally issued for allocated quantities on a quarterly basis and usually had to be used up during the term of validity, which is a respective calendar quarter.⁴² Unused quantities covered by a given licence were allocated to the same operator upon application for the use in a subsequent quarter within the same year. However, the securities were forfeited in proportion to quantities not used up during the term of validity of the initial licence. Bananas imported under licences could be freely distributed in all the Community.⁴³

- (38) From 1 July 2001 the system was modified⁴⁴. Non traditional operators were given a higher share of licences on the expense of traditional operators, whose share was reduced from 92 % to 83 %. As of 1 January 2002 the A/B quota was increased by 100 000 tonnes, while the C quota was reduced by 100 000 tonnes.
- (39) In addition to their own licences, banana importers in effect purchased licences of other operators⁴⁵. Licence holders were entitled to transfer their licences pursuant to

³⁹ The implementing Commission Regulation sets out provisions concerning so-called "newcomers" (until 1 July 2001) or "non-traditional operators" (as of 1 July 2001) (see Articles 7 et seq. of Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, OJ L 293, 31.10.1998, p. 32, as amended, and Articles 6 et seq. of Regulation (EC) No 896/2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards arrangements for importing bananas into the Community, OJ L 126, 8.5.2001, p. 6). See also Case C-37/02 et seq. *Di Lenardo Adriano Srl et al.* [2004] ECR I-6911, paragraphs 83-87. Under certain conditions an importer could operate both as a traditional and non-traditional operator.

⁴⁰ Until 1 July 2001 traditional operators received for each year for imports of bananas from certain Latin American countries and/or ACP countries a single reference quantity based on the quantities of bananas actually imported during a reference period. For 1999 the reference period was made up of the years 1994, 1995 and 1996. Thereafter, a single reference quantity for each operator was set for each year on the basis of the quantities actually imported in the respective reference period. (See Articles 3 et seq. of Regulation (EC) No 2362/98). As of 1 July 2001 traditional operators received for each year for imports of bananas from third countries or from ACP countries, respectively, a single reference quantity based on the average of primary imports during the years 1994, 1995 and 1996 (as taken into account in 1998 for the purposes of administering the tariff quota) multiplied by an adjustment coefficient. (See Articles 3 et seq. and Articles 28 et seq. of Regulation (EC) No 896/2001). See also Case T-139/01 *Comafrika SpA et al v. Commission* [2002] ECR II-799, paragraphs 145 et seq.

⁴¹ I.e. a certain amount in EUR (ECU) per tonne of bananas, for details see Articles 9, 20 and 25 of Regulation (EC) No 2362/98 and Articles 8, 19 and 24 of Regulation (EC) No 896/2001.

⁴² For details see Articles 14 et seq. of Regulation (EC) No 2362/98 and Articles 14 et seq. of Regulation (EC) No 896/2001.

⁴³ See Regulation 404/93.

⁴⁴ By Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas, OJ L 31, 2.2.2001, p. 2.

⁴⁵ See for example file p. 50297-50302 [...], p. 50303-50319 [...], p. 50320-50328 [...] and p. 50329-50335 [...]. See also file p. 36776-36777, 50620-50621, 50622, 50623 [...] (inspection documents), file p. 47464 and 47466 [...] reply to request for information of 10 February 2006).

applicable legal rules.⁴⁶ In practice, importers largely used licences of other licence holders without a formal transfer of such licences.⁴⁷

- (40) In addition to Latin American and ACP bananas, there were certain quantities of Community-produced bananas for sale (approximately 20 % of the total Community volume, 790 000 tonnes in 2002⁴⁸). In practice, the annual amount of Community-produced bananas was capped by the aid scheme which was in place to support Community production, mainly in French overseas departments and the Canary Islands. There was no banana production in the Northern European region.

2.3.4. Territory covered

- (41) The territory covered by cartel arrangements was eight Member States of the European Community ("Northern European region"): Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden (see section 4.4.3).

2.4. Inter-state trade

- (42) From information received from the parties it is apparent that each of them was active in all of the Member States in the Northern European region during the period 2000-2002.⁴⁹ The bananas trade during the period considered was characterised by important trade flows between Member States. In particular, bananas imported into a few Northern European ports (see recital (33)) were distributed throughout the region or could be transported elsewhere (see recital (131)).

3. PROCEDURE

3.1. The Commission's investigation

- (43) The Commission's investigation started on the basis of information received from an immunity application under the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases⁵⁰ (hereinafter the "Leniency Notice"). [...] Chiquita approached the Commission pursuant to the Leniency Notice [...].
- (44) [...], the Commission granted Chiquita conditional immunity from fines in accordance with point 8 (a) of the Leniency Notice. [...].

⁴⁶ See Article 21 of Regulation (EC) No 2362/98 and, for the period as of 1 July 2001, Article 20 of Regulation (EC) No 896/2001.

⁴⁷ See for example file p. 50324-50325 [...].

⁴⁸ See Report from the Commission to the European Parliament and the Council on the operation of the common organisation of the market in bananas COM(2005) 50 final.

⁴⁹ With the exception of Weichert which did not have banana sales in Luxembourg in 2000-2002.

⁵⁰ OJ C45 19.2.2002, p. 3. This 2002 Leniency Notice was replaced by the 2006 Leniency Notice (OJ C 298, 8.12.2006, p. 17). However, according to point 37 of the 2006 Leniency Notice from the date of its publication in the Official Journal, this notice replaced the 2002 Leniency Notice for all cases in which no undertaking had contacted the Commission in order to take advantage of the favourable treatment set out in that notice. Given that Chiquita contacted the Commission before that date, the 2002 Leniency Notice applies to this case (except for that points 31 to 35 of the 2006 Leniency Notice apply to all pending and new applications for immunity from fines or reduction of fines from the date of publication of the 2006 Leniency Notice).

- (45) On 2-3 June 2005 the Commission carried out inspections under Article 20 (4) of Regulation No 1/2003 at the premises of *inter alia* Dole, Del Monte, Pacific, Weichert and Fyffes. [...].
- (46) Between February 2006 and May 2007 the Commission sent several requests for information under Article 18 (2) of Regulation No 1/2003 to Dole, Del Monte, Pacific, Weichert and Fyffes. [...].

3.2. Statement of Objections and Oral Hearing

- (47) The Commission's Statement of Objections of 20 July 2007 was addressed to Chiquita Brands International Inc., Chiquita International Ltd., Chiquita International Services Group N.V., Chiquita Banana Company B.V., Dole Food Company, Inc., Dole Fresh Fruit Europe OHG, Fresh Del Monte Produce Inc., Del Monte Fresh Produce International Inc., Del Monte (Germany) GmbH, Del Monte (Holland) BV, Fyffes plc, Fyffes International, Fyffes Group Limited, Fyffes BV, FSL Holdings N.V., Firma Leon Van Parys N.V. and Internationale Fruchtimport Gesellschaft Weichert & Co. KG. It was notified to the addressees between 24 and 26 July 2007. The Statement of Objections set out the Commission's preliminary findings in relation to three activities (pre-pricing communications, exchange of volume information and exchange of quotation prices). According to the Commission's then preliminary findings pre-pricing communications amounted to price fixing.
- (48) All the parties to which the Statement of Objections had been addressed submitted written submissions in reply to the objections raised by the Commission.
- (49) The undertakings had access to the Commission's investigation file in the form of a copy on DVD, except records and transcripts [...] and documents relating thereto. With the DVD, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the DVD gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information and internal documents. Access to [...] statements and transcripts [...] and documents relating thereto was given at the Commission premises. The addressees of the Statement of Objections raised various points (for example, concerning allegedly illegible pages in the investigation file, claiming access to additional documents) which all were dealt with by DG Competition, and/or the Hearing Officers.
- (50) An Oral Hearing on the case was held from 4 to 6 February 2008. All undertakings addressed in the Statement of Objections exercised their right to be heard. After the Statement of Objections and the Oral Hearing, several parties provided further written submissions in reply to Commission's questions at the Oral Hearing which could not be fully answered on the spot. Moreover, on 28 February 2008 Weichert submitted a further letter with comments and annexes. On 17 March 2008 Del Monte submitted a "post-hearing briefing paper". After the Oral Hearing Dole made further presentations to the Commission.

4. DESCRIPTION OF THE EVENTS

4.1. Overview of the cartel

- (51) The parties engaged in bilateral pre-pricing communications during which they discussed banana price setting factors, that is factors relevant for setting of quotation prices for the upcoming week⁵¹ and discussed or disclosed price trends and/or indications of quotation prices for the up-coming week as further explained in section 4.4. Such communications took place before the parties set their quotation prices. All these communications were relevant for the future setting of quotation prices. The parties communicated on a bilateral basis by phone usually on Wednesdays (in some instances early Thursday mornings) and in any case prior to setting their quotation prices, which they set later on Thursday mornings. Therefore, these communications are also collectively referred to as "pre-pricing communications". These communications took place from at least 1 January 2000 until at least 31 December 2002 (for Chiquita, until at least 1 December 2002). There was a consistent pattern of pre-pricing communications, even though they took place not necessarily every week. Once they had set their quotation prices on Thursday mornings, the parties bilaterally exchanged these prices or at least had a mechanism in place, which enabled them to bilaterally exchange information about quotation prices set. This exchange of quotation prices enabled the parties to monitor the individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between parties beforehand. The specific timing, frequency, duration and contents of communications between the parties are described in detail in sections 4.2-4.5.
- (52) During bilateral pre-pricing communications parties would discuss sales situation, supply and demand conditions, that is, factors relevant for setting of quotation prices for the upcoming week ("price setting factors", see section 4.4.4). Moreover, some of these communications specifically covered discussions on and/or disclosure of price trends and/or indicative quotation prices to be set on Thursday mornings or competitors' views about the evolution of prices before quotation prices were set (see section 4.4). Such communications mainly concerned discussions about price setting factors and price trends and/or indications of quotation prices relevant to the Northern European region, where the parties traded bananas. This region covered the following Member States: Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden (see section 4.4.3).
- (53) When pre-pricing communications specifically concerned price trends and/or indications of quotation prices for the up-coming week, they would refer either to the development of prices in terms of direction: up, down, the same, or disclose indicative quotation price (including those instances where parties would discuss or disclose a specific amount of change, for example, "one EUR up") (see section 4.4). Such type of discussions must be understood in the light of business context. As described in section 2.3.1 (see also section 4.4.2.1), there was some brand differentiation, which was reflected in pricing. This meant that there were price differentials between brands of bananas. The parties' pre-pricing communications concerned possible price trends and/or indications of quotation prices for the following week relative to the current week.

⁵¹ In the Statement of Objections also referred to as "communications on market conditions".

- (54) The object of pre-pricing communications between competitors was to discuss demand and supply conditions relevant for the setting of quotation prices ("price setting factors") and/or to exchange views on or to disclose their intentions concerning price trends and/or indications of quotation prices for the upcoming week before quotation prices were set. Their purpose was to reduce uncertainty as to the conduct of the parties with respect to the quotation prices to be set by them on Thursday morning. The Commission considers that these communications gave rise to a concerted practice by which they coordinated quotation prices for bananas which they each set weekly (see section 5.2).
- (55) [...] Dole and Weichert confirm, in their replies to the Statement of Objections, the general finding that there were communications with competitors prior to setting quotation prices. However, they deny that these communications had an anticompetitive objective.

4.2. Organisation of the cartel

4.2.1. Cartel participants

- (56) The Commission has evidence which shows the pre-pricing communications during which banana price setting factors and/or price trends and/or indications of quotation prices for the up-coming week were discussed or disclosed took place between Dole and Chiquita and between Dole and Weichert.
- (57) Dole bilaterally communicated with both Chiquita and Weichert. Chiquita was aware or at least foresaw that Dole had pre-pricing communications with Weichert, which during the relevant period traded essentially Del Monte bananas (see section 4.4.4.1).

4.2.1.1. Dole and Chiquita

- (58) [...] Chiquita [...] had pre-pricing communications with Dole.⁵² In addition, [...] phone records demonstrating calls to Dole (for phone calls outgoing from numbers used by Chiquita's employee Mr [...]).⁵³ Dole states that it had bilateral communications with Chiquita, which took place before banana quotation prices were set.⁵⁴
- (59) As for individuals involved in these communications, according to Chiquita, its employee Mr [...] communicated with Mr [...] (Dole). When Mr [...] was on vacation, the telephone calls were sometimes conducted between Mr [...] and another Dole employee, Mr [...].⁵⁵
- (60) In its reply to a request for information, Dole states that its employees communicated with Mr [...] at Chiquita.⁵⁶ Dole states that Mr [...] (Dole) had contacts with Mr [...] until autumn 2001. According to Dole, it is possible that a few calls occurred from

⁵² See for example file p. 9227 et seq. [...].

⁵³ See file p. 27869 et seq. [...] and p. 30521-31102.

⁵⁴ See file p. 43509 et seq. [...] revised reply to the request for information of 30 March 2006).

⁵⁵ See file p. 27870 [...] [...].

⁵⁶ See file p. 43509 et seq. [...] revised reply to the request for information of 30 March 2006).

autumn 2001 prior to Mr [...] leaving Dole in December 2002.⁵⁷ Dole states that its employee Mr [...] had contacts with Chiquita employee Mr [...] after about autumn 2001 until about 2002-2003.⁵⁸

- (61) [...] most of the time Mr [...] called Mr [...] and sometimes *vice versa*.⁵⁹ Nevertheless, phone records [...] show numerous calls from Mr [...] to Dole (see recital (77)). Chiquita states that [...].⁶⁰ In its reply to a request for information Dole states that pre-pricing communications were initiated by Chiquita. According to Dole, "Mr. [...] may have very rarely contacted Mr. [...] on Wednesday afternoon if Dole had not heard from him on Wednesday afternoon, and in particular, if there was some unusual circumstance in market developments [...]".⁶¹ The Commission observes that it is clear from this statement that when Mr [...] had reasons to talk to Mr [...] and had not heard from him, he would then call, particularly in cases of "unusual circumstances" in the banana business. Similarly, Dole states that "[a]ccording to Dole's best estimate, [...] would only initiate contact if Chiquita had not called".⁶²
- (62) In its reply to the Statement of Objections, Dole admits having had communications with Chiquita before setting quotation prices⁶³ but points at differences between its statements and Chiquita's submissions concerning who initiated them. The Commission notes that the evidence confirms that the contacts did exist, even though the parties differ in their recollections of who initiated them "most of the time". Even though Chiquita submits [...] that according to Mr [...] it was "*mostly Mr. [...] calling Mr. [...], sometimes vice versa*", the phone records [...] show that Mr [...] made numerous calls to Dole (see recital (77)). The Commission had requested Dole to provide full telephone records for certain of its employees for certain days of the week.⁶⁴ However, Dole did not provide any telephone records of Mr [...] and Mr [...]/'s fixed line calls but only mobile phone records. Therefore, the available phone records are only partial. Nevertheless, the evidence clearly shows that Chiquita and Dole communicated and that Mr [...] initiated calls to Dole (see in particular recitals (58) and (60) and phone records referred to in footnote 53). Moreover, both parties admit, respectively in [...] replies to requests for information, that their own employees also on occasions contacted the other party (see recital (61)).

⁵⁷ See file p. 45202 ([...] reply to the request for information of 27 February 2007), see also file p. 45216, 45220.

⁵⁸ See file p. 45201 ([...] reply to the request for information of 27 February 2007), see also file p. 45219. [...] also states, in reply to the same request for information, that Mr [...]/'s calls to Mr [...] "*diminished and stopped entirely once Mr. [...] retired in approximately 2002 or 2003.*" (file p. 45201 and 45219).

⁵⁹ See file p. 27870 [...]. [...].

⁶⁰ See file p. 27870-27871 ([...]).

⁶¹ See file p. 45198 ([...] reply to the request for information of 27 February 2007), see also file p. 45216.

⁶² See file p. 43511 ([...] revised reply to the request for information of 30 March 2006).

⁶³ [...] submits that "*[i]t is undisputed that sporadic, brief, bilateral information exchanges about general market conditions occurred*", see page 109 et seq. of its reply to the Statement of Objections.

⁶⁴ The Commission had asked Dole in the request for information of 10 February 2006 (see p. 9757 et seq.) (among other things) to provide telephone records of Mr [...] for the period from 2000 until 2003 for Mondays, Tuesdays and Wednesdays of each calendar week; of Mr [...] for the period since 2000 to 2003 (inclusive) for Mondays, Tuesdays, Wednesdays and Thursdays of each calendar week. Dole (see its justification p. 42923 et seq.) did not provide any fixed line telephone records, but only mobile phone records for the following periods (see also p. 50918 of the file): mobile telephone records (full outgoing calls as well as incoming calls when roaming) for [...] from 22 December 1999 to 21 July 2004 and for [...] from 22 December 1999 to 21 December 2002.

- (63) The individuals involved in pre-pricing communications had responsibilities related to sales and/or marketing of bananas, including price setting. Mr [...], ([...], Chiquita) made pricing recommendations to the [...], who, [...]⁶⁵. Mr [...] ([...], Dole) and Mr [...] ([...], Dole) participated in the internal Dole pricing meetings.⁶⁶

4.2.1.2. Dole and Weichert

- (64) Dole states that it had bilateral communications with Weichert, which took place before banana quotation prices were set.⁶⁷ Weichert also states that it had bilateral communications with Dole.⁶⁸
- (65) Dole indicates that it had communications with [...] employees of Weichert. In its reply to a request for information, Weichert also states that its employees [...] communicated with Dole.⁶⁹
- (66) Concerning contact persons at Dole, in its reply to a request for information, Weichert indicates that it had communications with Mr [...] and Mr [...] (Dole). In its reply to a request for information, Dole states that Mr [...], Mr [...] and Mr [...] communicated with Weichert.⁷⁰ According to Dole, both Mr [...] and Mr [...] communicated with Weichert "almost weekly" (approximately 40 weeks a year), while Mr [...] communicated when the other two were not available.⁷¹
- (67) In its reply to the Statement of Objections, Weichert submits that contrary to Dole's assertion, its communications with Dole involved Mr [...] (Dole) "only occasionally"; "[h]e was not Weichert's principal contact person [at Dole]"⁷². Nevertheless, in its reply to the Statement of Objections, Weichert does not contest that Mr [...] was also its contact individual at Dole, even though, according to it, "only occasionally". The Commission considers that submissions concerning contact individuals at these parties are sufficiently consistent.
- (68) Dole states that the communications were initiated either by Dole or Weichert.⁷³ According to Weichert, its communications with Dole were initiated by Dole.⁷⁴ In its reply to the Statement of Objections, Dole points at differences between its statements and those of Weichert concerning who initiated the phone calls. As a general observation, the Commission notes that both parties admit in their replies to requests for information that the contacts took place. In addition, Dole submits that its employees also contacted Weichert. Therefore, both parties admit that they had

⁶⁵ See file p. 23886 [...].

⁶⁶ See file p. 43516 [...] revised reply to the request for information of 30 March 2006).

⁶⁷ See file p. 43481 et seq. [...] revised reply to the request for information of 30 March 2006).

⁶⁸ See file p. 38524-38525 [...] reply to the request for information of 15 December 2006).

⁶⁹ See file p. 43531 [...] revised reply to the request for information of 30 March 2006), p. 38526 [...] reply to request for information of 15 December 2006).

⁷⁰ See file p. 43481 et seq., 43531 [...] revised reply to the request for information of 30 March 2006), p. 38525 [...] reply to request for information of 15 December 2006).

⁷¹ See file p. 43531.

⁷² Page 185 of [...] reply to the Statement of Objections.

⁷³ See file p. 43531 [...] revised reply to the request for information of 30 March 2006).

⁷⁴ See file p. 38529 [...] reply to request for information of 15 December 2006). See also file p. 38583: "[...] the calls with Dole were, to the best of Weichert's recollection, initiated by Dole".

communications. The Commission considers that for the purposes of this decision it is not essential which party called the other.

- (69) Individuals at Weichert, who communicated with Dole, had positions and responsibilities related to sales and/or marketing of bananas or to management functions.⁷⁵ Dole employees involved in such communications had also similar responsibilities (see recital (63)).

4.2.2. *Timing of communications*

- (70) [...], replies to requests for information and available phone records⁷⁶ show that such bilateral communications took place mainly on Wednesdays. Communications between Chiquita and Dole also took place early Thursday mornings. All such communications occurred prior to the parties setting their own quotation prices, which are usually set on Thursday mornings.

4.2.2.1. Dole and Chiquita

- (71) Initially Chiquita submitted that its communications with Dole took place mostly on Monday/Tuesday and sometimes Wednesday morning, however [...].⁷⁷
- (72) [...] the relevant communications between Mr [...] (Chiquita) and Mr [...] (Dole) took place in general on Wednesdays and Thursdays.⁷⁸ [...] these communications took place on Wednesday late afternoons and typically there was a second call on early Thursday morning.⁷⁹ [...] the general pattern was that a second call took place before, sometimes immediately before, the internal Chiquita conference call that preceded its pricing decision.⁸⁰ These statements are supported by Mr [...]’s available phone records, which show phone calls which he made to Mr [...] (but not incoming calls).⁸¹
- (73) In reply to a request for information, Dole states that communications between its employees and Chiquita took place on Wednesday afternoons.⁸² Dole adds that Mr [...] would very rarely make a call to Mr [...] on Thursday morning, which either preceded or followed the Dole pricing meeting held on Thursday mornings at 8.30

⁷⁵ See file p. 38100 [...] reply to the request for information of 10 February 2006).

⁷⁶ See recital (62). Concerning Weichert’s phone records, by request for information of 10 April 2007, the Commission asked Weichert to provide complete telephone records of (among others) [...] from 2000 to 2005 and of [...] from 2000 until the end of his employment. In response to an earlier request for information (10 February 2006), by which it was asked to provide phone records of certain employees for Thursdays, [...] provided fixed line outgoing telephone records for Thursdays in the period 30 August 2001 to 29 March 2002. Moreover, Weichert provided (outgoing and roamed incoming) mobile phone records from mid-November 2002 onwards for [...]. The mobile records provided for the period prior to November 2002 seem to reach back until December 2000, they do not, however, indicate regularly the year they are stemming from. However, being requested to provide the complete records of the above mentioned employees, Weichert states that it was not in a position to provide other telephone records than provided in reply to the request of information of 10 February 2006 (see file p. 38680, 38116, 13352 et seq., 50918).

⁷⁷ See file p. 9229 [...].

⁷⁸ See file p. 27875 [...]. [...] See file p. 27875.

⁷⁹ See file p. 27870 [...].

⁸⁰ See file p. 27870-27871 [...].

⁸¹ See recital (58). See also file p. 30521 et seq.; file p. 27869 et seq. [...].

⁸² See file p. 43509, 43514 [...] revised reply to the request for information of 30 March 2006).

am.⁸³ According to Dole, "[r]ather, such Thursday morning call would have been a substitute for the Wednesday afternoon market trends call."⁸⁴

- (74) In its reply to the Statement of Objections, Dole argues that there are inconsistencies [...] concerning the timing of calls. Dole also claims that the Commission simply accepts the leniency applicant's "contradicted version of events".⁸⁵ The Commission notes that Chiquita has consistently submitted that these communications with Dole took place before the quotation prices were set. Moreover, the timing of calls [...] (see recital (72)) is supported by phone records, [...]. [...] the calls took place on Wednesdays (in particular, late afternoons) and Thursday mornings [...]. Indeed, phone records show that calls took place most often in the afternoons on Wednesdays and also less often on Thursday mornings (see recitals (78) et seq.). Dole admits in its replies to requests for information that calls took place on Wednesday afternoons and (even though according to it very rarely) on Thursday mornings (see recital (73)). Therefore, the Commission considers that the evidence is sufficient to conclude that such communications between Dole and Chiquita took place before quotation prices were set (on Wednesdays and/or Thursday mornings). Even if there are some inconsistencies concerning the precise timing of such communications, the evidence is sufficient for the Commission to conclude that such communications took place before quotation prices were set. This is admitted by both parties [...] and replies to requests for information and supported by available phone records. Therefore, the Commission disagrees with Dole's claim that there are contradictions in essence in the evidence on which the Commission relies.

4.2.2.2. Dole and Weichert

- (75) In reply to requests for information Dole states that it communicated with Weichert on Wednesday afternoon between 2 pm and 5 pm.⁸⁶ Weichert states that its employees had telephone conversations with Dole employees usually on Wednesdays.⁸⁷ These submissions confirm that communications between these parties took place on Wednesdays, which is before quotation prices were set by the parties.

4.2.3. Frequency of communications

4.2.3.1. Dole and Chiquita

- (76) With respect to the pre-pricing communications, [...] contacts with Dole were regular and took place every week or on a bi-weekly basis.⁸⁸ Moreover, [...] communications

⁸³ See file p. 45199 [...] reply to the request for information of 27 February 2007), see also file p. 45217.

⁸⁴ See file p. 45203 [...] reply to the request for information of 27 February 2007), see also file p. 45221.

⁸⁵ Dole argues that "[t]he Commission overstates the frequency and intensity of Dole's sporadic market conditions calls with Chiquita" and that "Chiquita gave various erratic and inconsistent statements concerning the circumstances of market conditions calls between Chiquita and Dole", page 111 et seq. of [...] reply to the Statement of Objections.

⁸⁶ See file p. 43531 [...] revised reply to the request for information of 30 March 2006).

⁸⁷ See file p. 38583 [...] reply to the request for information of 5 February 2007). See also file p. 38527, 38529.

⁸⁸ See file p. 9180 [...], p. 9227 et seq. [...].

between Mr [...] (Chiquita) and Mr [...] (Dole) took place almost every week (with the exception of vacations and other absent weeks).⁸⁹

- (77) Mr [...]’s available phone records show outgoing phone calls made to Mr [...] (but not incoming calls).⁹⁰ These phone records register at least 55⁹¹ calls between Mr [...] of Chiquita and Dole on Wednesdays (in terms of weeks, 6 weeks in 2000, 22 in 2001, 22 in 2002). Sometimes two or a few phone calls were made on the same week (not only on Wednesdays).
- (78) These phone records also register at least 53 outgoing calls on Thursdays mornings in the period 2000 to 2002⁹² (sometimes two or a few phone calls were made on the same Thursday). According to Dole, its pricing meetings would take place between [...] and [...]. Chiquita’s pricing conference call would not normally start before [...] and during the relevant period normally started at [...] (see recitals (73) and (102)). The phone records show that among these 53 Thursday morning outgoing calls, 23 calls (in 19 weeks) took place before 8:45 am, of which 18 calls (in 17 weeks) took place even before 8:30 am (that is, before the time when Dole’s pricing meeting would start). [...] Chiquita [...] and Dole had Thursday morning pre-pricing communications. Moreover, during this period the records show that in 8 weeks⁹³ when Mr [...] called Dole on Wednesdays, he also called on the following day before 8:45 am (in one occasion two calls the following Thursday before 8:45); 7 of these calls took place even before 8:30 am.
- (79) In reply to a request for information, Dole states that from 2000 until about autumn 2001 contacts between its employee Mr [...] with Mr [...] (Chiquita) took place about 20 times per year (15 times on Wednesdays and 5 times on Thursdays).⁹⁴ In addition, Dole states that from about autumn 2001 until about 2002-2003 contacts between its employee Mr [...] with his counterparts at Chiquita took place up to possibly 10 times per year.⁹⁵ According to Dole, it is possible that from about autumn 2001 until

⁸⁹ See file p. 27875 [...].

⁹⁰ See recital (58). See also file p. 30521 et seq.; file p. 27869 et seq. [...].

⁹¹ In its reply to the Statement of Objections [...] provides its calculation that the phone records show 7 Wednesday calls in 2000, 24 Wednesday calls in 2001 and 24 Wednesday calls in 2002 (that is a total of 55 contacts). In the Statement of Objections, the Commission has mentioned 56 contacts. It has to be noted that the Commission calculated its number by already excluding some of the very short communications. Whether the Commission should have excluded one more call from its calculation is immaterial. Therefore, the Commission concludes that the records show at least 55 calls.

⁹² In its reply to the Statement of Objections, [...] asserts that it counted 58 instead of 53 contacts. It is true that the available telephone records show more than 53 contacts. However, as it is also the case with the other calculations in relation to the number of communications, the Commission did not count very short telephone conversations and, therefore, came to the number of 53 contacts.

⁹³ These calls took place on 2/3 February 2000, 21/22 March 2001, 6/7 June 2001, 15/16 August 2001, 26/27 September 2001, 5/6 December 2001, 9/10 January 2002 and 15/16 May 2002.

⁹⁴ See file p. 45208 and 45227 [...] reply to the request for information of 27 February 2007). See also file p. 45202 and 45220 "*[i]n a recent interview, Mr [...] estimates that this ["contact on Wednesday afternoon"] amounted to about 20 times a year*" and file p. 45203 and 45222 "*[a]ccording to Mr [...] best recollection such call ["Thursday morning market trend call"] might have occurred about 5 times a year.*"

⁹⁵ See file p. 45207 [...] reply to the request for information of 27 February 2007), see also file p. 45225.

December 2002 a few such calls between Mr [...] and Mr [...] may have occurred, however "Mr. [...] [...] has no recollection of such calls during such period".⁹⁶

- (80) In reply to the Statement of Objections, Dole argues that its communications with Chiquita were "sporadic". In addition, Dole argues that regular calls between Mr [...] and Mr [...] were "highly unlikely" because these employees "travelled heavily" or had "heavy travel schedules"⁹⁷. Dole also points out that a number of calls registered in the phone records⁹⁸ lasted less than a minute (Dole indicates 1 such call in 2000, 1 in 2001, and 1 in 2002) and "numerous calls" 1-2 minutes (Dole specifies 3 calls in 2001 and 3 in 2002).⁹⁹ Dole argues that the calls that lasted less than a minute suggest that Mr [...] did not reach Mr [...]. Dole observes that the majority of the calls were under 10 minutes, which cannot demonstrate a pattern of any substantial discussions.
- (81) The Commission disagrees that for the purposes of the communications at issue (see section 4.4) there was a need of long lasting calls. These communications took place between people who knew the market well, and focused on discussions about price setting factors, price trends and/or indications of quotation prices relevant for the upcoming weekly quotation price setting. The Commission does not consider that in order to exchange views on the development of future quotation prices or even of price setting factors (see section 4.4.4.1) these persons needed lengthy conversations. Moreover, the Commission observes that Dole does not argue that calls had a different purpose depending on whether they were longer or shorter. Neither does Dole argue that those calls which it suggests were short because Mr [...] might not have succeeded in reaching Dole employees had a different purpose. Finally, the number of short calls (below 1 minute or 2 minutes), specified by Dole, is not substantial. To the contrary, only a few calls were so short.
- (82) Moreover, the reasoning provided by Dole that communications could not have occurred regularly due to "heavy travel schedule" or other commitments does not contradict the findings of the Commission. In addition, Chiquita has also explained that communications did not take place in some weeks due to vacation and other absent weeks (see recital (76)).
- (83) The Commission disagrees with Dole's assessment that these communications were "sporadic" or irregular. The evidence described in section 4.2.3.1 shows numerous communications between Chiquita and Dole. The communication was intensive even if one discounts very short calls, which lasted below 1 or 2 minutes. Dole itself does not contest, in its reply to the Statement of Objections, that these communications took place (about) 20 times a year, referring to available phone records [...], which list Mr [...]’s outgoing calls. In its reply to a request for information, Dole admits that, on some occasions, its employees called Chiquita (see recital (61)). The Commission observes that Dole calls to Chiquita would not appear in the phone records which

⁹⁶ See file p. 45202 and 45198 ([...] reply to the request for information of 27 February 2007), see also file p. 45220 and 45216.

⁹⁷ Page 109 et seq. and page 113 of [...] reply to the Statement of Objections.

⁹⁸ In its reply to the Statement of Objections [...] provides its calculation that the phone records show 7 Wednesday calls in 2000, 24 Wednesday calls in 2001 and 24 Wednesday calls in 2002.

⁹⁹ In this respect it has to be noted that the Commission did not take into account very short conversations when calculating the numbers in recital (77) and, therefore, some of these calls were not even counted by the Commission.

register only [...]’s calls to Dole. These calls from Dole to Chiquita were therefore in addition to those shown in these records.

- (84) In its reply to the Statement of Objections, Dole states there were not more than 20 weeks in which calls took place on both Wednesday and Thursday in the period 2000-2002¹⁰⁰. Dole argues that according to its employee, early Thursday calls were a substitute for a Wednesday call. Dole does not contest that the phone records demonstrate that in some weeks Dole and Chiquita communicated both on Wednesday and on Thursday morning. In this respect the Commission concluded in the Statement of Objections that communications on both days took place in at least 17 weeks during the relevant period. Dole refers to phone records which show, according to it, that there were 20 such weeks. In addition, according to Dole, there were only a very few multiple calls on Thursdays.
- (85) Moreover, referring to available phone records Dole argues that a general pattern of early Thursday calls before Chiquita’s pricing call did not exist, since out of 58 Thursday morning calls in 2000-2002, 36 were after 8:45 am¹⁰¹. Dole does not contest that the phone records show 22¹⁰² Thursday calls that took place before 8:45 am (that is the time by which Chiquita internal pricing meeting would [...]) during the relevant period. Moreover, Dole admits, in its reply to a request for information, that its employees had early Thursday morning calls with Chiquita (which, according to Dole, [...]) (see recital (73)).
- (86) There is, nevertheless, inconsistency in the parties’ submissions as to whether the early Thursday morning call was a "second" call following Wednesday calls or a "substitute" call. Dole counts that there were 20 weeks, where the parties communicated both on Wednesdays and Thursday morning. However, the Commission considers that there is sufficient evidence to show that Thursday early morning calls did take place (sometimes following a Wednesday call, see recital (77)). The parties admit, in [...] replies to requests for information respectively, that during those calls they discussed or disclosed the same matters, which they discussed or disclosed during Wednesday pre-pricing communications¹⁰³ (see section 4.4). The Commission does not consider that it is necessary to establish whether such communications were substitute or subsequent communications. In conclusion, the evidence shows that Chiquita and Dole had communications on Wednesdays and early on Thursday mornings, before they set their quotation prices. Moreover, in some weeks at least, they communicated both on Wednesdays and early on Thursday mornings. The Commission concludes that the evidence of sufficient probative force shows that the communications between Chiquita and Dole were sufficiently consistent to form a pattern.

¹⁰⁰ [...] submits this calculation in its reply to the Statement of Objections (page 113) basing itself on available phone records, which are summarised in the Commission document at file p. 50918 et seq.

¹⁰¹ [...] (see file p. 50272). [...] (see file p. 23884).

¹⁰² The phone records confirm that at least 22 of these contacts occurred: see file p. 50920, 50930, 50932, 50935, 50936, 50937, 50939, 50941, 50942, 50943, 50946, 50949, 50950, 50951.

¹⁰³ In its reply to the request for information of 27 February 2007 (file p. 45204, see also file p. 45222) [...] states that "*[s]uch communication was a last-minute call on market trends, which was basically identical to the Wednesday afternoon market trends call. [...] The market trends call generally took place on Wednesday, since Thursday was a very intense and busy day for Dole and presumably the other competitors. [...]*" [...] (see [...], file p. 27871 et seq.).

4.2.3.2. Dole and Weichert

- (87) In its replies to requests for information Dole states that it communicated with Weichert "*almost weekly*".¹⁰⁴ During the relevant period Dole specifies that its employee Mr [...] communicated with Weichert employees approximately 40 weeks per year. Mr [...] (Dole) also communicated with Weichert employees on approximately the same basis, that is, 40 weeks per year from January 2000 to December 2002. According to Dole, during the relevant period Mr [...] (Dole) communicated with Weichert employees very rarely (estimated at 3 to 5 times a year) when Dole employees Mr [...] or Mr [...] were not available.¹⁰⁵ In its reply to a request for information Weichert states that communications with Dole did not take place every Wednesday but on average once or twice a month. Being asked by the Commission to specify a number of weeks per year, Weichert submits that its employees had communications with Dole approximately 20 – 25 weeks per year.¹⁰⁶
- (88) In its reply to the Statement of Objections, Dole submits that "upon further investigation" it has determined that communications took place on "intermittent basis" and that they occurred "*much less frequently (i.e. an estimated 1-2 times per month) than Dole's original estimate of approximately 40 weeks a year*".¹⁰⁷ Dole explains that Mr [...] and Mr [...] (Dole) have recently indicated that "*the market conditions exchange occurred approximately every other week, due to travel and other commitments*".¹⁰⁸
- (89) Dole does not indicate on what basis its employees determined that these communications took place on "intermittent basis", except by referring generally to "travel and other commitments". The Commission observes that Dole has already taken into account such circumstances in its reply to the Commission's request for information, where it has submitted that Mr [...]’s contact "*would not take place due to the following circumstances: holidays, business trips, other meetings, time pressure*".¹⁰⁹ Dole has not provided to the Commission any documents or employees statements, which would justify its statements in response to the Statement of Objections. The Commission notes that in its reply to the Statement of Objections Dole revised the frequency of communications, which it had stated in its original and revised reply to the Commission's request for information of 30 March 2006. The Commission does not consider that such revised position is credible.
- (90) In 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*".¹¹⁰ (2000-2002). Weichert does not explicitly renounce its estimate provided in reply to a request for information (20-25 weeks a year, see recital (87)). The Commission observes that Weichert provided this estimate (20-25 weeks) in response to a request for information being specifically asked by the Commission to

¹⁰⁴ See file p. 43531 ([...] revised reply to the request for information of 30 March 2006).

¹⁰⁵ See file p. 43531 ([...] revised reply to the request for information of 30 March 2006).

¹⁰⁶ See file p. 38583 ([...] reply to the request for information of 5 February 2007). See also file p. 38527, 38529-38530 ([...] reply to the request for information of 15 December 2006).

¹⁰⁷ Page 109-110 of [...] reply to the Statement of Objections.

¹⁰⁸ Page 110 of [...] reply to the Statement of Objections.

¹⁰⁹ See file p. 43531 ([...] revised reply to the request for information of 30 March 2006).

¹¹⁰ Page 185 of [...] reply to the Statement of Objections.

specify a number of weeks per year. Nevertheless, in its reply to the Statement of Objections, Weichert argues that the Commission cannot rely on disputed and uncorroborated statements of Dole concerning the frequency. Weichert claims that contacts with Dole were not regular but only occurred "on some infrequent occasions".

- (91) The Commission disagrees with the parties' assessment that their communications were "sporadic", "infrequent" or irregular. The frequency of communications, which is stated in the parties' replies to Commission's requests for information, in Commission's view cannot be regarded as "sporadic", "infrequent" or irregular. In the light of the necessity to corroborate the parties' statements given in response to requests for information, the Commission estimates that the frequency of communications between Dole and Weichert was not less than about 20-25 weeks a year in 2000-2002. The Commission concludes that these communications were sufficiently consistent to form a pattern of communications.
- (92) In addition, Weichert argues, in its reply to the Statement of Objections, that it is not open for the Commission to rely on phone records as evidence to substantiate the frequency of communications because there were various legitimate contacts among banana importers. The Commission observes that it does not rely on phone records to prove Weichert's communications with Dole. As concerns communications between Dole and Chiquita, these parties do not argue that their phone calls recorded in the available phone records did not concern relevant pre-pricing communications (see recitals (76) et seq.). Moreover, to substantiate the frequency of communications of these parties, the Commission does not rely solely on phone records, but relies on [...] replies to requests for information (see section 4.2.3.1).

4.3. Duration

- (93) The Commission has evidence that the bilateral communications between the parties took place during the following periods: between Chiquita and Dole at least from 1 January 2000 to at least 1 December 2002 and between Dole and Weichert at least from 1 January 2000 to at least 31 December 2002.
- (94) [...] communications with Dole commenced in the early 1990s (probably 1994) and ended in 2002/2003.¹¹¹ Later, [...] the contact was established probably in January 1998.¹¹² Moreover, [...] the contact between Mr [...] (Chiquita) and Mr [...] (Dole) was established at the Fruit Logistica Fair in Berlin, most likely in January 1998. Following this initial meeting, Mr [...] and Mr [...] started their telephone contacts in late 1998.¹¹³ However, according to Chiquita, the year when the aforementioned contact was established could have been 1999.¹¹⁴ Chiquita submits that on 1 January 1999 (at least) the communications between Mr [...] and Mr [...] had already started.¹¹⁵ However, Chiquita states that if the initial contact occurred in January 1999,

¹¹¹ See file p. 9180 et seq. and 9227 et seq. [...].

¹¹² See file p. 50276 [...].

¹¹³ See file p. 27870 [...].

¹¹⁴ See file p. 27870 [...].

¹¹⁵ See file p. 27870 [...].

the communications between Mr [...] and Mr [...] are likely to have developed over the year 1999.¹¹⁶

- (95) [...], communications between Mr [...] and Mr [...] ended when Mr [...] left Chiquita in mid December 2002.¹¹⁷ The available phone records which register outgoing calls made by Mr [...] to Dole (Mr [...]) show that such calls were made at least until 2 October 2002 (Wednesday) and 17 October 2002 (Thursday at 8:33 am); the first registered call in 2000 was made on 26 January 2000 (Wednesday).¹¹⁸
- (96) In reply to a request for information Dole states that communications between Mr [...] and Mr [...] commenced in the late 1990s or early 2000s and that they lasted until about autumn 2001.¹¹⁹ However, according to Dole, it is possible that a few phone calls between Mr [...] and Mr [...] took place after autumn 2001 prior to Mr [...] leaving Dole in December 2002.¹²⁰ Dole also states that its employee Mr [...] communicated with Mr [...] after about autumn 2001 until about 2002-2003.¹²¹
- (97) In their replies to the Statement of Objections Dole and Chiquita do not question the duration of the infringement found in this decision, that is from at least 1 January 2000 to December 2002.¹²² Dole, however, in general points out that the Commission is under a duty to corroborate Chiquita submissions, which, according to Dole, the Commission did not do. The Commission observes that its conclusion on the duration of the conduct is based on statements of both parties. Overall, in response to a request for information (see recital (96)) Dole submits that these contacts took place from late 1990s or early 2000s and lasted until about 2002-2003. Moreover, available phone records also show that the parties communicated in 2000-2002. [...] the contacts lasted from at least 1 January 2000 to mid December 2002. Given the evidence as a whole, the Commission concludes that the communications started not later than on 1 January 2000 and ended in December 2002, even though there is evidence, which is not sufficiently conclusive, pointing to a later end date. The Commission will take, where relevant, 1 December 2002 as the end date.

¹¹⁶ See file p. 27870 [...].

¹¹⁷ See file p. 27870 [...].

¹¹⁸ See file p. 30521 et seq., see also file p. 27878 [...]. The Commission observes that short calls are already registered for 4, 19 and 20 January 2000.

¹¹⁹ See file p. 45198-45199 [...] reply to the request for information of 27 February 2007), see also file p. 45216-45217.

¹²⁰ See file p. 45202 [...] reply to the request for information of 27 February 2007), see also file p. 45198, 45216 and 45220.

¹²¹ See file p. 45201 [...] reply to the request for information of 27 February 2007), see also file p. 45219.

¹²² In the Statement of Objections the Commission has alleged that the duration of pre-pricing communications between Dole and Chiquita was 1 January 2000 – December 2002 (paragraphs 339 and 343). [...] In its reply to the Statement of Objections [...] restates that as it has described in its revised reply to the request for information of 30 March 2006 (Excel response) and its revised reply to the request for information of 27 February 2007 (Excel response), the "*relevant time span of the market conditions information exchange*" with Chiquita was "*from about late 1990s-early 2000s to about 2002-2003*" (page 109, footnote 263). In addition, in its reply to the Statement of Objections [...] states that these contacts ended in "about late 2002" (p. 109). See also file p. 45201, 45202, 45207 and 51030, 45220, 45225; in particular, in its reply to the request for information of 27 February 2007 [...] also states that calls from Mr [...] (Chiquita) to Mr [...] (Dole) diminished and stopped entirely once Mr [...] retired in approximately 2002 or 2003. Therefore, Dole also relates the end of its pre-pricing communications with Chiquita with Mr [...] retirement. According to Chiquita, Mr [...] left Chiquita mid-December 2002 (see file p. 27870 [...]).

- (98) According to Dole communications between Dole and Weichert took place during the period from January 2000 until June 2005.¹²³ In reply to a request for information Weichert states that during the period 2000-2005 it had communications with Dole.¹²⁴ However, in the same reply, Weichert submits contacts with Dole "almost" ceased in "beginning 2004"¹²⁵. In the same statement, Weichert links the end of communications with Mr [...] (Dole) retirement from Dole. He in fact left Dole in December 2002. However, Mr [...] was not Weichert's only contact at Dole. In 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).
- (99) The Commission concludes that the evidence shows that Dole and Weichert engaged in communications, the contents of which are described in section 4.4, from at least 1 January 2000 to at least 31 December 2002.

4.4. Contents of communications

4.4.1. Overview

- (100) The communications between the parties concerned price setting factors, that is, factors relevant for setting of quotation prices for the upcoming week and price trends and/or indications of quotation prices relevant for Northern European region. As described in section 4.2.2, communications took place on Wednesdays or/and (between Chiquita and Dole) on early Thursday mornings, before the parties set their own quotation prices on Thursday mornings. Pre-pricing communications preceded the setting of quotation prices by the parties. These pre-pricing communications must be distinguished from the exchange of quotation prices which took place on Thursday mornings after quotation prices were set by the respective parties (see the description of the latter in section 4.5).
- (101) Before describing in detail what was discussed during such pre-pricing communications, the factual context is outlined, in particular the setting of quotation prices, the Community licence regime and banana import arrangements are described as well as the geographical area for which such communications were relevant.

4.4.2. Factual context

4.4.2.1. Setting quotation prices

- (102) The parties set their quotation prices on Thursday mornings¹²⁶ (see section 2.3.1). Communications further described in section 4.4 (namely pre-pricing communications) took place prior to the setting of weekly quotation prices by the parties.

¹²³ See file p. 43531 ([...] revised reply to the request for information of 30 March 2006).

¹²⁴ See file p. 38524-38527 ([...] reply to the request for information of 15 December 2006).

¹²⁵ See file p. 38530 ([...] reply to the request for information of 15 December 2006).

¹²⁶ See for example file p. 50258 et seq. [...], file p. 50290 et seq. [...], file p. 50346 et seq. [...], file p. 50352 et seq. [...], file p. 50359 et seq. [...], file p. 42896 ([...] reply to the request for information of 10 February 2006), file p. 45199 ([...] reply to the request for information of 27 February 2007) and file p. 45217, file p. 38112 et seq. ([...] reply to the request for information of 10 February 2006), see also file 38236 et seq. ([...] reply to the request for information of 6 June 2006).

- (103) In 2000-2002, Weichert traded bananas marked with the Del Monte brand (see section 2.2.3). On Thursdays Weichert would set weekly quotation prices [...]. Weichert's communications with Dole during this period concerned quotation prices to be set for Del Monte bananas.¹²⁷
- (104) The leading importers and marketers of bananas set and announced to their customers their quotation prices for their brand(s) each week. The term "quotation prices" usually refer to quotation prices for green bananas ("green quote"). Quotation prices for yellow bananas ("yellow quote") are normally the green quote plus a ripening fee. Quotation prices set by the parties weekly were relevant for the Northern European region (see section 4.4.3). In particular, Chiquita quotation price was relevant for the Northern European region¹²⁸. [...]¹²⁹. [...]¹³⁰. Dole submits that its "[g]reen sales are generally based on one weekly price."¹³¹ In its reply to a request for information Dole explained its pricing particularities for Germany, Belgium, France, Greece, Italy, Spain and Sweden¹³². According to Dole, concerning [...].¹³³ Documents found at Dole during the inspection show that for the Community it had a price for "North Europe EU 15" and separate prices for France, Italy, UK¹³⁴ (see also recital (142)). Weichert quotation price was also relevant for the Northern European region (see recital (140)). The prices paid by retailers and distributors for bananas (so called "actual prices" or transaction prices) can be determined in a number of ways.¹³⁵ [...] (see also recital (175)). From about 2002 customers increasingly preferred to have the price linked to the Aldi price.¹³⁶ Dole and Weichert had either supply contracts with a fixed price formula or contracts with weekly negotiated prices. Dole's German entity Dole Fresh Fruit Europe OHG, which set Dole's weekly quotation price, mostly set prices on a weekly basis.¹³⁷ The Commission observes that during the relevant period quotation prices for Dole and Del Monte bananas (the latter were traded by Weichert) were virtually identical.¹³⁸ On Thursday mornings banana suppliers which sell to Aldi usually submitted their offers to Aldi. Usually by around 2 pm the "Aldi price" was set. The Aldi price is the price paid by Aldi to its banana suppliers. Aldi explains that [...].¹³⁹ From the second half of 2002, the Aldi price began to be used more as an

¹²⁷ [...] See file p. 18096-18238, 38241-38242.

¹²⁸ See file p. 28103 [...].

¹²⁹ See file p. 23887 [...].

¹³⁰ See file p. 4939-5447.

¹³¹ See file p. 42911 [...] reply to the request for information of 10 February 2006).

¹³² See file p. 42902 et seq.

¹³³ See file p. 42902 [...] reply to the request for information of 10 February 2006).

¹³⁴ See file p. 49086-49091, 49096-49097.

¹³⁵ Weichert and Dole explained their pricing processes (setting quotation price, yellow quotation price and actual prices) in their replies to the request of information of 10 February 2006.

¹³⁶ See file p. 50277-50279 [...].

¹³⁷ See footnotes 149 and 153.

¹³⁸ [...] explains, in response to a request for information, 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" (see file p. 38533 [...] response to the request for information of 15 December 2006)). [...] states, in response to a request for information, for the period including 2000-2002 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" (see file p. 51027 [...] response to the request for information of 15 December 2006)). In addition, [...]. [...] (See file p. 27873, [...]).

¹³⁹ [...] The description shown here is from [...] (see file p. 24477-24478). For a very similar description from [...] see file p. 24467-24468.

indicator for banana pricing formulae in certain other transactions, including for branded bananas.

- (105) The Commission finds that through the pre-pricing communications the setting of the parties' quotation prices was coordinated. By concerting in advance on quotation prices set weekly and in particular on the development of these quotation prices, namely whether they would be going up, going down or staying the same, the parties coordinated their quotation prices before they were set, instead of deciding upon their prices independently. In addition, during the relevant period some customers had supply contracts with prices that were linked to quotation prices. [...] ¹⁴⁰ For these customers there was a direct link between the prices they paid and the quotation prices. Furthermore, the negotiating position of other customers who negotiated their prices weekly was diminished as a result of the coordination of quotation prices, since they had less opportunity to exploit differences in quotation price movements between suppliers of the leading brands. Moreover, even in case of contracts with pre-established pricing formulae or with fixed prices such coordination had a negative impact since it in general lessened the competitive pressure. To the extent that the price to one customer in particular (the Aldi price) became more important at the end of the relevant period as a reference price in relation to supply contacts with other buyers, the Aldi price was itself always set after the parties had announced their quotation prices for the week on Thursday morning.
- (106) The relevance of quotation prices for banana trade and prices obtained is confirmed by evidence in the Commission's file. The Commission notes that from at least the early 1990s the parties and certain other banana importers established their quotation prices each week and numerous lists of these prices have been copied by the Commission during the inspections. ¹⁴¹ The Commission does not conclude that this in itself demonstrates the importance of quotation prices. However, it does show that such weekly prices were widely disseminated in the banana trade. The parties themselves explain that the quotation prices were rapidly transmitted throughout the trade and afterwards reported in the trade press. Moreover, the parties submit that they communicated quotation prices to their customers on Thursday mornings. ¹⁴²
- (107) To demonstrate the importance the addressees put on the quotation prices it is appropriate to quote an email from Mr [...] to Mr [...] (both managers of Chiquita) of 30 April 2001. "[...]". ¹⁴³ This shows that actual prices were dependent on quotation prices and that customers followed their development. Moreover, from this document it is apparent that there was certain interdependence among quotation prices of Chiquita, Dole and Del Monte banana brands and limits in differentials which could be sustained. Concerning this document Dole argues, in its reply to the Statement of Objections, that the fact that customers will react badly to even a non binding quotation price if that price is at a sufficiently astronomical level, does not show that they were meaningful in determining actual transaction prices. The Commission

¹⁴⁰ See file p. 50277 et seq. [...], file p. 50231-50232 [...], 50389 et seq. [...].

¹⁴¹ For examples of such lists see file p. 37571-37595.

¹⁴² See file p. 50231 [...], file p. 43476 et seq. [...] revised reply to the request for information of 30 March 2006), file p. 45129 [...]s reply to the request for information of 15 December 2006), file p. 38584 [...] reply to the request for information of 5 February 2007), see also file p. 38112 [...] reply to the request for information of 10 February 2006).

¹⁴³ See file p. 50986 [...]. "Green quote" is quotation price for un-ripened (green) bananas.

disagrees with this argument. Contrary to what Dole suggests, this document not only shows that customers react when quotation prices reach certain levels, but also shows that they perceived that quotation prices had a link to actual prices. The document clearly states that if the [...].

- (108) Weichert, in its reply to the Statement of Objections, observes that this e-mail provides indirect evidence of the fact that retailers are price sensitive. However, Weichert disagrees that the Commission could draw conclusions from [...] document that other importers attached equal importance to quotation prices. The Commission observes that this document specifically refers to buyers of Del Monte bananas, traded by Weichert, and Dole bananas.
- (109) In their replies to the Statement of Objections, Dole, Weichert and Del Monte argue that the quotation prices had no or limited impact on actual prices. These parties claim that the quotation prices and actual prices were disconnected and/or that quotation prices were of little or no relevance. However, documents in the file show that quotation prices were relevant for the banana trade and prices that could be expected to be obtained.
- (110) An indication of the relevance of quotation prices for customers is their reaction when Chiquita increased its quotation price after it had been announced, referred to in recital (176). The Chiquita internal correspondence and correspondence with Atlanta quoted in recitals (176) et seq. show that customers clearly thought this change had relevance for the prices they could expect to pay or receive. From the parties' perspective, the concern of Chiquita "not to let down" the other parties by failing to support increases by them of their quotation prices illustrates that these prices were important for them too. This is explained in another document of the same date, sent to Chiquita by Atlanta (see recital (176)). If Chiquita had not supported the rise in the quotation price announced by Dole this would have compromised an upward movement in the price, and jeopardized price evolution in the next weeks. This document shows that by supporting the rise in the quotation price announced by Dole, Chiquita avoided jeopardising an upward movement in the upcoming weeks.
- (111) Another indication of the relevance of quotation prices is the document quoted in recital (172) et seq.¹⁴⁴ [...] Moreover, this document demonstrates that Dole's and its own quotation prices were relevant for the price which Chiquita would obtain in reality. In this e-mail a Chiquita employee wrote his consideration what could be Dole's motivation for an increase in quotation prices by 2 EUR: [...] This demonstrates the relevance of the Dole's quotation price for the market, including for the actual prices obtained by Dole itself. In addition, [...] This clearly shows the relevance of Dole's quotation price for the actual prices of Chiquita. Moreover, at this instance Dole's quotation price influenced the quotation price of Chiquita. This e-mail indicates that a day before Chiquita was considering the upward move [...], however, that morning Chiquita decided to increase its quotation price by EUR 1.5. Indeed, [...] in this instance, in the light of Dole's increase of its quotation price by EUR 2, Chiquita changed its quotation price by EUR1.5 upwards [...]¹⁴⁵.

¹⁴⁴ See file p. 24794 [...].

¹⁴⁵ See file p. 24771 [...].

- (112) Another document demonstrating the relevance of quotation prices is the letter of German trade association DFHV, where it states that (still) in 2005 quotation prices were considered as *the starting position for weekly price negotiations* for banana importers (see recital (119)). Even though Weichert disclaims the relevance of quotation prices, demonstrated by this document, to it, the document presents the position of the trade association, of which Weichert was a member, and contains a clear message about the relevance of quotation prices, not requiring any interpretation or supposition. Moreover, this document demonstrates the relevance of quotation prices in general and is not limited to any particular importers. The Commission recognises that this document is from the year 2005. Nevertheless, it considers that the document is relevant for the period between 2000 and 2002 in that it shows that even in 2005 when the relevance of quotation prices was less significant than in 2000-2002, quotation prices were considered as "*the starting position for weekly price negotiations*". Moreover, evidence in the Commission's file shows the relevance of quotation prices for Del Monte's bananas traded by Weichert during the period of the infringement. In the document quoted in recital (389) (fax of 28 January 2000), Del Monte requested that Weichert provide an explanation about price difference between "final price" and "expected price" in the following terms: "*I was told that Interfrucht [Weichert] will keep its prices "very close" to the official price!!!*". Clearly, the document shows Del Monte's expectation that Weichert will obtain the final price, which will be very close to quotation ("official") prices.
- (113) In addition, in an e-mail of Mr [...] ([...], Chiquita) to members of an e-mailing list called [...] (which was copied *inter alia* to a high level official at Chiquita [...]) of 21 June 2000 (Wednesday of week 26), Mr [...] indicates that [...]¹⁴⁶ This e-mail demonstrates how Chiquita was concerned about such downward revision of quotation prices and shows that Chiquita considered such move as [...] since there was [...]. Moreover, it shows that there were limits in quotation price differentials which could have been sustained. The document demonstrates that Chiquita was frustrated with such a downward revision and that it was [...] the Dole's decrease in quotation prices. According to Mr [...], Chiquita had no other alternative given Dole's 2 DEM decrease and given that the market was [...]. In the same e-mail Mr [...] further writes [...]
- (114) Dole argues, in its reply to the Statement of Objections, that this document shows that Chiquita was forced to follow a steep Dole price cut or lose out in the market. Dole argues that this is totally inconsistent with the idea that any form of price coordination took place. The Commission observes that it is established that even though the concertation between parties formed a consistent pattern, the Commission has not found that it took place every week. Therefore, the Commission cannot accept the argument that such incidents could rule out that there was a concerted practice. It is not necessary, in order to find a cartel which concerns price fixing, to demonstrate that it had no exceptions or that it was "perfectly" functioning. In any case, Dole's argument is clearly inconsistent with Dole's position that there is no connection between the quotation prices (including those of other importers) or at least their evolution, and price developments in the market place. Moreover, Dole itself submits in its reply to the Statement of Objections that customers used quotation prices as a bargaining tool in negotiating actual prices. In particular, according to Dole's

¹⁴⁶ See file p. 49436 [...].

statement given in its reply to the Statement of Objections "[...]customers [...] sought to bargain for the best offer by publicly comparing competing quotation prices".¹⁴⁷

- (115) The Commission concludes that evidence in the file shows that quotation prices served at least as market signals, trends and/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 through price formulae based on quotation prices.
- (116) In its reply to the Statement of Objections, Dole argues that the Commission misunderstands the role (or lack thereof) of quotation prices. First, Dole argues that quotation prices were merely market indicators, one of many factors considered by the customers, only a guideline in customer negotiations. *"In a very modest way, they help importers and customers assess the current state of the market and how it may evolve"*.¹⁴⁸ Second, Dole argues that actual prices are totally different from quotation prices and could not have been used as a vehicle for coordinating prices. Third, Dole argues that customer negotiations involved confidential rebates and bonuses, which was unknown to the competitors and could not be coordinated by the quotation price. Fourth, Dole argues that the actual prices were increasingly determined by the Aldi price.¹⁴⁹ Dole argues, in its reply to the Statement of Objections, that there is no evidence that the quotation prices it provided to the ripeners influenced the price they quoted to Aldi for non-Dole bananas, nor is there any evidence that the prices the ripeners quoted to Aldi influenced Aldi. Dole states that Aldi disclaims any such effect. Del Monte states that Aldi treated the ripeners offers as only providing a certain tendency upwards or downwards. It refers in this regard to Aldi's response to the Commission's request for information where Aldi indicates that [...].¹⁵⁰
- (117) As a preliminary observation, the Commission notes that Dole itself explains, in its reply to the Statement of Objections, that quotation prices help importers and customers assess the current state of the market and how it may evolve. In addition, Dole states that *"[...] the quotation price simply served as a market indicator, which had the purpose of advancing negotiations toward the actual price."*¹⁵¹ Moreover, Dole does mention, in the economic analysis attached to its reply to the Statement of Objections, that it had transactions directly based on its quotation price.¹⁵² It is difficult to see how these statements by Dole could be reconciled with its arguments that quotation prices had no or little relevance for prices obtained.
- (118) In addition, Dole argues, in its reply to the Statement of Objections, that the Commission misunderstood the process by which Dole quotation price is set. [...].

¹⁴⁷ [...] reply to the Statement of Objections page 222.

¹⁴⁸ [...] reply to the Statement of Objections page 145-146. See also file p. 50573.

¹⁴⁹ See also [...] reply to the request for information of 10 February 2006, where Dole explained its pricing process. [...] (p. 42903). Dole also states that the Aldi price has become a benchmark for banana pricing in Europe. [...] (file p. 42896).

¹⁵⁰ See file p. 24478 ([...] reply of 12 October 2006 to the request for information). The German original reads: "[...]."

¹⁵¹ [...] reply to Statement of Objections, page 151.

¹⁵² Economic analysis attached to [...] reply to Statement of Objections, page 20.

- (119) In its reply to the Statement of Objections Weichert makes many of similar arguments as Dole as regards the importance of the Aldi price. Weichert also argues that actual prices were not negotiated on the basis of quotation prices. Weichert points to the fact that Aldi is the largest single purchaser of bananas in the Community, and its buying price is "the obvious focal point for what the market clearing price will be in any given week". Moreover, Weichert states, in its reply to the Statement of Objections, that its quotation prices did not form the basis for, nor were relevant for, negotiations with customers and that its actual prices were not determined by quotation prices.¹⁵³ Weichert states, in its reply to the Statement of Objections, that its quotation prices were unrelated to quotation prices of other importers and other importers did not negotiate prices with customers with reference to Weichert's quotation price. Weichert argues that the Commission should not focus on quotation prices which it argues are largely meaningless. Weichert also argues that there was no correlation between quotation and actual prices, and that the Commission was mistaken in concluding that actual prices were negotiated on the basis of the quotation price. To support these arguments, Weichert submits, with its reply to the Statement of Objections, economic studies, information about its contractual arrangements and also refers to various statements in the Commission's investigation file and to Commission's submissions in the WTO Dispute Settlement Panel¹⁵⁴. According to Weichert, various banana operators confirm the importance of the Aldi price and irrelevance of importers' quotation prices both for the Aldi price and for prices for thirds' bananas. In its written reply to the Statement of Objections and at the Oral Hearing, Weichert referred (albeit in a different context) to a letter of German trade association DFHV to a Member of the European Commission dated 21 January 2005 where this association *inter alia* states that "[t]hese "official" prices reflect only the starting position of the different operators for their weekly price negotiations, they are up to 50% higher than the truly agreed prices."¹⁵⁵ However, at the Oral Hearing Weichert excluded such impact of quotation prices - the starting position for weekly price negotiations - for Weichert.
- (120) Del Monte argues, in its reply to the Statement of Objections, that quotation prices had no impact on actual prices. It argues that quotation prices were not linked to transaction prices but "*they reflected the established importers' view as to (i) the positioning of their brand as a first, second or third tier product and (ii) the supply and demand situation for the relevant week.*"¹⁵⁶ Del Monte also emphasises the importance of contractual arrangements (including "the prevalence of long term agreements with customers") and, in particular, of the Aldi price ("that underlies the

¹⁵³ See also file p. 38113-38114 ([...] reply to the request for information of 10 February 2006), where Weichert states that it has essentially two ways of negotiating individual prices: (i) either the parties enter into a framework supply agreement or (ii) prices are negotiated individually on a weekly basis. Weichert has about 20 customers for bananas. [...] A certain percentage of Weichert's sales are accounted for by its largest customers. These four customers as well as several other smaller customers have entered into framework agreements which contain price formulae based on the Aldi price. According to Weichert, "[e]ven where no framework agreements exist that refer explicitly to the Aldi price, individual negotiations with the customers always have the Aldi price as a starting point."

¹⁵⁴ This is made in reference to the WTO Dispute Settlement procedures in relation to the ACP-EC Partnership Agreement, in particular (amongst other submissions by parties during these proceedings) to the Awards of the Arbitrator of 1 August 2005 and 27 October 2005 in relation to the Recourse to Arbitration pursuant to the Decision of 14 November 2001 (WT/L/616) and the Second Recourse to Arbitration pursuant to the Decision of 14 November 2001 (WT/L/625).

¹⁵⁵ See file p. 51180.

¹⁵⁶ Page 10-11 of [...] reply to the Statement of Objections.

contractual pricing formula"). Del Monte argues "*the manner in which importers agree prices with their customers makes it highly unlikely that the weekly exchange of information on official prices could have facilitated coordination of pricing by importers.*"¹⁵⁷ According to Del Monte, "[...]importers could at worst have coordinated a common "signal" to send to the market (in the form of coordinated official prices)"¹⁵⁸. Del Monte also argues that competitors did not exchange transaction prices, while quotation prices were not a basis for price negotiations with customers.

- (121) As concerns the arguments of these addressees (Dole, Weichert, Del Monte) that quotation prices had no relevance for the prices obtained in the market, the Commission observes that the evidence described in recitals (106)-(113) shows the contrary. In addition, these arguments do not appear to be consistent with the fact that the parties communicated their quotation prices to their customers on Thursday mornings (see recital (106)). As regards the addressees' arguments concerning the importance of the Aldi price, it is important to observe that the relevant period for this decision is 2000-2002, in which the Aldi price was of less importance for price setting than later (2003-2005). Moreover, even though the parties and other banana suppliers underline the importance of the Aldi price, nevertheless quotation prices were relevant for the banana trade. Even though Dole and Weichert claim that the Aldi price was of particular importance also in 2000-2002, the Commission notes that the Aldi importance is described by the parties and other banana suppliers as "growing". It is clear that it was less significant in 2000-2002 than later. In this context it is also significant that Dole and Weichert only from late 2002 started adjusting their quotation prices following the announcement of the Aldi price (see recital (123)). As concerns Dole, the Commission observes that in its reply to the Statement of Objections Dole indicates the percentage of sales which its German entity Dole Fresh Fruit Europe OHG had formally pegged to the Aldi price (so called "Aldi plus" contracts) by 2005. In the economic study attached to Dole's reply to the Statement of Objections, more detailed figures going back to 2001 are provided.¹⁵⁹ Here it can be seen that Aldi plus contracts played a considerably smaller role in earlier years.¹⁶⁰
- (122) As a general remark the Commission observes that the Aldi buying price was itself determined after banana importers had set and announced their quotation prices for the following week (see also recital (104)). The importers would signal to the market the intended development of their prices before suppliers made offers to Aldi. It is not relevant whether Aldi itself took importers' quotation price into account. Moreover, the fact that parties may have revised their announced quotation price after the Aldi price was set does not justify their pre-pricing communications. Dole maintains, in its reply to the Statement of Objections, that quotation prices were irrelevant, while at the Oral Hearing Mr [...], [...] DFFE, in response to a question from the French competition authority concerning the purpose of initial quotation price explained that

¹⁵⁷ Page 18 et seq. of Annex 1 to [...] reply to the Statement of Objections (Report "Economic Assessment of an exchange of information on the Northern European supply of bananas").

¹⁵⁸ Page 21, *ibid.* However, Del Monte argues that "[...]there is no obvious, economically coherent, mechanism through which such a strategy would be expected to lead persistently and systematically to higher Aldi prices[...]" (see also recitals (290) and (292)).

¹⁵⁹ Economic study attached to [...] reply to Statement of Objections as Annex 3, page 19.

¹⁶⁰ The Commission does not provide specific numbers in this decision since Dole claims that this information is confidential/business secret.

"...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 Euro, 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 Euro 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 Euro 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 Euro (that's what they are voicing to the market) but then the crucial thing is what Aldi thinks [...]." ¹⁶¹ In addition, in its reply to the Statement of Objections Dole admits that still there remained "some scope for weekly negotiations about actual prices". ¹⁶² In these cases, according to Dole, the exchanges improved its ability and that of other banana importers to more precisely gauge the state of supply and demand in the market. Dole argues that to the extent Aldi took into account the quotation prices (even indirectly - through the prices quoted by ripeners), the Aldi price more accurately reflected changes in the balance of supply and demand. Indeed, these statements do not contradict the Commission's finding that, first, importers set and announced their quotation prices signalling the intended development of banana prices, second, ripeners formed an idea about the market development and submitted their offers to Aldi and only then the so-called "Aldi price" was set. Del Monte submits, in its reply to the Statement of Objections, 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". Del Monte argues that importer's direct or indirect customers (in particular Aldi) were "free to ignore" quotation prices. Nevertheless, this statement does not contradict the Commission's finding that by quotation prices importers were at least signalling the intended development of banana prices.

- (123) Documents in the file show that Dole and Weichert, who during that period traded Del Monte 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. ¹⁶³ 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. [...] ¹⁶⁴ These parties did not provide explanations why they still set quotation prices,

¹⁶¹ Commission's transcript of excerpt from recording of Oral Hearing Bananas 6 February 2008 (from 1:54:40 to 1:58:06 of the recording), document ID 1865.

¹⁶² For example page 89 of [...] reply to the Statement of Objections.

¹⁶³ See for example file p. 5392, 5405, 5410, 5415, 5420, 5424, 5430 and 5446. [...] explains, in response to a request for information, that [...] (file p. 45125 [...] response to the request for information of 15 December 2006), see also file p. 45126, 51027).

¹⁶⁴ See for example file p. 24769-24771 [...].

which according to these parties were "meaningless", even if they revised them after the Aldi price was set.

- (124) The Commission observes that Dole's arguments regarding the revision of its quotation prices do not contradict its findings. On the contrary, they show that Dole did set and announce a quotation price on Thursday mornings. It does not matter how exactly prices set on Thursday mornings were called by the parties: quotation prices, official prices, initial quotation prices, reference prices. In the later period of the infringement Dole continued to set and announce a quotation price on Thursday morning before the Aldi price was set. The message to the market had been sent, even if Dole or Weichert may have begun to later revise their quotation prices. The fact that there were subsequent revisions of the quotation prices set on Thursday morning does not alter the Commission's findings concerning quotation prices set by Dole on Thursday mornings.
- (125) Dole, Weichert and Del Monte state that their communications with competitors concerned quotation (reference, official) prices, but not actual prices charged to customers.¹⁶⁵ The Commission notes that even if the parties concert on quotation prices, this is contrary to Article 81 EC (see section 5.2). The Commission has neither claimed direct fixing of *actual* prices in the Statement of Objections nor finds such a practice in this decision.
- (126) Weichert submits, in its reply to the Statement of Objections, that the quotation prices are of no commercial significance for importers of "third" brands, for which the basis of negotiations is the Aldi price. The Commission observes that Weichert in 2000-2002 traded Del Monte bananas, which is considered in the banana business as a second-tier brand (not "third") (see section 2.3.1). In 2000-2002 the large majority of Weichert's sales were Del Monte bananas. In each of the years 2000, 2001 and 2002 measured in volume considerably over [...] % of Weichert's sales in the Northern European region were Del Monte bananas.¹⁶⁶ Only later did Weichert essentially trade thirds. In any case, the Commission does not accept this argument. The Commission also notes that the Aldi price is the price that it pays for "third" or unbranded bananas. However, the parties state that they made sales of branded bananas on the basis of Aldi plus pricing formulae. Moreover, evidence in the Commission's file shows the relevance of quotation prices specifically for Del Monte's bananas. In the document quoted in recital (389) and (112), Del Monte requested Weichert to provide an explanation about price difference between "final price" and "expected price" in the following terms: "*I was told that Interfrucht [Weichert] will keep its prices "very close" to the official price!!!*".
- (127) Moreover, the Commission considers that even if it was the case that for an undertaking quotation prices were less relevant or less important than to its competitors, in particular its main competitors, it does not justify that undertaking's participation in discussions, which lead to coordination of such quotation prices. The

¹⁶⁵ See for example file p. 38234-38235 ([...] reply to the request for information of 6 June 2006), p. 43476 et seq. ([...] revised reply to the request for information of 30 March 2006) and its cover letter (file p. 50573). These parties also make these arguments in their replies to the Statement of Objections, so does Del Monte (for example in page 31 of its reply).

¹⁶⁶ See file p. 38634-38655.

Commission observes that [...] quotation prices announced by importers gave an indication of the importers' intentions or aspirations as regards the trend in prices for the following week¹⁶⁷.

- (128) Therefore, the Commission considers that quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices. Moreover, in some transactions actual prices were directly linked to quotation prices. The Commission considers that they were sufficient means to achieve the anticompetitive object which is found by the Commission in this decision.

4.4.2.2. Banana quota regime and import arrangements

- (129) During the relevant period banana imports into the Community were under the licence regime with fixed annual quotas and limited flexibility on a quarterly basis (see section 2.3.3).

- (130) In its response to the Statement of Objections Dole argues that as the quotas were fully utilised, the supply of bananas to the Community was artificially fixed by the quotas and licences. The Community quota regime "*inalterably fixed each importer's annual banana volume. It fixed within a tiny margin each importers quarterly banana. It made public the total volume of bananas each importer could supply. [...] On a shorter time horizon, the old regime left importers to deal with the competitively artificial situation of fixed supply, but variable demand.*"¹⁶⁸ Weichert and Del Monte make, in their replies to the Statement of Objections, similar arguments. According to Weichert, the regulatory regime imposed on all economic operators restricted and pre-determined volumes of bananas sold in the Community and, as a consequence, importers' market shares of bananas. Weichert argues that the licence regime meant that there was no commercial interest for importers to restrict supply, therefore a hypothetical collusive agreement to restrict output in order to raise banana prices was unlikely to be sustainable. Moreover, Weichert argues that the regulatory regime created a high level of volume transparency in the market since it allowed accurate quarterly estimates. Del Monte argues that the CMO (that is, the Community common market organisation for bananas) effectively froze supply levels. The market operators were not free in their decision as to when to use the licences, they were granted on a quarterly basis. Del Monte argues that in the medium term and "even within a longer time frame", importers were "*unable to appreciably influence supply, due to the licences, fixed shipping schedules, the inability to influence harvests and reliably predict demand and, most importantly, the EU's banana regime*"¹⁶⁹. Del Monte argues that the quota system made the collusion over the entire Community highly implausible. Moreover, according to Del Monte the licence allocation system made additional incentives to make full use of licences.

- (131) It is correct that the quotas available were largely taken up by operators. The Commission notes that in 2000-2002 the utilisation ratio appears to be slightly lower

¹⁶⁷ In addition, the Commission notes that [...], in response to a request for information of 10 February 2006, where it was arguing about a decreasing relevance of quotation prices, states "[t]oday [the response is dated 20 March 2006], the function of reference prices is limited to reflecting price trends and to a signal within organisations." (See file p. 40495).

¹⁶⁸ [...] reply to the Statement of Objections page 35.

¹⁶⁹ Page 6-7, [...] reply to the Statement of Objections.

than 100 %.¹⁷⁰ However, in the view of the Commission the arguments of Dole, Weichert and Del Monte are not sustainable. The scope of the quotas was the entire Community, but only the Northern European region is covered by the infringement. The licence regime could not have fixed the market share for the Northern European region. Moreover, licences were distributed quarterly, while shipping and allocation decisions were taken weekly. During the relevant period banana imports into the Community were under the licence regime with fixed annual quotas (see section 2.3.3) which were distributed quarterly. In any given week banana shipments to North European ports were determined as a result of the production and shipping decisions taken by producers and importers. Volumes arriving at these ports were allocated by the importers to Member States in the Northern European region, to Eastern Europe and to EFTA as arrivals information exchanged between them demonstrate (see recital (136)). In addition volumes arriving at these ports could be transported to Member States outside the Northern European region for example the United Kingdom or France. Likewise volumes available in other Member States could be transported to and supplied in the Northern European region. Eurostat data on import and export of bananas to the Member States¹⁷¹, show significant movements of volumes from the Northern European region to other parts of the Community, and volumes being moved from the rest of the Community to the Northern European region. These movements vary considerably in size showing real flexibility in the market. For example from 2001 to 2002 exports from the Northern European region to the rest of the Community fell from 310758 tonnes to 255434 tonnes, while imports from the rest of the Community increased from 115955 tonnes to 138233 tonnes. Exports from the Northern European region to the rest of the Community varied between 255434 tonnes in 2002 and 324623 tonnes in 2000.¹⁷² Del Monte refers in its reply to the Statement of Objections to pressure in the Northern European region from other countries, in particular France.¹⁷³

- (132) In addition, there was a secondary market in licences whereby they could be used by others without transfer of the title to the licence. Licences could be used at any entry point in the Community. So the importers had freedom to decide how many licences to purchase, and were not limited to import only the quantities covered by the licences allocated to them. The evidence shows that certain parties significantly increased their volumes by purchasing licences held by others and importing under licences held by customers¹⁷⁴. Certain addressees of the Statement of Objections also demonstrated the significance of licence purchases with information provided at the Oral Hearing. Finally, from the turnover figures provided by the addressees of this decision as well as Fyffes and LVP it is clear that importers' national market shares varied considerably

¹⁷⁰ According to information from DG AGRI in 2000 licences for 3 410 700 tonnes were available, while supply from ACP and "dollar countries" amounted to 3 298 321 tonnes. In 2001 licences for 3 403 000 tonnes were available, supply from ACP and "dollar countries" amounted to 3 203 342 tonnes. In 2002 licences for 3 403 000 tonnes were available, supply from ACP and "dollar countries" amounted to 3 287 935 tonnes (see file p. 49812).

¹⁷¹ Data from Eurostat covers not only fresh bananas but also dried bananas and plantains, which are not covered by this decision. However, the importance of dried bananas and plantains volumes compared to fresh bananas volumes is very minor.

¹⁷² EUROSTAT COMEXT database on banana export and import. Figures include dried bananas and plantains, which however play a very limited role compared to fresh bananas.

¹⁷³ Page 60 of [...] reply to the Statement of Objections.

¹⁷⁴ See for example file p. 50324-50325 [...].

from year to year, which also demonstrates that these sales were not predetermined as a result of the quota regime.

- (133) Dole argues that as a result of the market characteristics and the quota regime, basic economic principles would suggest that price fixing was rendered impossible, as in order for a conspiracy to be effective and actually raise prices, the conspiracy must successfully reduce supply available to the market. "[T]he regime rendered impossible any conspiracy to withhold volumes over a yearly or even quarterly basis, or to withdraw permanently any portion of volume from the market."¹⁷⁵ A similar argument was made by Weichert (see recital (130)). The Commission observes in this regard that it did not allege in the Statement of Objections and does not find in this decision cartel conduct to allocate markets or withhold volumes. It is not necessary in order to establish a price fixing cartel to find in addition a "conspiracy to withhold volumes from the market". Moreover, the Commission observes that this issue concerns what is relevant for the geographical scope and the factual context of cartel arrangements but not any alleged "conspiracy" concerning volumes.
- (134) The Commission recognises 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, 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. However the Commission does not accept the arguments of the parties that they had no freedom to each decide on the quantities imported or sold by them in the Community and even less to determine what quantities were marketed by them in the Northern European region in any given week. For all the reasons explained in recitals (131) and (132), the quota regime did not in fact even on an annual or quarterly basis determine who would import the quota of bananas into the Community (given that licences could be and were traded), much less the quantities sold by each party in a given part of the Community or *a fortiori* in a given week.
- (135) Dole, Del Monte and Weichert also argue, in their replies to the Statement of Objections, that the practicalities of growing, shipping and marketing of bananas (including packaging arrangements) lead to the inflexibility of banana supply and/or rendered any cartel arrangements implausible. Dole argues that any decision to alter the volume of bananas would need to be made during the loading process, roughly three weeks prior to arrival. Del Monte argues that the shipping capacity is fixed and is not subject to any influence during the course of the year. Weichert claims that the shipping schedules worked to yearly plans and therefore contained no flexibility. According to Weichert, shipping arrangements of banana importers were pre-determined in advance on the basis of the volume of bananas they were able to import and where they had to be imported. The Commission considers that the parties' arguments that banana shipping arrangements rendered the supply of bananas into the Northern European region inflexible are not sustainable. In any given week the amount of volume to be discharged for supply in the Northern European region depended on importers decisions. First, the volumes arriving at Northern European ports could be transported to countries outside the Northern European region and *vice versa*, volumes available in other Member States could be transported to and supplied in the Northern European region. Eurostat data on import and export of bananas to Member States (see

¹⁷⁵ Page 35 of [...] reply to the Statement of Objections.

recital (131)) show significant movements of volumes from the Northern European region to other parts of the Community, and volumes being moved from the rest of the Community to the Northern European region¹⁷⁶. These movements vary considerably in size showing real flexibility in banana movements. Second, banana arrivals information (see recital (136)) demonstrates that parties' and other importers' banana import volumes into the Northern European region (and other territories which were supplied by North-bound vessels, including "EFTA", "East" volumes) varied from week to week. Moreover, Dole and Del Monte volume information sheets provided information about "revised" EFTA and East volume for the earlier week. In any event, in any given week banana shipments to North European ports and the ultimate destination were determined as a result of the production, shipping and marketing decisions taken by producers, importers and traders (see also recital (131); see also the document quoted in recital (113), which demonstrates Chiquita's decision to compensate an unexpected reduction in quotation prices by an increase in volumes). Concerning parties' arguments that the supply was inflexible due to marketing particularities, the Commission considers that parties did not substantiate that these particularities would render the supply of bananas inflexible. The Commission also considers that these parties did not demonstrate that banana growing particularities would result into the rigidity of the amount of bananas available for the Northern European region in a short or long term.

- (136) Various documents in 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.¹⁷⁷ The parties admit that such exchanges took place.¹⁷⁸ 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.¹⁷⁹ The Commission observes that this banana arrivals information shows that importer's banana volumes arriving to Northern European ports differed from week to week.
- (137) As explained in this section 4.4.2.2 the Commission does not accept the argument that the quota system determined the quantities each party could or did sell in the Northern European region. On the contrary, the quantities sold there depended upon production, shipping and marketing decisions made by the parties themselves or their suppliers. Neither in the Statement of Objections the Commission has claimed, nor in this decision does it find a "conspiracy" concerning volumes.

¹⁷⁶ For example, in 2000-2002 the export from Belgium to Member States outside the Northern European region ranged from 189 506 tonnes in 2002 to 268 718 tonnes in 2000, while the import from Member States outside the Northern European region to the Northern European region ranged from 115 955 tonnes in 2001 to 165 108 tonnes in 2000 (EUROSTAT. The figures include dried bananas and plantains, see footnote 6).

¹⁷⁷ See for example file p. 37651 et seq., 37764 et seq., 37882 et seq. ([...] inspection documents), p. 5909-9174 [...], p. 43476 et seq. ([...] reply to the request for information of 30 March 2006).

¹⁷⁸ See for example file p. 50229 [...], p. 43531 and 43534 ([...] revised reply to the request for information of 30 March 2006), p. 38527 ([...] reply to request for information of 6 June 2006).

¹⁷⁹ [...].

4.4.3. Geographical coverage

- (138) The Commission finds that the geographical coverage of the infringement is the area of the European Community, in which quotation prices were relevant and in which parties traded bananas. In particular, price setting factors and future quotation prices (price trends and/or indications of quotation prices for the up-coming week), discussed or disclosed by the parties, were relevant for the Northern European region.
- (139) [...] in 2000-2002 [*Chiquita's*] quotation price was relevant (determined) for [...] the following Member States: [...].¹⁸⁰ [...].
- (140) In response to the Commission's request to indicate the Member States for which its quotation price was relevant (determined), Weichert states that these Member States are the ones where it sold bananas during the relevant time. As concerns the Member States in 2000-2002, these are Austria, Belgium, Denmark, Finland, Germany, the Netherlands and Sweden.¹⁸¹ Weichert does not contest the Commission's finding in the Statement of Objections that the geographical coverage of the arrangements is the whole Northern European region. Weichert nevertheless argues that the Commission has not defined geographical market. The Commission notes that for the type of infringement which is found in this case it is under no duty to define the relevant market. It is clear from case-law that, for the purposes of applying Article 81 EC Treaty, the reason for defining the relevant market is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. Consequently, there is an obligation on the Commission to define the market in a decision applying Article 81(1) EC Treaty only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.¹⁸²
- (141) In its reply to the Statement of Objections Dole disagrees with the Commission's finding that pre-pricing communications concerned Austria, Belgium, Luxembourg, Denmark, Finland, Germany, the Netherlands and Sweden. Dole also disputes Commission's findings concerning the Member States, in which Dole's quotation price was relevant. However, the Commission has evidence which shows that pre-pricing communications in which Dole participated concerned the whole Northern European region. [...], Dole had [...]. [...].¹⁸³
- (142) Documents found at Dole during the inspection show that it had a price for [...].¹⁸⁴ Dole argues, in its reply to the Statement of Objections, that this price was a [...] price. This does not contradict the explanation given by Chiquita that Dole, in the same manner as Chiquita, had the "German quotation price" nor that this price was relevant for the Northern European region. Even though Dole claims, in its reply to the

¹⁸⁰ See file p. 28103 (...).

¹⁸¹ See file p. 38625, 29673 (...) reply to the request for information of 20 February 2007).

¹⁸² See for example Case T-38/02 *Groupe Danone v. Commission* [2005] ECR II-4407, paragraph 99.

¹⁸³ See file p. 27873 (...).

¹⁸⁴ See file p. 49086-49101 (...) inspection), see also file p. 45121 et seq. (...) reply to the Request for Information of 24 November 2006, Annex III).

Statement of Objections, that it had no [...] quotation price, the document clearly shows that it had a quotation price named [...] price. Moreover, in its reply to a request for information, when asked to indicate weekly prices for sales of bananas specifying established general quotation prices and quotation prices for specific countries, groups of countries or other regions within the EEA, Dole clearly explained: "[g]reen sales are generally based on **one** weekly price."¹⁸⁵ (emphasis added). Moreover, in the same reply to the requests for information Dole provided to the Commission general information concerning the Community market area, for which Dole quotation prices are determined¹⁸⁶.

- (143) Moreover, in its reply to a request for information Dole admits that it presumed that the competitors who participated in pre-pricing communications knew to what area quotation prices discussed in these communications with competitors were relevant. Dole states, in response to a request for information, that "*presumably all competitors knew that quotation prices [discussed at pre-pricing communications] referred to the [...] [not disclosed information] markets.*"¹⁸⁷ The Commission observes that for Weichert and Chiquita the Northern European price was relevant for all the Member States in the region where they had sales (see recitals and (140) and (139)).
- (144) Dole claims, in its reply to the Statement of Objections, that communications rarely, if ever, involved specific discussions regarding the Benelux or Sweden and argues that it is wrong to suggest that "the exchange" covered Austria, Belgium, Luxembourg, Denmark, Finland, Germany, the Netherlands and Sweden. The Commission observes that Dole does not exclude that such Dole's communications sometimes even specifically concerned the Benelux and Sweden. The Commission, moreover, concludes that even if these communications did not specifically concern other Member States in the Northern European area, they concerned them altogether. Moreover, Dole has not brought any argument that it had no sales in any of these Member States during the period of 2000-2002. To the contrary, Dole confirms that it had sales in all of these Member States.
- (145) In conclusion, the geographic scope of the infringement is Austria, Germany, Belgium, Luxembourg, the Netherlands, Denmark, Finland and Sweden.

4.4.4. What was discussed

- (146) [...], documents [...] and replies to requests for information show that pre-pricing communications concerned price setting factors and price trends and/or indications of quotation prices for the up-coming week in the Northern European region. Communications between the parties specifically covered on some occasions discussions on and/or disclosure of price trends and/or indicative quotation prices or competitors' views about the evolution of prices before quotation prices were set. Even though the respective parties might not discuss or disclose such indications of quotation prices and/or price trends in each communication, they had a practice of doing so. Therefore, they must have been aware that their communications could lead

¹⁸⁵ See file p. 42911 ([...] reply to the request for information of 10 February 2006). In this reply to the request for information [...] described how its quotation price (green quote) and yellow prices are set.

¹⁸⁶ See file p. 42902 et seq. and p. 11723.

¹⁸⁷ See file p. 29675 et seq. and 45207 and 45225-45226 ([...] reply to the request for information of 27 February 2007).

to such discussions on each occasion and nevertheless were willing to take part in them.

- (147) Taking into account information in the file, the Commission requested the parties to provide information regarding contents of their bilateral communications with competitors, which took place prior to the setting of banana quotation prices on Thursday mornings.¹⁸⁸ Such communications took place orally by phone. The parties have informed the Commission that they had no notes or records concerning these communications. Therefore, to establish their contents the Commission relies on replies to requests for information and corporate leniency statements. There are also contemporaneous documents, which demonstrate the nature of pre-pricing communications (see recitals (172) et seq., (176)).
- (148) In the course of the various pre-pricing communications between parties, they discussed demand and supply conditions ("price setting factors", that is, factors relevant for setting of quotation prices for the upcoming week) and exchanged views about or disclosed price trends and/or indications of quotation prices for the upcoming week. The parties in their replies to requests for information [...] submit statements concerning the purpose of pre-pricing communications. [...]. Dole and Weichert deny this. The arguments of Dole and Weichert, submitted in their replies to the Statement of Objections, are also addressed in section 5.2.

4.4.4.1. Dole and Chiquita

- (149) [...] informed the Commission about its pre-pricing communications with Dole, [...] their topics had been sales and market conditions and price factors as well as official price quotes concerning bananas.¹⁸⁹ [...] ¹⁹⁰ [...] ¹⁹¹ [...].¹⁹² [...] exact volume data was not usually discussed, since they had already exchanged volume information (see also recital (135)), but they would inform each other if competitors' vessel got stuck or had a breakdown.¹⁹³
- (150) [...] ¹⁹⁴ [...], in practically all of these communications, Mr [...] and Mr [...] discussed the price intentions.¹⁹⁵
- (151) [...] ¹⁹⁶ [...] ¹⁹⁷
- (152) In response to a request for information, Dole states that its communications with Chiquita concerned "*market conditions and, in this context, sometimes indicative quotation price trends*"¹⁹⁸. Dole states that "[...] *market condition assessments*

¹⁸⁸ See for example file p. 43476 et seq. (request for information to [...] of 30 March 2006), file p. 16514 et seq. (request for information to [...] of 6 June 2006).

¹⁸⁹ See file p. 9227 et seq. [...].

¹⁹⁰ See file p. 27869 et seq. [...] and file p. 28100 et seq. [...].

¹⁹¹ See file p. 27871 [...].

¹⁹² See file p. 27872 [...], see also file p. 9227 [...].

¹⁹³ See file p. 9229 [...].

¹⁹⁴ See file p. 27869 et seq. [...], see also file p. 9227 et seq. [...].

¹⁹⁵ See file p. 27875 [...].

¹⁹⁶ See file p. 27872 [...].

¹⁹⁷ See file p. 27872-27873 [...], see also file p. 9228 [...].

¹⁹⁸ See file p. 43509 [...] revised reply to the request for information of 30 March 2006).

included weather conditions, ripeners' yellow stocks, estimated green port stocks and other factors influencing supply vs. demand. In conjunction with this market discussion, indicative quotation prices might also be mentioned as a reflection of whether the market was going up or down."¹⁹⁹

- (153) Dole states, in response to a request for information, that its employees involved in the communication with Chiquita (Mr [...] and Mr [...]) *"had no precise recollection of how many times a year such indicative prices/trends would be discussed. Their best estimate is that this occurred during about half of the Wednesday afternoon discussions with Chiquita."*²⁰⁰ Dole's reply to the Statement of Objections essentially rephrases the same what its submissions in reply to the request of information, as follows: *"Dole estimates that the exchange of indicative quotation price trends occurred during approximately half of the communications with Chiquita"*.²⁰¹
- (154) Moreover, Dole states that Chiquita and other competitors would occasionally call Dole seeking to verify customer claims about market developments. *"For example, [...] whether Dole was really having a promotion in a particular country"*.²⁰²
- (155) As regards Thursday early morning communications between Dole and Chiquita, Dole states that these were *"a last-minute call on market trends, which was basically identical to the Wednesday afternoon market trends call"*.²⁰³
- (156) Dole argues, in its reply to the Statement of Objections, that the Commission erred in relying on Chiquita's statements concerning the contents of communications since there are contradictions in these submissions. The Commission observes that [...] regarding these communications, [...] they concerned price setting factors and changes in future quotation prices. [...] these changes in quotation prices were discussed either in terms of price development ("up"/"down"/"stay put"), where its understanding would be that the change is of 50 cents, or disclosing specific anticipated change (for example, "one EUR up/down"). [...] The Commission does not consider that there are any contradictions in Chiquita's submissions, which would make them unreliable. Moreover, no contradiction arises from the fact that the former employee, being confronted with phone records, and the immunity applicant itself were in a position to provide a more precise account of the past events.
- (157) Dole, on the other hand, itself states in response to a request for information that it and Chiquita discussed "factors influencing supply vs. demand" and/or indicative quotation prices (indicative quotation price trends) (see recital (152)). These "factors influencing supply vs. demand" are in fact equivalent to what Chiquita calls "sales and market conditions and price factors". Discussions about "indicative quotation prices" is consistent with what Chiquita describes as discussions about whether quotation prices would "go up, go down or stay put" or what the parties specifically intended to do with prices for the upcoming week. The Commission considers that these statements are

¹⁹⁹ See file p. 43515 ([...] revised reply to the request for information of 30 March 2006). Dole observes that these exchanges of assessments of market conditions were also one of the main topics between Dole and its customers.

²⁰⁰ See file p. 45205 ([...] reply to the request for information of 27 February 2007), see also file p. 45224.

²⁰¹ Page 117 of [...] reply to the Statement of Objections.

²⁰² See file p. 50594 (cover letter to [...] reply to the request for information of 27 February 2007).

²⁰³ See file p. 45204 ([...] reply to the request for information of 27 February 2007), see also file p. 45222.

corroborated by Dole's statements given in response to a request for information. All such topics in fact pertain to discussions about what changes there would be in quotation prices for the following week.

- (158) Furthermore, Dole claims in its reply to the Statement of Objections that there was "no alleged "50 cent" agreement" that the price change would be 50 cents, if not otherwise specified. "*Mr. [...] has explained that he and Mr. [...] might sometimes say that they expected prices to go up by 1 Euro or 50 cents, but no agreement on a price increase ever existed" (emphasis added)²⁰⁴. This submission by Dole does not contradict the Commission's findings. On the contrary, Dole admits that during these conversations the parties relayed their pricing intentions and/or discussed development of prices for the following week. Moreover, [...] Mr [...] understood that the change in quotation price would be 50 cents (up or down), if the counterparts did not indicate specific amount. However, Chiquita also submits that sometimes they discussed the precise amount of such change (see recital (151)). In response to a request for information Dole admits that it and Chiquita discussed "*indicative quotation price trends*" (see recital (152); see also recital (153)). Therefore, the parties' submissions on this point are sufficiently consistent and corroborated. As to Dole's argument that no *agreement* on a price increase ever existed, the Commission observes that an express agreement on the price increase has not been alleged and the Commission does not find that there was an understanding between these parties that if the amount of a change was not specified, it was understood to be 50 cents.*
- (159) Dole claims, in its reply to the Statement of Objections, that neither Mr [...] nor Mr [...] had the ultimate authority to set prices, therefore they were exchanging their personal views. The Commission observes that these individuals did have responsibilities related to sales and/or marketing of bananas, including price setting (see recital (63)). It is not necessary to establish that they had ultimate authority to set prices. Moreover, Dole itself has submitted, in response to a request for information, that it was Dole's understanding that Chiquita's indicative Wednesday price would be confirmed on Thursday.²⁰⁵ This shows that Dole could rely on communications with Chiquita and confirms that Mr [...] was indeed speaking with authority concerning Chiquita's future pricing intentions.
- (160) Dole claims, in its reply to the Statement of Objections, that it never disclosed confidential information to competitors, including Chiquita. Dole submits that communications related only to "general" market information, and that Dole simply referred to whether the market was "going up" or "going down". However as Dole itself admits its communications with Chiquita concerned pricing factors (as Dole puts it "*factors influencing supply vs. demand*"), price trends and/or indicative quotation prices (indicative quotation price trends). [...] the parties discussed such topics (see in particular recital (149)). Such discussions, and in particular major competitors' state of mind on such topics, cannot be considered as exchanges of "general market information". Even if information about various topics discussed could be obtained from other sources, as Dole argues in its reply to the Statement of Objections, the competitors' views about them, exchanged in bilateral discussions, could not.

²⁰⁴ Page 130 of [...] reply to the Statement of Objections.
²⁰⁵ See file p. 51033.

- (161) In addition, [...] during the conversations on prices for the upcoming week, Dole sometimes made a reference to the Del Monte prices.²⁰⁶ [...] Although, [...], this did not happen very often.²⁰⁷ The Commission observes that this shows that Chiquita was aware, or at least foresaw, that Dole had pre-pricing communications with Weichert.
- (162) Dole disagrees [...] that Dole and Chiquita talked about Del Monte prices. Dole refers to Mr [...] explanations given in Dole's reply to a request for information that he has no recollection of talking about Del Monte's quotation prices with Mr [...]. Dole quotes Mr [...] explanations, given in its reply to a request for information "[h]e [Mr [...]] does not recall that either Dole or Chiquita had any specific interest in Del Monte, nor does he consider that Del Monte was of any particular relevance to Dole's operation in the market"²⁰⁸ The Commission observes that Mr [...] has "no recollection" of talking about Del Monte prices, but does not explicitly exclude it. As to the relevance of Weichert's views to Dole, they are demonstrated by Dole's pre-pricing communications with Weichert (see section 4.4.4.2). [...] Dole would sometimes make a reference to Del Monte prices. This confirms that Chiquita was aware, or at least foresaw, that Dole had pre-pricing communications with Weichert.
- (163) [...] during pre-pricing communications [*Chiquita*] and Dole "together evaluated" price factors and discussed price development (see recital (149)).²⁰⁹ Asked by the Commission to explain [...], [...] the ultimate topic of Mr [...]s (Chiquita) calls with Mr [...] (Dole) was [...].²¹⁰
- (164) [...]. It was particularly important to know directly from Dole as the most important competitor, whether there was still room to increase the prices. [...].²¹¹
- (165) [...], with the information discussed during the communications with Mr [...] (Dole) in mind, Mr [...] participated in the internal Chiquita pricing call on Thursday mornings. [...] when the discussion in the call pointed to the likely pricing behaviour of the competitors, Mr [...] reported what he had discussed with Mr [...]. [...] Mr [...] did not explicitly refer to Dole as such and did not disclose that he had discussed this with Mr [...]. [...], however, the pricing information provided by Mr [...] was evaluated in the [...].²¹²
- (166) [...] the pricing decision was made by [...] who, however, always discussed prices with Mr [...] and relied on his information and recommendations.²¹³ [...] without disclosing the sources, Mr [...]s recommendation for the price was based *inter alia* on his knowledge of the likely intention of Dole (discussed on Wednesday afternoons and Thursday mornings) on how Dole would set the prices for the upcoming week. [...],

²⁰⁶ See file p. 9228 [...], p. 27873 [...].

²⁰⁷ See file p. 28101 [...].

²⁰⁸ See file p. 45206 [...] reply to the request for information of 27 February 2007), see also file p. 45224.

²⁰⁹ See file p. 9227-9230 [...].

²¹⁰ See file p. 27872 [...], see also file p. 28100 et seq. [...].

²¹¹ See file p. 27873 [...], see also file p. 28100 et seq. [...].

²¹² See file p. 27871 [...].

²¹³ See file p. 23886 [...].

Mr [...]’s input was particularly important for any decision to increase quotation prices.²¹⁴

- (167) Chiquita submits that Mr [...] (Dole) was aware of the fact that the pricing intention as communicated to Mr [...] was part of the market intelligence on the basis of which the pricing decision was made by Chiquita. [...].²¹⁵
- (168) Dole argues, in its reply to the Statement of Objections, that the Commission errs in relying on Chiquita's statements concerning the purpose of communications, since there are discrepancies in them. In particular, Dole points out that there is inconsistency in how Chiquita described the pricing indications or intentions, which it would learn from Dole during such communications. Dole points out that [...] Chiquita refers to them as "likely intention" or "final indication". Moreover, according to Dole, the timing of calls contradicts the statement that its indication was "final": its pricing recommendation was presented on Thursday [...], and on Wednesday afternoon these calls provided, at most, a sense of whether prices might fluctuate.
- (169) As a general remark, the Commission observes that given that these communications were pre-pricing communications, the pricing indications or intentions communicated to competitors could not have been a final quotation price, which was set only the following day. [...]. This clearly shows that Chiquita did not claim that what was communicated by Dole was a final price. [...]. The Commission considers that these statements are not inconsistent and it is clear from them what the purpose of these communications was for Chiquita.
- (170) As concerns pricing indications which Mr [...] (Dole) received from Mr [...] (Chiquita), Dole confirmed in its reply to a request for information that it was Dole's understanding that Chiquita's indicative Wednesday price would be confirmed on Thursday²¹⁶. As to its own intentions, Dole admits that it would communicate to Chiquita its views about development of future prices, and sometimes would specifically reveal its views or intentions about pricing development by disclosing the amount of anticipated increase²¹⁷ (see this section 4.4.4.1 above). Therefore, the Commission does not accept Dole's argument that such communications would reveal no more than "a sense of whether prices might fluctuate".
- (171) Furthermore, Dole claims, in its reply to the Statement of Objections, that [...] Chiquita sought to intensify the nature of calls. The Commission observes that [...] during these communications it and Dole had "together evaluated" price factors and had discussed price development. Given that these communications took place between the main competitors, and in the light of other facts described in the

²¹⁴ See file p. 27871 [...].

²¹⁵ See file p. 27873 [...].

²¹⁶ See file p. 51033.

²¹⁷ See, for example, file p. 45205 ([...] reply to the request for information of 27 February 2007) and file p. 45224, where Dole submits that Mr [...] and Mr [...] (Dole) "had no precise recollection of how many times a year such indicative prices/trends would be discussed. Their best estimate is that this occurred during about half of the Wednesday afternoon discussions with Chiquita." The Commission observes that [...] in page 130 of its reply to the Statement of Objections specifically states that "Mr. [...] has explained that he and Mr. [...] might sometimes say that they expected prices to go up by 1 Euro or 50 cents[...]" It is difficult to see how [...] reconciles this statement with its arguments in its reply to the Statement of Objections concerning the purpose of communications.

Statement of Objections (chapter 4, in particular section 4.2.3) and in this decision (sections 4.2-4.4), the Commission considers that these statements are sufficiently self-explanatory, even without explicitly stating the purpose of communications.

- (172) The Commission observes that contemporaneous documents confirm the nature and purpose of these communications. In an internal Chiquita e-mail of 8 August 2002 (Thursday of week 32, 08:31) to [...] (Chiquita's [...]), [...] and [...]), [...] raised a question [...].²¹⁸
- (173) The document quoted in recital (172) clearly indicates that Chiquita found it unusual that Dole took such pricing decision [...] Chiquita, and that Chiquita had the expectation that Dole and Chiquita would normally consult prior to taking such a pricing decision.
- (174) Moreover, in the same e-mail [...] writes [...]. This shows that while Dole initially had communicated with a more junior employee of Chiquita, no doubt to avoid questions, it made a second call to a senior manager at Chiquita to explain the price change and encourage Chiquita to follow their lead.
- (175) Dole, in its reply to the Statement of Objections, claims that this document simply shows that Mr [...] could not reach Dole. Dole also argues that this document shows Chiquita's frustration at Dole's different price and the consequent signal to the market. Dole points out that in the same document Mr [...] writes that [...]. According to Dole, this shows that it was setting its strategy independently while trying to harm Chiquita. The Commission observes that the document shows not simply that Mr [...] could not reach Dole that morning, but that Dole announced its quotation price "without consulting" Chiquita and that Chiquita was surprised not to be "consulted". As stated in the Statement of Objections this document clearly shows that Chiquita did expect Dole to consult it before taking such a decision. Moreover, the document shows that later Dole did contact Mr [...] to inform him about this price move, and to encourage Chiquita to follow. Moreover, while talking to Mr [...] Dole was trying to encourage Chiquita by saying that Aldi price would "certainly" move by EUR 2 too. In its reply to the Statement of Objections Dole does not properly explain why it called Chiquita and gave explanations to Chiquita, if they had practice to act independently. The Commission observes that even if a participant in cartel conduct may seek to exploit it for its own ends, or even cheat, this does not diminish its responsibility for participation in that conduct.
- (176) In an e-mail of 2 January 2003 (Thursday of week 1) to Chiquita ([...], [...]) Atlanta (ripeners and distributor) refers to a decision by Chiquita to increase its quotation price, which was already given out to the customers earlier, by EUR 0.5. In this e-mail Atlanta communicates to Chiquita's executive representatives a [...] about such pricing decision. To this Mr [...] replies [...].²¹⁹ On the same day (2 January 2003) in relation to the same matter a Chiquita employee writes to Mr [...] that he had troubles due to this upward revision after the price had been already announced to customers. To this on 6 January Mr [...] replies [...].²²⁰

²¹⁸ See file p. 24794.

²¹⁹ See file p. 49434-49435 [...].

²²⁰ See file p. 24792.

- (177) The Commission considers that Chiquita managing director's decision to go upwards even after having announced the price to customers in order "not to let down" Dole and Del Monte indicates a strong concern to support a price increase by these competitors despite the difficulties this could create with customers.
- (178) In its reply to the Statement of Objections, concerning this document Dole suggests the contents of the document are untrue, that Mr [...] (Chiquita) simply misjudged the market and had to find a justification for Chiquita's subsequent revision. However, the Commission observes that the document puts forward strong reasons for Chiquita to take the very unusual step of revising upwards a price already announced. Chiquita did not want to let Dole and Del Monte down in a manner that could compromise an upward price development for the next weeks.
- (179) The Commission acknowledges that the documents quoted in recital (176) concern the pricing decision taken on 2 January 2003. This is just after the end of the established period of pre-pricing communications (see section 4.3). Nevertheless, what this document shows is the strong interest of the parties to coordinate the setting of quotation prices and the continuing concern of Chiquita to support upward price initiatives by its main competitors. This document is consistent with the Commission's findings.
- (180) Dole claims, in its reply to the Statement of Objections, that such communications largely arose from the personal relationship between Mr [...] and Mr [...] and the information shared was neither critical to Dole's analysis nor indicative of a general exchange of information between Dole and Chiquita as companies. As to the first point, the Commission notes that even if it were true, it does not absolve the company of responsibility for its conduct and that of its employees.
- (181) Furthermore, concerning the value of communications with Chiquita, in its reply to a request for information, Dole submits that "*[t]he Chiquita quotation price information was simply another indication of whether market prices were generally moving up or down, but the exact quotation price itself was of little or no relevance to Dole.*"²²¹ The Commission observes that by this statement Dole nevertheless admits that information received from Chiquita would serve for the purpose of assessing the future development of prices, which Dole refers to here as "market prices".
- (182) The Commission concludes that evidence in the file shows that Dole and Chiquita, in the course of their various pre-pricing communications discussed price setting factors, that is, factors relevant for setting of quotation prices for the upcoming week and discussed or disclosed price trends and indications of quotation prices for the upcoming week before quotation prices were set.

4.4.4.2. Dole and Weichert

- (183) Dole states that its bilateral communications with Weichert concerned "*general discussion of market conditions (current and expected developments), overall market volumes*"²²². Dole states that there was a discussion as to how it and Weichert "*saw the*

²²¹ See file p. 45205 ([...] reply to the request for information of 27 February 2007), see also file p. 45224.

²²² See file p. 43481 et seq. ([...] revised reply to the request for information of 30 March 2006).

*market in the current week and how they thought the market might develop in the following week. 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)".*²²³

- (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 (whether, for example, Aldi's price could move up by 3-4 cents per kilo)*".²²⁴
- (185) Dole submits that expected import volumes to Northern Europe (EU 15, EFTA, EU 10), were already exchanged prior to such communications (see also recital (136)). Therefore, individual parties' import volumes were generally not discussed unless it appeared there would be a significant variation/irregularity in expected imports. In such case, the reason for the variation would be discussed. However, according to Dole, sometimes such information was provided and sometimes not.²²⁵
- (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*".²²⁶
- (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 [...] (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.*"²²⁷
- (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.). Weichert adds that "[t]he

²²³ See file p. 43481et seq. ([...] revised reply to the request for information of 30 March 2006).

²²⁴ See file p. 43481et seq. ([...] revised reply to the request for information of 30 March 2006).

²²⁵ See file p. 43481et seq. ([...] revised reply to the request for information of 30 March 2006).

²²⁶ See file p. 50594 (cover letter to [...] reply to the request for information of 27 February 2007).

²²⁷ See file p. 43485 ([...] revised reply to the request for information of 30 March 2006). According to Dole, concerning the period from 1 January 2000 until 31 December 2002 Dole employee [...] communicated with Weichert employees very rarely (an estimate 3 to 5 times a year) when Dole employees [...] or [...] were not available (see file p. 43531), see also recital (87).

discussions were not specific to the situation prevailing in Germany but also touched the situation in other European territories."²²⁸

- (189) Moreover, Weichert states that "[o]n some occasions Dole called Weichert to exchange views about general conditions prevailing on the market [as described in recital (188)] and rarely also the possible evolution of official prices prior to the communication of official prices among banana importers on Thursday".²²⁹
- (190) In its reply to the Statement of Objections, Dole claims that "[q]uotation trends were simply general estimates and reflected no specific price information"²³⁰. According to Dole, these communications were "inherently unreliable" and "it would remain vague about its quotation price". Dole submits that communications related only to general market information, it never disclosed confidential information to competitors and it simply referred to whether the market was "going up" or "going down".²³¹ However, in 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"²³². It is difficult to reconcile Dole's argument that such information was "unreliable" with its submission that such information could serve "as a yard stick against which [Weichert] could measure the accuracy of [its] own estimates". Weichert refers, in its reply to the Statement of Objections, to Dole statements in response to a request for information claiming generality and unreliability of such talks. However, as Dole itself submits in its replies to requests for information, its communications with Weichert concerned market conditions (current and expected developments), a general market increase or decrease in banana prices or whether prices would generally remain at status quo and/or its "possible quotation trend" (see in particular recitals (183)-(187)). Such discussions, and in particular one of major competitor's views on such topics, cannot be considered as simply exchanges of "general market information".
- (191) Weichert claims, in its reply to the Statement of Objections, that Dole would not disclose to Weichert its quotation price on Wednesday.²³³ As a general observation, the Commission points out that indeed the quotation price as such could not have been disclosed on Wednesday since it was normally set only on Thursday morning. Moreover, Weichert submits in reply to a request for information that it *inter alia* exchanged views with Dole as to "the possible evolution of official prices" (see recital (189)). Weichert does not contest this in its reply to the Statement of Objections either.
- (192) Weichert also argues, in its reply to the Statement of Objections, that its communications with competitors did not involve discussions which either served to enable or facilitate common understanding on the setting or development of official prices. Moreover, according to Weichert's reply to the Statement of Objections, it and Dole did not discuss let alone disclose their commercial intentions or future pricing decisions.

²²⁸ See file p. 38528-38529 ([...] reply to the request for information of 15 December 2006).

²²⁹ See file p. 38529 ([...] reply to the request for information of 15 December 2006).

²³⁰ Page 117 of [...] reply to the Statement of Objections.

²³¹ Page 117 and 13 of [...] reply to the Statement of Objections.

²³² Page 117 of [...] reply to the Statement of Objections.

²³³ See also file p. 38529 ([...] reply to the request for information of 15 December 2006).

- (193) Nevertheless, Weichert itself explained in its reply to the request for information (see recitals (188) and (189)) (and does not contest in its reply to the Statement of Objections) that it "rarely" exchanged views with Dole as to "*the possible evolution of official prices prior to the communication of official prices among banana importers on Thursday*"²³⁴. Dole also admits in reply to a request for information that it would disclose to Weichert, sometimes, "*the possible quotation price trend*" (see recital (187), see also recital (184)). Moreover, Weichert admits in response to a request for information that other topics of communications included *inter alia* evolution of demand, sales situation and banana imports (see recital (188)). This explanation is in substance confirmed by Dole's submissions, who states that it and Weichert discussed current and expected market conditions development (see recital (183)). The Commission observes that these factors are, in fact, factors influencing supply against demand, in other words, price setting factors. Even if information about various topics discussed could be obtained from other sources, as Weichert and Dole argue in their replies to the Statement of Objections, the competitors' views about them, relayed in bilateral discussions between competitors, could not be so easily obtained.
- (194) Furthermore, Weichert argues, in its reply to the Statement of Objections, that the Commission relies on indirect, disputed, uncorroborated evidence of bilateral communications among other importers. The Commission disagrees with this and observes that when establishing the contents of communications between Dole and Weichert, the Commission does not refer to evidence concerning communication between other competitors.
- (195) As regards the communications between Dole and Weichert, in 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.*"²³⁵ In its reply to the Statement of Objections Weichert disagrees with this statement. The Commission addresses Weichert's arguments in section 5.2.4.
- (196) The Commission concludes that evidence in the file shows that Dole and Weichert in the course of their various pre-pricing communications discussed price setting factors, that is, factors relevant for setting of quotation prices for the upcoming week and discussed or disclosed price trends and indications of quotation prices for the upcoming week before quotation prices were set.
- (197) In addition, Weichert, in its reply to the Statement of Objections, states that since the documents referred in recitals (172) et seq. and (176) of this decision concern the period prior to 2003, it is not credible to conceive that any action by Weichert influenced Chiquita's quotation price decision. The Commission observes that the document referred to in recital (176) concerns a price decision of 2 January 2003 and refers to "Del Monte", while Weichert was an exclusive distributor of Del Monte bananas until 31 December 2002. Nevertheless, this document rather concerns the

²³⁴ See file p. 38529 ([...] reply to the request for information of 15 December 2006). This issue is addressed in page 196 of [...] reply to the Statement of Objections.

²³⁵ See file p. 43481 et seq. ([...] revised reply to the request for information of 30 March 2006).

pattern preceding that date and shows a continuing concern of Chiquita to support upward initiatives in quotation prices by its main competitors (see recital (179)). In its reply to the Statement of Objections Weichert seems to argue that this document concerns the period prior to 2003. This does not contradict with the Commission's findings. Nevertheless, the Commission does not seek to rely on the reference to Del Monte in this document as evidence that Chiquita communicated with Weichert before setting quotation prices.

4.5. Thursday exchanges of quotation prices

- (198) The Commission finds, in the light of the arguments presented by the parties in response to the Statement of Objections in this case, that exchange of quotation prices between parties after these prices had been set did not in itself give rise to a distinct infringement of Article 81. The Commission finds that such exchange of quotation prices forms an element of the parties' cartel arrangements. The Commission considers that during the period when the parties took part in pre-pricing communications, the arrangements for the exchange of quotation prices enabled the parties to monitor the individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between parties beforehand. In particular, the exchange of quotation prices enabled the parties to verify directly between them the quotation prices which other participants had set and reinforced the bonds of cooperation among them arising from the pre-pricing communications. Such exchanges took place on Thursday mornings (usually completed by noon). The Commission observes that this is before the Aldi price is set (see recital (104)).
- (199) There is evidence that the parties bilaterally exchanged quotation price information on Thursday mornings shortly after quotation prices were set by each of them. The parties exchanged this information by telephone systematically or at least regularly. The Commission has evidence that this exchange of information may have commenced prior to the parties starting their pre-pricing communications and continued afterwards until the Commission's inspections (2 June 2005).²³⁶ Chiquita states that it unilaterally terminated all concerted practices and agreements [...]²³⁷.
- (200) The individuals involved in Thursday exchanges of quotation prices were not necessarily the same as those who engaged in pre-pricing communications. According to Chiquita, from its side the exchange was conducted by [...] and/or [...] at its headquarters in Antwerp, Belgium.²³⁸ Chiquita submits that [...] predecessors were [...] and [...].²³⁹ Dole states that its contact individuals at Chiquita were [...], [...] and also Mr [...].²⁴⁰ Weichert submits that it would exchange quotation price information

²³⁶ See for example file p. 43481 et seq. ([...] revised reply to the request for information of 30 March 2006), file p. 38234 et seq. ([...] reply to the request for information of 6 June 2006), file p. 38112 ([...] reply to the request for information of 10 February 2006), file p. 50225 et seq. [...]. Moreover, the Commission observes that [...] states in its reply to the Statement of Objections that it collected its competitor's quotation prices already before 2000 up to the Commission's inspections in 2005. [...] in their replies to the Statement of Objections, state that they immediately terminated the "information exchanges" after the inspections in June 2005.

²³⁷ See file p. 50226 [...], file p. 292 [...].

²³⁸ See file p. 50229 and 50231 [...].

²³⁹ See file p. 50266, 50274, 50276 [...]. Concerning Mr [...], in its written submissions dated 30 March 2007 (Annex 4, file p. 50528) and 13 April 2007 (Annex 1, file p. 50531) Chiquita spells [...].

²⁴⁰ See file p. 43509 et seq., 43534.

with [...] (Chiquita).²⁴¹ The evidence shows that Chiquita had internal mechanisms by which information about Dole and Del Monte quotation prices were communicated to its management, having responsibilities related to sales and/or marketing of bananas, including price setting.²⁴²

- (201) As regards individuals at Dole, Chiquita and Weichert indicate that they had communications with the following Dole employees: [...] (Weichert), [...] (Chiquita), [...] (Weichert) and [...] (Chiquita)²⁴³. In its reply to a request for information, Dole indicates that Mr [...] communicated with Weichert, Mr [...] and Mr [...] with both Chiquita and Weichert and that [...] "extremely rarely" had contacts with individuals at both of Chiquita and Weichert.²⁴⁴ Dole also states that its "receptionist" communicated with Chiquita ("presumably an administrative-level person"), although according to Dole "very rarely".²⁴⁵
- (202) As regards individuals at Weichert, Dole and Chiquita indicate that they had communications with [...] (Chiquita, Dole), [...] (Chiquita, Dole), [...] (Dole), [...] (Dole), [...] (Dole), [...] (Chiquita).²⁴⁶ In its reply to a request for information, Weichert states that its employees [...] exchanged quotation prices with the parties (with both Dole and Chiquita).²⁴⁷
- (203) Weichert states that the communications with the parties did not take place at any pre-arranged point in time on Thursday morning but generally occurred at any time between 9 a.m. and 12 a.m.²⁴⁸ In 2000-2002 Weichert would normally set its quotation price after having learned Dole quotation price set by Dole that Thursday morning.²⁴⁹ As regards information about the Dole quotation price in the period of 2000 – 2002, Weichert states that it obtained such information from customers, other importers and/or Dole employees.²⁵⁰ 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.
- (204) Dole states that the communication with the competitors regarding quotation prices on Thursday mornings took place between 10 a.m. and 12 noon after it had informed its customers about Dole's quotation price. In its reply to the request for information of 30

²⁴¹ See file p. 38112, 38236 et seq.

²⁴² Chiquita [...] internal European Price Update Reports, which would be usually prepared by [...]. These reports indicate quotation prices for Chiquita bananas, as well as for Dole and Del Monte bananas. [...] these reports were circulated internally and provided a list of recipients, see file p. 23880 et seq. [...] and p. 23892 et seq. (Annex 1).

²⁴³ See for example file p. 50231 [...], file p. 50284 [...], file p. 38237 ([...] reply to request for information of 6 June 2006). However, it appears that Mr [...] joined Dole after the period of the infringement found in this decision (see file p. 43529 ([...] revised reply to the request for information of 30 March 2006)).

²⁴⁴ See file p. 43531 and 43534 ([...] revised reply to the request for information of 30 March 2006).

²⁴⁵ See file p. 43534 ([...] revised reply to the request for information of 30 March 2006). See also file p. 45208 ([...] reply to the request for information of 27 February 2007) and file p. 45227.

²⁴⁶ See for example file p. 50229 and 50231 [...], file p. 50284 [...], file p. 43531 ([...] revised reply to the request for information of 30 March 2006).

²⁴⁷ See file p. 38236-38238 ([...] reply to request for information of 6 June 2006).

²⁴⁸ See file p. 38534 ([...] reply to the request for information of 15 December 2006), see also file p. 38584-38585 ([...] reply to the request for information of 5 February 2007).

²⁴⁹ See file p. 38584 ([...] reply to the request for information of 5 February 2007).

²⁵⁰ See file p. 38584 ([...] reply to the request for information of 5 February 2007).

March 2006 Dole specifies that in the period from 2000 until about 2004, Chiquita would call the Dole receptionist during Dole's pricing meeting and provide the Chiquita price. The receptionist would then hand over the information [...].²⁵¹ Available phone records²⁵² show that on Thursdays Dole had phone calls with Chiquita around 8:30 – 10:00 am.

- (205) In its reply to the Statement of Objections Dole states that the only price it ever received [...] came from Chiquita and often from Dole's customer, not Chiquita itself, and on a unilateral basis. This customer, according to Dole "in a customer capacity", provided the initial Chiquita quotation price [...] until "around 2002-2003". At these occasions Dole did not communicate its initial quotation price. The Commission observes that Dole uses the expression "often from Dole's customer" and it does not exclude that calls on Thursday mornings "came from Chiquita" too.
- (206) Moreover, the Commission observes that in its revised reply (6 October 2006) to the request for information of 30 March 2006 Dole specifies that in the period from 2000 until about 2004, Chiquita would call the Dole receptionist during Dole's pricing meeting and provide the Chiquita price. The receptionist would then hand over the information [...].²⁵³ Nevertheless, in reply to the same request for information²⁵⁴ Dole states that during Dole's pricing meeting [...], it was mostly the Dole's customer who made the calls indicating Chiquita's quotation price. In reply to the Commission's question "*how was the Dole quotation price communicated to Chiquita (presumably after the Dole pricing meeting)*" Dole states that to the best of its knowledge it was mostly the same customer that indicated Dole's quotation price to Chiquita. However, Dole stated in reply to this request for information that "*if Dole had not received contact from Chiquita, [...] would contact Chiquita to indicate Dole's quotation price*"²⁵⁵. Moreover, Dole states that "[...] (until Autumn 2001 [...]) very rarely made such calls, or [...] or [...] would only do so if [...] was not available."²⁵⁶ In addition, in its reply to the request for information of 27 February 2007 Dole states that "*[d]uring the period until Autumn 2001, Mr. [...] may have very rarely contacted Chiquita [Mr [...], in order to learn Chiquita's quotation price] on Thursday morning [...] if Dole had not heard Chiquita's quotation price from customers*".²⁵⁷ In the same reply Dole, however, states that "*during the period until about 2002-2003, Mr [...] did not take up Mr [...] previous role of very rarely contacting Chiquita on Thursday morning [...]*".²⁵⁸ Apparently, here Dole refers to [...] role "to learn Chiquita's quotation price", but not to [...]s calls to Chiquita to "indicate Dole's quotation price". In addition, Dole states that during the period until about 2002-2003 "very rarely" Dole receptionist would receive a call from Chiquita ("presumably an administrative-level person") on Thursday [...].²⁵⁹

²⁵¹ See file p. 43509 et seq. ([...] revised reply to the request for information of 30 March 2006).

²⁵² See recital (62).

²⁵³ See file p. 43509 et seq., p. 43511.

²⁵⁴ See file p. 43515 et seq. [...] makes a similar statement also in its reply to the Statement of Objections, p. 167 of [...] reply to the Statement of Objections.

²⁵⁵ See file p. 43516 ([...] revised reply to the request for information of 30 March 2006).

²⁵⁶ See file p. 43516 ([...] revised reply to the request for information of 30 March 2006).

²⁵⁷ See file p. 45200 ([...] reply to the request for information of 27 February 2007), see also file p. 45218.

²⁵⁸ See file p. 45201 ([...] reply to the request for information of 27 February 2007), see also file p. 45219-45220.

²⁵⁹ See file p. 45208 ([...] reply to the request for information of 27 February 2007), see also file p. 45227.

- (207) Dole does not specify on what dates the presumed calls by the customer occurred. The assertion that the customer would often call Dole [...] does not exclude that there were days when Dole and Chiquita had also exchanged information about their quotation price *after* they had been set. Dole does not exclude this. On the contrary, Dole admits, in its replies to Commission's requests for information, that there were such calls between Mr [...] (Dole) and Mr [...] (Chiquita) and also that Mr [...] would contact Chiquita to communicate Dole's quotation price "if he had not received contact from Chiquita".²⁶⁰ Dole also submits in reply to a request for information that there were also Thursday morning calls to its receptionist, during which Chiquita communicated its quotation price (although Dole states that such calls took place "very rarely" (see recital (201) and (206)). In addition, Dole does not explicitly renounce that Mr [...] would call to Chiquita to "indicate Dole's quotation price" and [...] Mr [...] was its contact individual for Thursday morning exchanges of quotation prices (see recital (201)). Moreover, phone records register Thursday morning communications between Dole and Chiquita. There were numerous Thursday morning calls between Dole and Chiquita. Dole itself admits in its reply to the Statement of Objections, that the phone records show 36 Thursday morning calls by Mr [...] (Chiquita) to Dole after 8:45 am in the relevant period.²⁶¹ Moreover, document quoted in recital (174) of this decision also demonstrate such Thursday morning calls.
- (208) For these reasons, the Commission concludes that during the relevant period Dole and Chiquita as well as Dole and Weichert had mechanisms in place, which enabled them to bilaterally exchange information about quotation prices set by the other on Thursday morning, and that this mechanism was applied frequently, even if not every week.

5. APPLICATION OF ARTICLE 81 OF THE EC TREATY

5.1. Applicability of the EC Treaty and Jurisdiction

- (209) The arrangements described in Chapter 4 covered the Northern European area, which is Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden (see section 4.4.3). Given that the infringement affected competition in the common market and trade between Member States (see also section 2.4), Article 81 of the EC Treaty is applicable.
- (210) In the Statement of Objections the Commission has alleged that the infringement concerned also Norway. However, this decision exclusively concerns Community territories. According to Article 8(3) (a) and (b) of the EEA Agreement, the provisions of the EEA Agreement only apply to products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System and to products specified in Protocol 3 of the EEA Agreement. Bananas are not covered by Chapters 25 to 97 of the Harmonized Commodity Description and Coding System nor specified in Protocol 3 of the EEA Agreement. Therefore, bananas are not subject to Article 53 of the EEA

²⁶⁰ See for example file p. 43516, 45199, 45203 et seq., 45208, 45217, 45221 et seq., 45227.

²⁶¹ See file p. 50920 et seq. [...] claims, in its reply to the Statement of Objections, that the phone number which [...] its employee [...] (see file p. 50290) used to call Dole (+49 40 329 066), "appear[s] not to be a Dole telephone number" (p. 165 of [...] reply to the Statement of Objections) as no extension "6" does exist.

Agreement and this decision does not cover any arrangements concerning territories in the EEA which are not Member States of the European Community.

5.2. Application of Article 81(1) of the EC Treaty

5.2.1. Article 81(1) of the EC Treaty

(211) Article 81(1) of the EC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

5.2.2. Agreements and concerted practices

5.2.2.1. Principles

(212) Article 81 EC Treaty prohibits anti-competitive agreements between undertakings, decisions of associations of undertakings and concerted practices.

(213) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market.

(214) In its judgment in *HFB Holding* case²⁶², the Court of First Instance, referring to settled case-law, stated that in order for there to be an agreement within the meaning of Article [81(1)] of the EC Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. In this judgement the Court reiterated that that is the case where there is a gentlemen's agreement between a number of undertakings representing the faithful expression of such a joint intention concerning a restriction of competition. Taking into account the facts at hand, the Court of First Instance stated that "*it is apparent from the series of meetings at which market-sharing was discussed that, at least at a certain time, the undertakings in question expressed their joint intention to conduct themselves on the market in a specific manner.*"

(215) Although Article 81 of the EC Treaty draws a distinction between the concept of "concerted practices" and "agreements between undertakings", the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition²⁶³.

²⁶² Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission* [2002] ECR II-1487, paragraph 199-207. See also joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II) [1999] ECR II-931, paragraph 715.

²⁶³ Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

- (216) The criteria of co-ordination and co-operation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the EC Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market²⁶⁴. Moreover, in *Trefilunion*²⁶⁵ the Court of First Instance held that the disclosure by an undertaking of information to its competitors in preparation for a cartel also constitutes a prohibited concerted practice that falls within the application of Article 81(1). Furthermore, in *Tate & Lyle* the Court of First Instance held that "[...] *the fact that only one of the participants at the meetings [...] reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.*"²⁶⁶
- (217) Thus, conduct may fall under Article 81 of the EC Treaty as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour²⁶⁷.
- (218) In terms of Article 81 of the EC Treaty, the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it. However, it is well settled case-law that there must be a presumption, subject to proof to the contrary, which is for the economic operators concerned to adduce, that undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with competitors when determining their conduct on the market. This is all the more true where the undertakings concert together on a regular basis over a long period. Such a concerted practice is caught by Article 81 of the EC Treaty even in the absence of anti-competitive effects on the market²⁶⁸.
- (219) Indeed, in its judgment in *HFB Holding* case²⁶⁹, the Court of First Instance stated "*it follows from the case-law that a concerted practice is caught by Article [81(1)] of the Treaty, even in the absence of anti-competitive effects on the market. First, it follows from the actual text of that provision that [...] concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily imply that that conduct should produce the specific effect of restricting, preventing or distorting competition.*"

²⁶⁴ Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 174.

²⁶⁵ See Case T-148/89 *Trefilunion v Commission* [1995] ECR II-1063, paragraph 82.

²⁶⁶ Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 54.

²⁶⁷ See also Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 255-256.

²⁶⁸ See Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, paragraphs 158-166. See also Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 121.

²⁶⁹ Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission* [2002] ECR II-1487, paragraph 217.

- (220) In its judgment in *Westfalen Gassen* case²⁷⁰, in the light of the facts at hand, the Court of First Instance stated that "[...] *in the absence of evidence which it is for the applicant to adduce, it must be considered that the applicant, which remained active on the market in question after the meeting [...], took account of the unlawful concerted practice, in which it participated at that meeting, when determining its own conduct on that market.*" The Court referred to the judgment of the Court of Justice in *Anic Partecipazioni* case²⁷¹, namely paragraphs 119 and 121. In this judgment, in the light of the circumstances, the Court of First Instance did not specifically underline duration or frequency of the conduct to conclude that the conduct constituted a concerted practice.
- (221) Moreover, in *Tate & Lyle* the Court of First Instance stated that "[i]n *Case T-1/89 Rhône-Poulenc v Commission [1991] ECR II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged amongst competitors concerning, inter alia, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (Rhône-Poulenc, paragraphs 122 and 123). [The Court of First Instance] considers that that conclusion also applies where [...] the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors.*"²⁷²
- (222) In *Cimenteries* the Court of First Instance pointed out that "[...]the concept of concerted practice does in fact imply the existence of reciprocal contacts (Opinion of Advocate General Darmon in *Woodpulp II* [...]). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it."²⁷³ In the same case the Court of First Instance stated that "[i]n order to prove that there has been a concerted practice, it is not [...] necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market (Opinion of Advocate General Darmon in *Woodpulp II* [...]). It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market (*Case T-4/89 BASF v Commission [1991] ECR II-1523, paragraph 242; and Hercules Chemicals v Commission*[...] paragraph 260)."²⁷⁴
- (223) According to the case-law, the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 81 of the EC Treaty. It is however not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if

²⁷⁰ Case T-303/02 *Westfalen Gassen Nederland BV v. Commission* [2006] ECR II-4567, paragraph 133.

²⁷¹ See Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125.

²⁷² Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 58.

²⁷³ Joined Cases T-25/95 etc. *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 1849.

²⁷⁴ *Ibid.*, paragraph 1852.

the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. It is in fact normal that agreements and practices prohibited by Article 81 of the EC Treaty assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.²⁷⁵

- (224) Also, if an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed.²⁷⁶ It is, indeed, well established case-law that “*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*”.²⁷⁷ Such distancing should take the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

5.2.2.2. Application in this case

- (225) It is demonstrated in the facts described in Chapter 4 of the present decision that the parties were involved in collusive activities concerning the trade of bananas, in particular a concerted practice by which they coordinated quotation prices for bananas which they each set weekly, in the Northern European region during the periods identified in section 4.3.
- (226) These activities present a form of coordination and cooperation by which the parties knowingly substituted practical cooperation between them for the risks of competition. Instead of determining their respective policies independently, the parties discussed price setting factors, that is factors relevant for setting of quotation prices for the upcoming week and/or discussed or disclosed their views about price trends and/or indications of quotation prices for the up-coming week for the Northern European region. Such conduct lead to coordination of their quotation prices (see section 5.2.4).
- (227) It is demonstrated in the facts described in Chapter 4 that bilateral collusion took place repeatedly over the period of about three years. These bilateral arrangements took place following an established pattern, which was consistent over the relevant time period (see Chapter 4). The pre-pricing communications took place before quotation prices were set by each of the parties. Moreover, after setting their quotation prices on Thursday mornings parties bilaterally exchanged their quotation prices. This subsequent exchange enabled them to monitor the individual parties' quotation pricing

²⁷⁵ 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 and others v Commission* [2004] ECR I-123, paragraphs 53-57 and 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 AG and Others v Commission* [2006] ECR II-3567, paragraphs 59-67. See also joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II) [1999] ECR II-931, paragraph 696.

²⁷⁶ See Case T-334/94 *Sarrió v Commission* [1998] ECR II-1439, paragraph 118.

²⁷⁷ *Ibid.* See also Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85, Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 232, and Case T-25/95 *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1389.

decisions in the light of pre-pricing communications which took place between parties beforehand.

- (228) The Commission considers that the parties participating in concerted arrangements, described in Chapter 4 of this decision, and remaining active in the supply of bananas, cannot have failed to take account of the information received from competitors when determining their conduct on the market.²⁷⁸ Also, when undertakings, as in this case, are in direct contact with competitors, even if they merely receive information concerning the future conduct of competitors, they can be considered to have taken part in a concerted practice since the receiving undertaking could not fail to take into account, directly or indirectly, the information obtained in order to determine the policy which it intended to pursue on the market.²⁷⁹
- (229) In addition, as concerns Chiquita and Dole, [...] they took into account the information obtained from competitors in setting their quotation prices. In particular, Chiquita has [...] taken into account pre-pricing communications with Dole in its quotation price setting (see for example recitals (164)-(167)). Dole, in its reply to the Statement of Objections, states that "*Dole does 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.*"²⁸⁰ This statement of Dole concerns both its communications with Chiquita and with Weichert. Moreover, Dole submits in reply to a request for information that Chiquita's pricing intentions, received from Chiquita in pre-pricing communications on Wednesdays, were usually confirmed by Chiquita on the next Thursday morning (see recital (170)).
- (230) Dole however argues in its reply to the Statement of Objections, that the Commission wrongly infers, from the evidence relied in the Statement of Objections, that there was some form of common understanding between the addressees of the Statement of Objections. Dole claims that [...] e-mail communications, referred to in recitals (172) et seq., (176) et seq. of this decision, do not suggest collusion.²⁸¹ In addition, Dole argues that the Commission does not identify any evidence showing that Dole agreed to exchange information with other addressees of the Statement of Objections for the purpose of influencing each others' conduct on the market, as opposed to attempting to collect information to make its own best unilateral decisions, nor that Dole knowingly used the exchanges to coordinate its competitive behaviour. Dole argues that the Commission fails to satisfy the standard of proof by presuming implementation and causal connection. Dole claims that the Commission did not analyse the intent of Dole and other participants and did not establish that each participant adhered to a common scheme. Dole argues that under the similar circumstances in the *Woodpulp*²⁸² case the European Court of Justice found that price announcements did not constitute a concerted practice within the meaning of Article 81 (1) EC.

²⁷⁸ See Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 121.

²⁷⁹ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 58, Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, paragraph 122-123.

²⁸⁰ Page 215 of [...] reply to the Statement of Objections.

²⁸¹ Commission's findings concerning these documents are stated in section 4.4.4.1 of this decision; in the same section the Commission has addressed Dole's arguments concerning these documents.

²⁸² 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, *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307.

- (231) Weichert, in its reply to the Statement of Objections, claims that the Commission did not establish to the requisite legal standard the existence of any agreement or concerted practice nor Weichert's participation in the alleged common scheme. Weichert argues that the Commission fails to establish that Weichert's bilateral exchanges alleged in the Statement of Objections were conducted in a systematic and consistent fashion and in the pursuit of a focused and tacitly accepted "co-ordinated course of action" with the single objective of fixing prices. According to Weichert, the conduct was directly related to and strongly influenced by the regulatory and commercial context and it was not secret, therefore there was no "clandestine character" of the conduct.
- (232) Del Monte argues, in its reply to the Statement of Objections, that in order to establish a concerted practice conduct on the market pursuant to those collusive practices and a relationship of cause and effect between the two needs to be established. Del Monte argues that the conduct is not a price fixing because it exclusively related to quotation prices, which were not a basis for price negotiations with customers, and there was no reporting or monitoring between the competitors. Del Monte refers to economic analysis, which suggests that influence of "exchanges of information" on actual prices was unlikely. In addition, Del Monte argues that conversations on market trends were by no means institutionalised or executed on the basis of a regular agenda.
- (233) The Commission disagrees with the arguments of parties (see recitals (230)-(232)) that their communications described in this decision do not constitute a concerted practice. First, as described in Chapter 4 of this decision, communications between parties formed a consistent pattern, took place repeatedly and over a long period of time. Second, the Commission finds that during the pre-pricing communications parties discussed price setting factors, that is factors relevant for setting of quotation prices for the upcoming week and, on some occasions, price trends and/or indications of quotation prices (see sections 4.4 and 5.2.4). These discussions took place before quotation prices were set. Such communications had an anticompetitive objective (see sections 5.2.3.2 and 5.2.4). Third, 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 market²⁸³. The Commission considers that none of the addressees has adduced evidence that it did not take information into account when setting its quotation prices. As concerns Dole's arguments, it does not contest that it took this information into account when setting its quotation prices.
- (234) The aforementioned presumption can be rebutted, however the undertaking must show that the concerted arrangements did not have any influence whatsoever on its own conduct on the market.²⁸⁴ The case-law suggests that the undertaking must at least have ended its participation in the anticompetitive arrangements and have publicly distanced itself from what was discussed or show that its participation in the anticompetitive arrangements was without any anticompetitive intentions by

²⁸³ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 58, Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, paragraph 122-123.

²⁸⁴ See, in this sense, Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paragraph 167. See also Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 121.

demonstrating that it had indicated to its competitor that it was participating in those meetings in a spirit that was different from the others.²⁸⁵ It is not sufficient to merely submit arguments claiming that there was no anticompetitive spirit, but the undertaking involved in such practices needs to adduce evidence.²⁸⁶ In the absence of such evidence, the mere participation in communications with an anticompetitive object, in particular where information concerning future setting of quotation prices was received or disclosed, is sufficient to conclude that each participant could not fail to take into account, directly or indirectly, the information obtained in order to determine the policy which it intended to pursue on the market. In the same manner, there was necessarily a causal relationship between these communications and conduct on the market. Nor it is sufficient for the parties to simply claim that the information was not useful for them or that the conduct was public or that there was simply no implementation. It must therefore be concluded that the conduct had an anticompetitive object in the sense of Article 81 of the EC Treaty.

- (235) In such circumstances, the Commission, contrary to what Dole argues, does not need to specifically establish subjective intent of the parties, once an anticompetitive object of concerted practice is established (see also section 5.2.4) and once it is shown that the undertaking contributed by its own conduct to that object. Moreover, collusive arrangements can be restrictive by object even if they also pursued legitimate objectives.²⁸⁷ The Commission notes that the conduct may fall under Article 81 of the EC Treaty as a concerted practice where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour²⁸⁸. As concerns Dole's argument that the Commission did not adduce evidence that Dole agreed with the others to exchange information for the purpose of influencing each others' conduct on the market, the Commission notes that it has not found an agreement in this case, but concerted practice. To establish concerted practice, according to case-law it is sufficient to demonstrate that there was cooperation (undertakings concerting with each other) and subsequent conduct on the market, between which there must be a causal relationship²⁸⁹. The fact that parties may have cheated or had subjective intents not disclosed to competitors does not justify their participation in collusive arrangements with an anticompetitive object. In this context, it is also irrelevant whether concerted practice was "clandestine" or not, once such object has been found (see also section 5.2.4).
- (236) Moreover, it is a settled case-law that concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.²⁹⁰ Once it is established, as it

²⁸⁵ See, in this sense, Cases C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paragraph 155, Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co KG and Others v Commission (Pre-Insulated Pipes)* [2002] ECR II-1487, paragraphs 223-227, and Case T 141/89, Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 65.

²⁸⁶ See, in this sense, Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 64-66.

²⁸⁷ See, in this sense, Joined Cases 96/82 etc. *NV IAZ International Belgium and Others v. Commission* [1983] ECR 3369, paragraph 25.

²⁸⁸ See Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 255-256.

²⁸⁹ See Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraphs 172 to 180, Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraphs 64 et seq., Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paragraph 161.

²⁹⁰ See Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, paragraphs 162 to 166.

is in this case, that the concerted practice had an anti-competitive object, it is not necessary to appraise effects of such a practice.

- (237) As to the argument that the parties did not agree or concert on actual prices, the Commission observes that the infringement concerns coordination of quotation prices, and not directly on actual prices. This does not alter Commission's findings (see sections 4.4.2.1 and 5.2.4).
- (238) Moreover, contrary to what some addressees argue, the exchange of quotation prices did provide a monitoring mechanism for pre-pricing communications (see section 5.2.4). In any case, in order to establish an infringement it is not necessary to find that any monitoring mechanism was in place.
- (239) Concerning Dole's argument that the facts described in this case should be construed in the same manner as the set of facts considered by the Court of Justice in *Woodpulp* judgement, the Commission observes that in the *Woodpulp* case the Court of Justice found that, on the facts at hand, concertation could not be presumed as the only plausible explanation for the parallel conduct concerning price announcements.²⁹¹ In the present case, the Commission does not base its findings concerning concertation on parallel conduct of the parties in the market, but on the overall body of consistent and precise evidence, described in Chapter 4 of this decision. Therefore, the Commission does not accept the aforementioned argument and clearly distinguishes this case from the *Woodpulp* case.
- (240) The Commission concludes that arrangements found in Chapter 4 of this decision present all the characteristics of a concerted practice in the sense of Article 81 of the EC Treaty.

5.2.3. *Single and continuous infringement*

5.2.3.1. Principles

- (241) A complex cartel may properly be viewed as a single and continuous infringement for the time frame in which it existed. As the Court of First Instance stated in *BASF*, "[t]he 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 [...]. The concept of single infringement can also be applied to the personal nature of liability for the infringements of the competition rules."²⁹² The Court of First Instance points out, *inter alia*, in the *Cement* cartel case 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.²⁹³ The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the EC Treaty.

²⁹¹ See paragraph 64.

²⁹² See Case T-101/05 etc. *BASF v. Commission*, not yet reported, paragraph 159-160.

²⁹³ Joined Cases T-25/95 etc. *Cimenteries CBR and Others v. Commission* [2000] ECR II-491, paragraph 3699.

- (242) It would be artificial to split up such a series of actions or continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in agreements and/or concerted practices. Indeed, as the Court of First Instance stated in *BASF* "[i]t appears that, in the cases which the case-law envisages, the existence of a common objective consisting in distorting the normal development of prices provides a ground for characterising the various agreements and concerted practices as the constituent elements of a single infringement."²⁹⁴
- (243) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or cheating may even occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81 of the EC Treaty where there is a single common and continuing objective.
- (244) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could reasonably have foreseen it and was prepared to take the risk²⁹⁵.
- (245) However, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine.²⁹⁶
- (246) In fact, as the Court of Justice stated in its judgement in *Commission v Anic Partecipazioni*²⁹⁷, the agreements and concerted practices referred to in Article 81(1) of the EC Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as reiterated by the Court in the *Cement* cases that an infringement of Article 81 may result not only from an isolated act but also from a series of acts or from a 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 taken in isolation an infringement of Article 81 of the EC Treaty. When the different actions form part of

²⁹⁴ See Case T-101/05 etc. *BASF v. Commission*, not yet reported, paragraph 179.

²⁹⁵ See Case 49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83.

²⁹⁶ See Case 49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 90.

²⁹⁷ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

an ‘overall plan’, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.²⁹⁸

5.2.3.2. Application in this case

- (247) The collusive arrangements described in Chapter 4 of this decision pursued a single anti-competitive object and a single economic aim, namely to distort the normal movement of prices for bananas in the Northern European region by coordinating quotation prices (see also section 5.2.4). Indeed, pre-pricing communications decreased uncertainty concerning the future setting of quotation prices by competitors and concerned the fixing of prices (for the facts, see Chapter 4, see also section 5.2.4). Bilateral pre-pricing communications between different participants (Dole-Chiquita and Dole-Weichert) had the same economic aim. In particular, first, Dole had pre-pricing communications with both Chiquita and Weichert; even the same individuals from Dole were communicating to both Chiquita and Weichert; second, Chiquita was aware of Dole's pre-pricing communications with Weichert or at least foresaw them and was prepared to take the risk (see recital (253) and section 4.4.4.1, in particular recital (161)). Therefore, Chiquita and Dole were acting in the cartel arrangements with Weichert; third, Dole had also pre-pricing communications with Weichert. Weichert's pre-pricing communications with Dole formed an integral part of the cartel. Weichert's anti-competitive intentions are demonstrated by its direct pre-pricing communications with Dole. Weichert contributed, through its own conduct, to the achievement of an anti-competitive objective common to the parties, namely to distort the normal movement of prices for bananas in the Northern European region by coordinating quotation prices.
- (248) The Commission observes that these three parties were among the main players in the bananas supply in the Northern European region. Chiquita had the prime brand for bananas, while Dole and Del Monte (the latter traded by Weichert) were the two second-tier brands of bananas. This brand-division was reflected in the banana pricing during the period of the infringement. Chiquita would normally quote the highest price for its bananas marketed with "Chiquita" brand, followed by bananas traded under "Dole" and "Del Monte" brands (the latter traded by Weichert); all others ("thirds") were at the lower scale (see recital (32), see also recital (107)). The Commission observes that during the period of the infringement Weichert and Dole had virtually identical quotation prices (see recital (104) and the parties' statements quoted in footnote 138). The cartel arrangements concerned the fixing of prices concerning the quotation prices of all these three undertakings. Therefore, the overall anti-competitive conduct formed the same infringement. Moreover, the exchange of quotation prices, which took place on Thursday mornings after the parties set their quotation prices, enabled them to monitor individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between them beforehand. This exchange reinforced the bonds of cooperation arising from pre-pricing communications. Therefore, it contributed to the same single economic aim as pre-pricing communications. It would be artificial to split up such overall continuous

²⁹⁸ See Joined Cases C-204/00 etc. *Aalborg Portland et al.* [2004] ECR I-123, paragraph 258. See also Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraphs 78-81, 83-85 and 203.

conduct or a series of conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement united with a single economic aim.

- (249) The single and continuous nature of the infringement is also demonstrated by the pattern of communications. The facts described in Chapter 4 of this decision show that there was an established consistent pattern of pre-pricing communications, which took place in the same or similar manner over a long period. The same individuals, employees of the parties, were involved in communications with competitors following the same or similar pattern in terms of timing and means of communications. Moreover, the topics discussed at these communications were the same or at least similar over the time. Therefore, there was a common pattern of such communications. Also, bilateral communications between different participants (Dole-Chiquita and Dole-Weichert) followed a similar pattern. The same individuals of Dole, who had pre-pricing communications with Chiquita, had also pre-pricing communications with Weichert. Both sets of pre-pricing communications took place before setting quotation prices and contributed to the same single economic aim, defined in recital (247). The parties maintained these contacts during the time period of the infringement indicated in section 4.3 of this decision.
- (250) An element of cooperation between parties was the exchange of quotation prices after they set them. This exchange of quotation prices served to monitor competitors' individual quotation price decisions with their pre-pricing communications, which took place beforehand. There was a consistent pattern of exchange of quotation prices over the time of the infringement and this pattern was similar for bilateral communications between different participants (Dole-Chiquita and Dole-Weichert) (see section 4.5).
- (251) The Commission hence considers that all collusive arrangements described in Chapter 4 of this decision form a single and continuous infringement united with a single economic aim, which had an object of restricting competition in the Community within the meaning of Article 81 of the EC Treaty. The fact that each instance of pre-pricing communications had an anticompetitive object (see also section 5.2.4) does not, however, alter the Commission's conclusion that all these arrangements as a whole formed a single and continuous infringement, since a series of efforts, which have an identical anticompetitive object, may form a single and continuous infringement, even though separate acts in isolation may also constitute an infringement.²⁹⁹
- (252) In order to attribute liability for the whole single and continuous infringement, even when an undertaking personally participated only in a part of anticompetitive arrangements, it is sufficient to show that the undertaking 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.³⁰⁰ There is no need to demonstrate that the parties were aware of all details concerning bilateral communications between the other parties.

²⁹⁹ See Case T-279/02 *Degussa AG v. Commission* [2006] ECR II-897, paragraph 155.

³⁰⁰ See Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83 and 87.

According to case-law, even facilitating the attainment of the cartel is enough to share responsibility for the overall cartel.³⁰¹

- (253) The facts described in Chapter 4 of this decision show that Chiquita was aware of Dole's pre-pricing communications with Weichert or, at least, it foresaw them and was prepared to take the risk (see section 4.4.4.1). It is not relevant, for establishing such awareness, whether Chiquita and Dole specifically discussed future prices for Del Monte bananas in their own pre-pricing communications. (The Commission's findings with this regard are in section 4.4.4.1). [...] (see recital (161)). Moreover, [...] in its communications with Dole it also expected to be able to discuss Weichert's pricing intentions with Dole. [...], sometimes it would ask Dole about Weichert's assessment of the market and price development (see recital (161)).
- (254) Therefore, the Commission concludes that Chiquita was aware of collusive arrangements between Dole and Weichert or, at least, it foresaw them and that it was prepared to take the risk, and was aware of or could have reasonably foreseen conduct concerning the overall cartel and its common objective. Chiquita could have reasonably foreseen and took the risk that its coordination with Dole also had an influence on the setting of quotation prices by Weichert. Therefore, Chiquita shall be held responsible for the whole single and continuous infringement.
- (255) Weichert argues, in its reply to the Statement of Objections, that it was not aware of pre-pricing communications between Mr [...] (Dole) and Mr [...] (Chiquita). According to the case-law in *Anic*, "[...]an undertaking which has participated in a single 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 [now 81(1)] of the Treaty 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. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk."³⁰² Indeed, Weichert is responsible for the single and continuous infringement in so far as Weichert participated in collusive arrangements with Dole. Nevertheless, the Commission does not have sufficient evidence to conclude that Weichert was aware of pre-pricing communications between Chiquita and Dole or to establish that it could have reasonably foreseen them and therefore is not found responsible for the cartel arrangements between Chiquita and Dole.
- (256) As the Court of First Instance stated in *BASF* "[...] the existence of a common objective consisting in distorting the normal development of prices provides a ground for characterising the various agreements and concerted practices as the constituent elements of a single infringement."³⁰³ It is a settled case-law that once a single economic aim and single scheme of efforts are established, the participants who were

³⁰¹ See in this sense Case T-36/05 *Coats Holdings Ltd v. Commission* (not yet reported), paragraph 119-122.

³⁰² See Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 203; see also Case T-28/99 *Sigma v. Commission* [2002] ECR II-1845, paragraph 40.

³⁰³ See Case T-101/05 etc. *BASF et al. v. Commission*, not yet reported, paragraph 179.

aware or could reasonably have foreseen them shall be liable for the overall single and continuous infringement.³⁰⁴ However, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine.³⁰⁵ The Court of Justice reiterated in *Aalborg* "[n]either is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission v Anic*, paragraph 90)."³⁰⁶

- (257) Weichert furthermore argues, in its reply to the Statement of Objections, that bilateral communications with competitors in which Weichert participated were not united by a single aim with communications between others, in which Weichert did not participate. Dole argues, in its reply to the Statement of Objections, that various communications ("exchanges of information") with competitors were not related. The Commission considers that, as has been demonstrated in Chapter 4 of this decision, all the pre-pricing communications formed a consistent pattern, which pursued an identical anticompetitive object and single economic aim (see also recitals (247), (249) and also section 5.2.4). All these communications had the aim of decreasing uncertainty concerning the future setting of quotation prices and followed a similar pattern. As for the exchange of quotation prices, it served to monitor individual pricing decisions of these parties in the light of their pre-pricing communications. Therefore, this exchange contributed to the same aim (see recital (247)). It is a settled case-law that exchanges of information, implementing, enabling or facilitating cartel arrangements, form a part of a single and continuous infringement³⁰⁷. Therefore, the Commission does not accept the above-mentioned arguments.
- (258) In conclusion, the 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 of the EC Treaty. 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.

5.2.4. *Restriction of competition*

- (259) The anti-competitive behaviour in the present case had the object of restricting competition in the Community.

³⁰⁴ See in this sense for example Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 78 et seq.

³⁰⁵ See Case 49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 90.

³⁰⁶ See Joined Cases C-204/00 P etc. *Aalborg and others v Commission* [2004] ECR I-123, paragraph 86.

³⁰⁷ See, for example, Joined Cases T-25/95 etc. *Cimenteries CBR and Others v. Commission* [2000] ECR II-491, paragraph 4142.

- (260) Article 81 of the EC Treaty expressly includes as restrictive of competition agreements and concerted practices which have as their object or effect to³⁰⁸:
- (a) directly or indirectly fix selling prices or any other trading conditions;
 - (b) limit or control production, markets or technical development;
 - (c) share markets or sources of supply.
- (261) In this case, collusive arrangements between the parties constituted concerted practices which concerned the fixing of prices. Price being a key instrument of competition in the trade concerned, the collusive arrangements adopted by the parties all ultimately aimed at reducing or eliminating uncertainty as to the future pricing behaviour of parties and to maximise the price that they could individually and/or collectively obtain. Horizontal practices relating to prices by their very nature restrict competition within the meaning of Article 81 (1) of the EC Treaty.
- (262) The cartel has to be considered as a whole and in the light of the overall circumstances. The Commission assesses the collusive arrangements described in Chapter 4 of this decision in the light of the overall circumstances, in particular the legal and economic context. Thereafter, the Commission addresses various arguments made by the parties. A number of the parties' arguments are addressed in other parts of this decision.

The cartel arrangements: pre-pricing communications

- (263) The cartel arrangements found by this decision are bilateral pre-pricing communications, which took place between parties before they set their weekly quotation prices. In such pre-pricing communications the parties discussed price setting factors, that is factors relevant for setting of quotation prices for the upcoming week and/or discussed or disclosed their views about price trends and/or indications of quotation prices for the up-coming week, for the Northern European region. By these practices the parties coordinated the setting of their quotation prices instead of deciding on them independently. These arrangements have as their object the restriction of competition within the meaning of Article 81(1) of the EC Treaty. They are described in detail in the factual part of this decision (Chapter 4).
- (264) The parties involved in these communications were three main suppliers of imported bananas in the Northern European region (see section 2.2). Individuals who participated in such communications had responsibilities related to banana price setting and/or marketing (see section 4.2.1, in particular recitals (63) and (69)).
- (265) During the communications relating to price setting factors, parties would discuss the sales situation and supply and demand conditions liable to affect price levels for the up-coming week (see Chapter 4). The Commission considers that communications concerning price setting factors decreased the degree of uncertainty concerning the future pricing policies of competitors. The Commission finds (given also the pattern and context of such communications, described in Chapter 4 and section 2.3 of this

³⁰⁸ The list is not exhaustive.

decision) that these communications must have influenced the setting of quotation prices for the up-coming week and concerned the fixing of prices. Therefore, the Commission considers that such collusive arrangements had an anticompetitive object.

- (266) Moreover, on some occasions, pre-pricing communications specifically included discussions on or disclosure of views about price trends and/or indications of quotation prices for the up-coming week (see Chapter 4, in particular, section 4.4.4). In particular, the parties discussed and/or disclosed indicative quotation prices or their views about the evolution of prices for the up-coming week. These communications gave rise to the disclosure of the course of conduct which competitors contemplated adopting in the market concerning their future setting of quotation prices and concerned the fixing of prices.
- (267) Communications concerning indicative quotation prices to be set disclose to a competitor the course of conduct which a party itself has decided to adopt or contemplates adopting on the market.³⁰⁹ Moreover, as the Court of First Instance observed in *Tate & Lyle*, "[...] *the fact that only one of the participants [...] reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.*"³¹⁰ The Commission considers that in the light of the facts of this case, even if only one party revealed its pricing intentions during such communications, such communication constitutes a concerted practice with an anticompetitive object.
- (268) Moreover, in the light of the facts of this case the Commission considers that when pre-pricing communications concerned the "development" or "evolution" of the prices (and not specifically of quotation prices of participants in such discussions), they also had an anticompetitive object. Such discussions had the same purpose as discussions concerning parties' intentions as to their own quotation price. Discussions or disclosure of expectations as to the "development" or "evolution" of prices were liable to reveal to competitors their intentions concerning future pricing decisions for setting of quotation prices. Viewed in their context, the discussions and disclosures on either "price trends" or specifically on quotation prices had the object of coordinating the setting of quotation prices by the parties. As concerns Chiquita and Dole, they both admit that they took into account the information obtained from competitors in setting their quotation prices.³¹¹ Weichert, however, does not admit that it took into account the information obtained from competitors in setting its quotation prices. The Commission observes that such an admission is not necessary. It is settled case law that when an undertaking receives information about "*the future conduct of their market competitors*", it could not fail to take into account, directly or indirectly, the information obtained in order to determine the policy which it intended to pursue on the market (see the case-law cited in recital (221)). By these communications parties coordinated the message to the trade instead of deciding on their pricing policies independently. In particular, these communications allowed to estimate competitors' views concerning future pricing decisions and to anticipate their intended course of action. Therefore, they decreased uncertainty concerning competitors' future decisions on quotation prices.

³⁰⁹ See joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 174.

³¹⁰ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 54.

³¹¹ See recital (229) above.

- (269) Even if the respective parties did not discuss or disclose price trends and/or indications of quotation prices in each pre-pricing communication that they had a practice of doing so, as described in the facts part of this decision (see Chapter 4). Therefore, 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. Moreover, there are no indications that parties distanced themselves from communications specifically concerning pricing issues. The facts described in Chapter 4 show the uniform pattern of bilateral pre-pricing communications, which the parties were able to use according to their needs. The Commission has concluded that all these pre-pricing communications had the same anticompetitive object and formed part of the same pattern. In any event, viewed in the overall context, communications concerning price setting factors had the same object as communications concerning price trends and/or indications of quotation prices (see recital (265)). When parties discussed or disclosed their views concerning price setting factors, in particular given the factual context of this case (see section 4.4.2), they thereby 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/or reduced uncertainty about it.
- (270) The facts described in Chapter 4 show that bilateral pre-pricing communications formed a consistent pattern of communications. The Commission cannot accept the parties' arguments that pre-pricing communications were sporadic or irregular in the light of Commission's findings (see in particular section 4.2.3). The Commission nevertheless observes that, as it has concluded in the Statement of Objections, it is not decisive, when evaluating the existence of infringement, that such communications may not have taken place systematically or regularly. The Commission considers that each separate instance of such communications had an anticompetitive object. Moreover, the parties were able to make use of the established pattern of communications according to their needs.
- (271) The Commission considers concludes that pre-pricing communications, which took place between Dole and Chiquita and between Dole and Weichert, as described in Chapter 4, were liable to influence pricing behaviour and concerned the fixing of prices. The Commission concludes that it has been demonstrated that these concerted practices had as their object the restriction of competition within the meaning of Article 81 of the EC Treaty.
- (272) Moreover, the Commission notes that such communications took place in circumstances where the participants already had a system of bilateral exchanges of volume information in place (see recital (136)). Even though information received through the said system may have been available from other sources, the parties had a mechanism in place to be informed about competitors' weekly banana arrivals directly from competitors. In such way, when the parties participated in pre-pricing communications, they were normally aware of counterpart's banana arrivals in the upcoming week. This shows that participants of pre-pricing communications communicated in the light of decreased uncertainty concerning their competitors' supply situation. The Commission considers, in the light of the arguments presented by the parties in response to the Statement of Objections that evidence in the Commission's possession does not lead to a conclusion that exchanges of volume information had an anticompetitive object or that they formed part of the infringement.

However, the Commission observes that there was a lessened degree of uncertainty in the bananas industry in Northern European region. Moreover, the regulatory regime also contributed to certain transparency, even though of a different scope (see section 2.3.3). The Commission considers it all the more important that the remaining uncertainty as to competitors' future pricing decisions should be protected.³¹² Therefore, contrary to what certain parties allude in their replies to the Statement of Objections, the existence of such exchange of volume information (and also the exchange of quotation prices after they were set) cannot justify the infringement found by the present decision.

Monitoring: exchange of quotation price information

- (273) The Commission, in the light of the arguments presented by the parties in response to the Statement of Objections, does not find that the exchange of quotation prices between the parties after these prices had been set in itself gives rise to a distinct infringement of Article 81(1). Rather, taking into account the facts described in Chapter 4, the Commission considers that during the period when the parties took part in pre-pricing communications, the arrangements for the exchange of quotation prices enabled them to monitor the individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between parties beforehand. As the Court of First Instance pointed out in *Cement* case at the facts at hand, "[...] *the fact that the information exchanges commenced before the [...] agreement was adopted is not in any way of such a nature as to invalidate the finding that those exchanges were designed to facilitate the implementation of the [...] agreement following its conclusion [...]*."³¹³ In particular, the exchange of quotation prices enabled the parties to verify directly between them the quotation prices which other participants had set and reinforced the bonds of cooperation between them arising from the pre-pricing communications. This conclusion applies to the exchanges of quotation prices between Dole and Chiquita and between Dole and Weichert.
- (274) As described in Chapter 4, after the parties had set their own quotation prices, they bilaterally exchanged this quotation price information with the others. The Commission considers that there was an established pattern of such exchange of information. It cannot be excluded that information about quotation prices could have been collected from other sources, that this exchange of information may not have been secret and not limited to the parties. It is also possible that the parties would have learned competitors' quotation prices from customers first. Nevertheless, even if all these circumstances were true, the Commission considers that this exchange of information provided a mechanism, which the parties were able to use for exchanging quotation prices between them and which the parties did use (see also recital (276)). It allowed them to monitor what the Thursday morning pricing decision was taken by a competitor, with whom they had pre-pricing communications and to reinforce the bonds of cooperation between them. The fact that the documents in the file suggest that the parties may have had this practice in place both prior to and after the relevant period of the infringement does not alter the Commission's conclusions.

³¹² See in this sense Joined Cases T-25/95 etc. *Cimenteries CBR and Others v. Commission* [2000] ECR II-491, paragraphs 1087, 1088 and 1856.

³¹³ See for example Joined Cases T-25/95 etc. *Cimenteries CBR and Others v. Commission* [2000] ECR II-491, paragraph 4144.

- (275) The Commission is aware that in particular from the end of 2002 some parties later revised their quotation prices, which they set on Thursday mornings. As the Commission indicated in recitals (123) et seq. of this decision, the later revisions of quotation prices do not alter the Commission's findings (see section 4.4.2.1).
- (276) The exchange of quotation prices enabled the parties to achieve monitoring, even if they could have learned such information from customers or various private or public sources. First, even if a party first notifies its quotation price to customers that fact does not imply that at the time of exchange of information those quotation prices constituted objective market data that were readily accessible³¹⁴. Moreover, it would necessarily take some time before such information would appear in various public or private sources of information which publish quotation prices. Even if such information were readily accessible at the time it was exchanged with a competitor, a direct contact with the competitor still serves for monitoring. In particular, it makes it possible, in case of necessity, to give an immediate reaction to the competitor and/or internally regarding that competitor's quotation price. Second, through direct information exchanges the parties became aware of that information more simply, rapidly or directly than they would via the market.³¹⁵ The parties were able to rely on the established pattern of communication in case of necessity for example if that information did not reach them or if they wanted to verify it. Third, the systematic participation of undertakings in bilateral communications allows them to create a climate of mutual certainty³¹⁶. Such exchange of information reinforced the bonds of cooperation arising from pre-pricing communications between the parties. Finally, such a mechanism also enabled the participants to discuss any deviations and exposed them to competitors' reactions in case of any unexpected course of conduct which followed their pre-pricing communications.
- (277) Therefore, the Commission concludes that even if quotation price information exchanged between the parties had limited value to them as such compared to what they could have learned from the market, this exchange of quotation prices served as a monitoring mechanism for pre-pricing communications. The Commission observes that even though this exchange of quotation prices complemented the pre-pricing communications, the existence or absence thereof does not alter the Commission's findings concerning the anticompetitive object of the pre-pricing communications.

Arguments of parties concerning legal and economic context

- (278) Dole and Weichert argue that the Commission failed to analyse the arrangements alleged in the Statement of Objections in their legal and economic context. These parties claim that collusion is not the only plausible explanation and that the Commission ignored market features and the regulatory regime applicable during the relevant period. While various specific arguments are addressed in other parts of the present decision, in this section the Commission deals with certain general arguments of parties concerning the legal and economic context. These arguments can be summarised as follows: (i) due to the banana regulatory regime, importers had no real

³¹⁴ See for example Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 60.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

freedom to determine the quantities they supplied or to set prices; (ii) the supply of the product at issue is rigid and the product is of a perishable nature (arguments concerning the rigidity of market); (iii) the market for bananas is neither oligopolistic nor highly concentrated; (iv) the market for bananas is highly competitive; (v) there was a significant buying power, in particular of one customer (Aldi); (vi) the nature of quotation prices excludes concerted practices or anticompetitive agreements or makes them implausible. These arguments are considered only as part of the legal and economic context. The fact that the Commission addresses these arguments in the subsequent recitals (or elsewhere in this decision, including in section 4.4.2) cannot be taken as an indication that they are necessarily of relevance for the legal assessment that underpins this decision.

- (279) The Commission cannot accept the parties' arguments that due to the common organisation of the banana market (in particular, the quota regime) parties had no real ability to determine the quantities supplied and prices, or that the rigidity in the banana industry made any cartel arrangements impossible or not feasible. It has been demonstrated in the facts part of this decision (see section 4.4.2) that this was not so. Moreover, as concerns Dole, in another context it claims that the parties competed fiercely, including in relation to prices.³¹⁷ This argument, in fact, appears to be contradictory with Dole's arguments that the market was so rigid that the parties could not determine the quantities they supplied or prices. The same applies to the parties' arguments concerning the rigidity of supply arrangements and the perishable nature of bananas. Indeed, the quantities sold there depended upon production, shipping and marketing decisions made by the parties themselves or their suppliers (see also recital (135)). Moreover, the weekly volumes imported by the addressees to Northern European ports differed from week to week (see section 4.4.2.2, including recital (136)). In any event, this decision does not find any infringement concerning restrictions of supply.
- (280) Concerning the argument that the market at issue is neither oligopolistic nor highly concentrated, the Commission observes that the market structure is not relevant for the purposes of establishing an infringement in this case. As the Court of First Instance observed in *Tate & Lyle*, in case of a price cartel the relevance of the structure of the market surrounding the infringement is different than in cases of market sharing³¹⁸. The Court of First Instance pointed out that in *Suiker Unie* the Court of Justice considered that the legislative and economic context of the sugar market was capable of justifying less severe treatment of practices. However, the Court of Justice itself indicated in *Suiker Unie* judgment that in the case of a price cartel, its conclusions would have been different³¹⁹. Therefore, in *Tate & Lyle*, the Court of First Instance approved the distancing from the *Suiker Unie* conclusions and approved that the Commission did not err in not considering the structure of the market surrounding the

³¹⁷ For instance, Dole submits that "[...] even documents in the Commission's own file show that Dole and the other banana importers have competed against each other in every conceivable way: for retail customers, for greater access to the EU market, and for consumer recognition as the superior brand" (page 5 of [...] reply to the Statement of Objections). According to Dole "Banana importers never agreed to anything, and instead competed vigorously on prices" (page 181 of [...] reply to the Statement of Objections).

³¹⁸ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 113.

³¹⁹ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 113; see also Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 621.

infringement.³²⁰ In any event, the Commission notes that the parties had a substantial share of the market and were the suppliers of the three leading brands of bananas.

- (281) Concerning the argument that the market for bananas is highly competitive, the Commission notes that Article 81 EC Treaty prohibits prevention, restriction or distortion of competition within the common market. Therefore, parties cannot justify their involvement in cartel arrangements claiming that there is competition in the market. As concerns the argument that the parties to the infringement also fiercely competed among themselves, this does not justify their concerted practice established in the present decision either. There is no requirement that in order to constitute an infringement by object arrangements should exclude any competition between the parties. It is sufficient to establish the anti-competitive object of communications between them.
- (282) The Commission also notes that once the anti-competitive object of the arrangements has been established, it is not relevant whether the trade in issue was, as certain addressees claim, subject to a significant "buying power", and the existence of any buying power could not justify the infringement found in the present decision.
- (283) Weichert claims, in its reply to the Statement of Objections, that the nature of quotation prices in the market during the relevant period made it impossible to fix actual prices through coordinating quotation prices. Weichert argues that quotation prices had no significance for the market and claims that the Commission has recognised this in its submissions in the WTO Dispute Settlement Panel. Dole and Del Monte also argue that quotation prices were irrelevant or of little relevance for the prices obtained in the market.
- (284) The Commission notes that this decision does not allege direct concertation on actual prices. The Commission observes that according to established case-law concertation on announced prices also may constitute an infringement by object. As the Court of First Instance held in *Bolloré* “[t]he fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition”.³²¹ Furthermore, according to the settled case-law, concertation on price objectives, target prices, list prices and other forms of announced prices may constitute an infringement of Article 81.³²² As the Court of First Instance stated in *Hoechst* “[i]t must be borne in mind [...] that setting a price, even one that is merely indicative, affects competition because it allows all the participants in the cartel to foresee with a reasonable degree of certainty what pricing policy will be pursued by their competitors. More generally, such cartels entail direct interference with the essential parameters of competition on the relevant market. In expressing a common intention to apply a certain level of prices to their products, the producers concerned no longer determine their policy on

³²⁰ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 113-114.

³²¹ See Joined Cases T-109/02 etc. *Bolloré and others v Commission* [2007] ECR II-947, paragraphs 450-453.

³²² See for example Case T-64/02, *Dr. Hans Heubach GmbH & Co. KG v Commission*, [2005] ECR p. II-5137, paragraph 81 and 111, Case T-224/00 *Archer Daniels Midland Company and others v. Commission*, [2003] ECR II-2597, paragraph 271. See also Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 21.

the market in an autonomous manner, thus adversely affecting the concept inherent in the Treaty provisions on competition (Case T-64/02 Heubach v Commission [2005] ECR II-5137, paragraph 81)."³²³ The Commission's findings concerning "importance" or "relevance" of quotation prices in terms of this decision are stated in section 4.4.2.1. The Commission finds that quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices. Moreover, as concerns Dole's arguments, the Commission observes that Dole on the other hand admits that quotation prices announced by importers gave an indication of the importers' intentions or aspirations as regards the trend in prices for the following week. This does not seem consistent with Dole's argument that quotation prices were of no or little relevance. The Commission considers that its findings support the conclusion that the quotation price is a sufficient means for the concerted practice found in this decision and that this concerted practice had an anticompetitive object. Therefore, the Commission does not accept the aforementioned arguments of parties.

- (285) The Commission does not agree with the argument by certain addressees that the Commission's submissions in the WTO Dispute Settlement Panel³²⁴ or any conclusions reached therein contradict the Commission's findings in the present case. The WTO proceedings concerned the determination of a tariff for banana imports into the Community and *inter alia* addressed the issue what price data was suitable for such determination. However, the subject-matter of the WTO proceedings differs from the subject-matter of the present decision. Moreover, the Commission does not claim that actual prices were at the same level as quotation prices, which are subject-matter of the concertation (see section 4.4.2.1).
- (286) In conclusion, the Commission, taking into account the legal and economic context and having considered addressees' arguments contained in their replies to the Statement of Objections as well as information in its possession, considers that the concerted practice constitutes an infringement of Article 81 EC Treaty.

Arguments concerning the product affected by concerted practice

- (287) Certain addressees (Dole, Del Monte, Weichert) argue that the product affected by activities alleged in the Statement of Objections was only green and/or only branded bananas and/or only Latin American imports. Certain addressees question the Commission's findings on the "product scope" of concerted practice or argue that the Commission did not properly define the "product market". The Commission observes that it is not obliged to engage in any market definition when conducting cartel investigations. It is the product covered by cartel conduct that defines the scope of the infringement. While quotation prices were set for different brands of the parties, there was a relationship between prices for those brands and for other "thirds" brands and

³²³ Case T-410/03 *Hoechst v. Commission*, not yet reported, paragraph 349.

³²⁴ The mandate of the Arbitrator comprised according to the 5th indent of the Annex to the Doha Waiver (WTO Ministerial Conference, Decision of 14 November 2001, WT/MIN(01)/15) "[...] to determine, [...] whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account [all EC WTO market-access commitments relating to bananas]" (see also e.g. recital 19 of the Award of the Arbitrator of 1 August 2005 in relation to the Recourse to Arbitration pursuant to the Decision of 14 November 2001 (WT/L/616) in the framework of the WTO Dispute Settlement procedures in relation to the ACP-EC Partnership Agreement).

for unbranded bananas. In fact both Dole and Weichert argue that even the price paid by Aldi (for non-branded bananas) was important in determining actual prices for branded bananas. Moreover, quotation prices for green bananas determine quotation prices for yellow bananas (see section 4.4.2.1) and nothing in the file suggests that there was any difference depending on banana origin. Therefore, the product affected by the infringement is bananas (fresh fruit) since the concerted practice found concerned price fixing for fresh bananas (see section 2.1; see also sections 2.3 and 4.4.2).

Arguments concerning the object of arrangements

- (288) Dole and Weichert claim that the Commission did not adduce evidence that the objective of arrangements alleged in the Statement of Objections was to fix prices. Moreover, these parties as well as Del Monte argue that the conduct by its very nature could not amount to price fixing. Dole claims that it did not agree to fix prices. Moreover, according to Dole, there is no evidence that the parties abandoned their unilateral self interest. Weichert argues, in its reply to the Statement of Objections, that its communications with competitors did not involve discussions which either served to enable or facilitate common understanding on the setting or development of quotation prices.
- (289) As a general observation the Commission notes that in the present decision it does not find an agreement to fix prices (see section 5.2.2). The Commission finds a concerted practice which concerned the fixing of prices.
- (290) The Commission notes that the question raised by some of these arguments is whether pre-pricing communications had an anticompetitive object. Moreover, Dole, Weichert and Del Monte argue, in their respective replies to the Statement of Objections, that price fixing (or another anticompetitive object) would be implausible or most likely implausible for the concerted practice alleged by the Commission. To support this supposition, these addressees provide different economic, regulatory and contextual arguments. Among such arguments the regulatory regime, the perishable nature of the product, the banana business particularities, a high degree of transparency and competitiveness are mentioned. In particular, Weichert argues that collusion aimed at raising prices selectively in a certain region can only be effective if this region constitutes a separate relevant geographic market and claims that the Commission has not established that the Northern European region was a distinct geographic market. Del Monte also claims that it is "highly unlikely" that collusive conduct can effectively lead to increased price discrimination between Northern Europe and other regions of the Community. Moreover, Weichert argues that in case of a hypothetical collusion aimed at raising prices selectively in a certain region, the colluding importers would have to sell additional quantities in other regions of the Community so as to compensate for the volume restriction they created in the "cartel region" and this would have depressed prices in "non-cartel" countries, reducing the importers' profits there and the importers' incentives to collude. Weichert claims that trade flows across Member States are largely outside the control of the major importers, that they have no equal presence in all European countries and concludes that importers did not have the ability to artificially restrict supply to certain Member States. Del Monte argues that a theory that collusive conduct can effectively lead to "increased price discrimination"

between Northern Europe and other regions of the Community is "highly unlikely".³²⁵ In addition, Del Monte argues, a Community-wide quota implies that the punishments against a deviating importer "will be less effective". Moreover, Dole argues that supracompetitive pricing levels could not be implemented or sustained. Dole and Del Monte claim that any attempt "to fool Aldi" would not sustain in the long run or that importers could not manipulate the Aldi price. According to Del Monte, "[...]there is no obvious, economically coherent, mechanism through which such a strategy [to coordinate a common "signal" to send to the market and to influence the Aldi price] would be expected to lead persistently and systematically to higher Aldi prices[...]"³²⁶. Weichert argues that retailers who submitted offers to Aldi had interest to submit "keen offers" to Aldi to secure their business. Dole, Del Monte and Weichert argue that in the light of the regulatory regime and transparency of the market, any additional transparency created by competitors cannot result in higher prices and/or have an impact on volumes. According to Weichert, the common market for bananas created a strong incentive not to collude to restrict output and raise prices. In addition, Dole and Del Monte argue that there were no and/or could not have been punishment mechanisms and/or mechanisms to ensure accuracy of information received from competitors or how such information would be used. By these arguments addressees in principle claim that an anticompetitive object (price fixing) of communications between competitors is implausible and/or that competitors had no incentives to collude.

- (291) The Commission considers that communications in which price setting factors are discussed and price trends and/or indications of quotation prices are discussed with or disclosed to competitors before quotation prices are set had the object of eliminating uncertainty about the future pricing policies of competitors, namely the setting of quotation prices. The concept inherent in the provisions of the Treaty relating to competition is that each economic operator must determine independently the policy which he intends to adopt on the common market.³²⁷
- (292) As to the arguments that such activities cannot amount to price fixing, the Commission notes that according to case-law conduct whereby an undertaking discloses to its competitors the conduct which it intends or contemplates to adopt in the market concerning its pricing policy is considered as conduct concerning price fixing.³²⁸ Indeed, the Commission finds a concerted practice between parties which concerned the fixing of prices. The facts are described in Section 4 of this decision. In its assessment of the facts the Commission has taken into account the legal and economic context (see *inter alia* recitals (278) et seq., section 4.4.2). However, for there to be an infringement it is not necessary to establish that the cartel was efficient or well organised or that there was any punishment mechanism in place. Therefore, the Commission does not accept the parties' arguments related to inefficiency or

³²⁵ Del Monte in principle refers to "market evidence" which concerns the period after 1 January 2003, i.e. after the end of the infringement found in this decision. Page 13 et seq. of Annex 1 to [...] reply to the Statement of Objections (Report "Economic Assessment of an exchange of information on the Northern European supply of bananas").

³²⁶ Page 21 of Annex 1 to [...] reply to the Statement of Objections (Report "Economic Assessment of an exchange of information on the Northern European supply of bananas").

³²⁷ See Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 173.

³²⁸ See for example Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, in particular paragraph 103.

"implausibility" of the concerted practice. Moreover, it is not necessary in order to establish that arrangements concerned the fixing of prices, to show also that the parties had supply restrictions in place. Furthermore, the Commission does not accept the argument that the parties had no freedom to determine their own weekly supply quantities or prices (see also recital (279) and section 4.4.2). Moreover, the factual circumstances show that banana importers were able to adjust the quantity of bananas sold in individual Member States in different weeks and to different customers (see section 4.4.2.2). At the same time, documents in the file suggest that parties considered different pricing for different Member States (see recital (104)). Therefore, the Commission concludes, in response to the parties' arguments, that there are, in the circumstances of the present case, no grounds to question the anti-competitive object of the pre-pricing communications, and the underlying presumption of consumer harm.

- (293) The Commission furthermore observes that it is not necessary to show that the parties abandoned their unilateral self interest. According to settled case-law collusive arrangements can be restrictive by object even if the parties had other motives or pursued their own interests. It is settled case-law that an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.³²⁹ Therefore, the Commission concludes that even if the parties did not abandon their unilateral self interest that does not alter the Commission's findings.
- (294) In addition, Weichert claims that individual communications did not amount to an infringement, therefore it is not open to the Commission to conclude that the individual arrangements when viewed together amounted to price fixing. It also argues that the totality of the alleged arrangements was not united by an express or tacit "single objective" to fix the prices. The Commission does not accept these arguments. First, the Commission considers that pre-pricing communications in which Weichert participated formed a part of an infringement, and that Weichert is liable for that part. The reasoning therefore is stated in the present decision. Second, the Commission has found that Weichert's communications with Dole were united by a single objective. Moreover, all the communications (Dole with Chiquita and Dole with Weichert) had a single objective (see section 5.2.3.2).
- (295) Certain addressees argue that communications with competitors were sporadic, irregular or not systematic and therefore could not amount to price fixing. The Commission cannot accept this argument. The Commission's findings on the frequency of pre-pricing communications are stated in the facts part of this decision (see Chapter 4) and support the Commission's conclusion that pre-pricing communications formed a pattern of communications. Moreover, the Commission has concluded that even if these communications were not systematic or regular, that would not change the Commission's finding of an infringement (see recital (270)).

³²⁹ See for example Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230; Judgement of the Court of First Instance in T-59/02 *Archer Daniels Midland Co v. Commission* [2006] ECR II-3627, paragraph 189. See also Joined Cases 96/82 etc. *IAZ and Others v Commission* [1983] ECR 3369, paragraph 25.

- (296) Dole points out, in its reply to the Statement of Objections, that the alleged communications relayed whether price would go up or down, while collusion is about raising, not reducing, prices. The Commission disagrees with this argument. Competitors must not eliminate in advance through contacts between them the uncertainty concerning their future pricing policies. This requirement of independence concerns the overall price setting policy of competitors. Article 81 EC Treaty explicitly prohibits to "directly or indirectly fix purchase or selling prices" and not only to increase prices. According to case-law of the Community Courts the purpose of Article 81 (1) EC Treaty, and in particular of point (a) thereof, is to prohibit undertakings from distorting the normal formation of prices on the markets³³⁰. This includes concerting on whether or not to reduce prices in a given week. It is not necessary for a cartel to exist that prices always increase. This is even more so in the trade where quotation prices are set weekly. In addition, price decreases could for example be avoided or delayed as a result of the cartel.
- (297) In addition, Dole argues, in its reply to the Statement of Objections, that its communications with Chiquita did not have the purpose to increase prices. According to Dole, as Mr [...] (Dole) was concerned, these calls were nothing more than a "market evaluation call". Dole only sought to formulate its own quotation price at a market clearing level. As the Commission has observed in recitals (296), (303) and elsewhere in this decision, it is prohibited to eliminate through contacts among competitors uncertainty concerning their future pricing policies. It is sufficient for the Commission to establish this object. Moreover, the Commission observes that it is not claimed that Dole and Chiquita made agreements to increase prices. Therefore, the aforementioned argument of Dole cannot be accepted.
- (298) In its reply to the Statement of Objections, Weichert disagrees with Dole's statements given in response to Commission's requests for information concerning the purpose of communications between Dole and Weichert (see section 4.4.4.2, in particular recital (195)) and submits that it is erroneous to suggest that Dole would or could have relied upon its communications with Weichert to make a meaningful assessment of Weichert's intention. Weichert argues that these calls were simply too general and generic in nature. However, Weichert admits, in its replies to the requests for information, and does not deny in its reply to the Statement of Objections that during the relevant period it "rarely" exchanged views with Dole as to "*the possible evolution of official prices*". According to Weichert, it and Dole did not discuss let alone disclose their commercial intentions or future pricing decisions. The contents of communications between Dole and Weichert are described in section 4.4.4.2 of this decision. It is established that these parties discussed price setting factors and also discussed or disclosed price trends and/or indications of quotation prices before quotation prices were set. The Commission considers that such communications eliminated in advance uncertainty concerning the future pricing policies of competitors, namely concerning the future setting of quotation prices. The Commission observes that even if the parties discussed evolution of "market" prices, in the light of the facts found in this case this sufficed to eliminate or reduce such uncertainty (see *inter alia* recital (266)). The Commission finds that the argument that communications were too generic is not convincing. It is clear that when parties

³³⁰ See for example Case T-13/89 *Imperial Chemical Industries v. Commission* [1992] ECR II-1021, paragraph 311.

discuss the future evolution of quotation prices before such prices are set, this enables the undertaking to estimate its competitors' future pricing intentions. The same is when parties discuss price setting factors. Therefore, the above mentioned argument of Weichert cannot be accepted.

- (299) Moreover, Weichert argues, in its reply to the Statement of Objections, that the Commission may rely on a rebuttable presumption that a concerted practice had anticompetitive effects once an anticompetitive object is established, only where the relevant conduct by its very nature has such a high potential of negative effects on competition that it is unnecessary for the purpose of applying Article 81(1) to demonstrate any actual effects on the market. The Commission observes that according to the settled case-law concerted practice having an anticompetitive object is caught by Article 81 of the EC Treaty even in the absence of anti-competitive effects on the market³³¹. Therefore, once an anticompetitive object is found, it is not necessary to assess anticompetitive effects. Moreover, as stated in recitals (312) et seq., infringements of horizontal nature which concern the fixing of prices by competitors have always been regarded as particularly harmful.

Arguments concerning plausible alternative explanations and legitimate purpose

- (300) Dole, Weichert and Del Monte argue that the Commission's findings concerning cartel arrangements alleged in the Statement of Objections could be explained by alternative "plausible explanation" or/and that communications between parties had a legitimate purpose. In particular, Dole argues, in its reply to the Statement of Objections, that the Commission ignores documents and explanations that demonstrate that the information exchanges pursued a legitimate purpose. According to Dole (and also according to Del Monte in its reply to the Statement of Objections), the information exchanges served "efficient clearance of the market for highly perishable bananas". Dole also refers to replies to requests for information by other addressees to the Statement of Objections, which in particular outline the importance to clear the produce each week, and to one letter to the Commissioner by a member of the general public who had worked in the banana trade expressing his belief that anticompetitive price agreements in the banana trade would not have made any sense (Weichert also refers to this letter).³³² Dole argues, referring to the judgement in *Coats*³³³, that the Commission cannot meet its burden of proof where there is a plausible alternative explanation and claims that in the absence of any convincing evidence, a plausible alternative explanation rules out an infringement. Weichert also argues that the Commission may rely on mere inferences or suppositions of collusion only where no alternative plausible explanations of the alleged conduct exist. Del Monte makes similar arguments.
- (301) It is correct that according to the settled case-law the Commission must show precise and consistent evidence in order to establish the existence of the infringement. As the

³³¹ See Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, paragraphs 158-166. See also Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 121.

³³² See file p. 50996. The Commission observes that this e-mail (as far as it discusses exchanges of prices and not volume data) concerns price discussions with customers on Thursdays (i.e. neither pre-pricing communications nor communications between competitors) and does not distinguish between quotation and actual prices, but refers to "the price" discussed in pricing discussions with each single customer.

³³³ Case T-36/05 *Coats Holdings Ltd v. Commission* (not yet reported).

Court of First Instance observes in *Coats*, "[...]the case-law, according to which it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another 'plausible explanation' of the facts to be substituted for the one adopted by the Commission, is applicable only where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings."³³⁴ The Court has also specifically stated that "[i]t is not, therefore, applicable where the Commission's findings are based on documentary evidence."³³⁵ Moreover, as the Court of First Instance stated in *JFE Engineering* about the case-law concerning alternative plausible explanations "[i]t must be pointed out that the case-law [*CRAM and Rheinzink v Commission, Woodpulp II and PVC II*] relates to circumstances in which the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed."³³⁶ In the present decision the Commission does not base its findings concerning pre-pricing communications on mere parallel conduct of the parties in the market or on suppositions. The parties cannot present as mere suppositions or presumptions facts that have been established by the Commission on the basis of a body of precise and consistent evidence.³³⁷ In Chapter 4 of this decision the Commission addressed specific arguments of the parties concerning particular evidence relied on in the present decision.

- (302) Moreover, the Commission observes that by offering an alternative 'plausible explanation', certain addressees seek to challenge not the facts concerning the concerted practice found by the Commission, but the object of the cartel arrangements. The Commission observes that it has based its findings concerning the object of the arrangements on evidence in its possession establishing the facts in this case (see in particular section 4.4.4) and also on the settled case-law, which establishes legal presumptions (see in particular recitals (220), (221), (228), (234)). As anticompetitive practices are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned; this is also so concerning their anticompetitive object. Once the anticompetitive nature of communications between parties is established to the requisite legal standard, according to the settled case-law, in order to rebut legal presumptions it is for the economic operators concerned to adduce evidence to the contrary.³³⁸ The Commission considers that mere explanations by the addressees of the Statement of Objections, given after the investigation had been initiated, cannot suffice for this purpose, in particular when the Commission concludes relying on the overall body of evidence and the settled case-law. The Commission cannot either accept as sufficient probative evidence letters by members of the general public or customers, in particular when there is no indication that they were aware of the nature of pre-pricing communications between parties. Overall, the Commission considers that these

³³⁴ Case T-36/05 *Coats Holdings Ltd v. Commission* (not yet reported), paragraph 72.

³³⁵ *Ibid.*

³³⁶ See Joined Cases T-67/00 etc. *JFE Engineering et al. v. Commission* [2004] ECR II-2501, paragraph 186.

³³⁷ See for example *Limburgse Vinyl Maatschappij NV v. Commission* [1999] ECR II-931, paragraphs 725-728.

³³⁸ Case T-303/02 *Westfalen Gassen Nederland BV v. Commission* [2006] ECR II-4567, paragraph 133. See also Case T-44/02 etc. *OP Dresdner Bank AG and Others v Commission* [2006] ECR II-3567, paragraph 64.

addressees did not adduce evidence which could rebut the findings on which the Commission bases its conclusions concerning the anticompetitive object of pre-pricing communications.

- (303) Concerning the argument that the purpose of communications was efficient clearance of the market for highly perishable bananas, or finding a market clearing price and similar arguments advanced by Dole and Del Monte (see recital (300)), the Commission observes that, by virtue of this, these addressees acknowledge that their communications did influence their pricing decisions. In any case, the Commission considers that once an anticompetitive object of communications is established, the parties cannot justify them by arguing that they had in mind "efficiency increasing" aims. For an anticompetitive concerted practice to be exempted from the application of Article 81 EC Treaty, the conditions set out in Article 81 (3) EC Treaty must be met (see section 5.3). Moreover, it would not be sufficient to have no "anticompetitive spirit" in such communications with competitors where pricing intentions and price setting factors were disclosed or discussed. Even if competitors were informed that a participant had no anticompetitive purpose and that its conduct in the market would be independent, it would not be sufficient to justify such conduct. Such communications eliminate in advance uncertainty concerning the future conduct of competitors, namely setting of quotation prices. As the Court of First Instance held in *Tate & Lyle* "By participating at one of those meetings, each participant knew that during the following meetings its most important competitor, the leader in the industry concerned, would reveal its future price intentions. Independently of any other reason for participating in those meetings, there was always one at least which was to eliminate in advance the uncertainty concerning the future conduct of competitors. Moreover, by merely participating in the meetings, each participant could not fail to take account, directly or indirectly, of the information obtained during those meetings in order to determine the market policy which it intended to pursue."³³⁹ In the same manner, independently of any reasons which they may have had in pre-pricing communications, the parties could not fail to take account, directly or indirectly, of the information obtained during such communications about the intentions of others in order to determine the market policy which they intended to pursue, namely setting of their own quotation prices. Moreover, these parties have not demonstrated that by their communications with competitors (see Chapter 4) they did achieve "efficient clearance of the market" or found a "market clearing price". Nor have they demonstrated that the pre-pricing communications with competitors were indispensable to achieve any pro-competitive objective (see also section 5.3). Therefore, the Commission cannot accept the aforementioned arguments of these parties.

Arguments concerning the nature of discussions or of information disclosed

- (304) Dole argues, in its reply to the Statement of Objections, that the Commission fails to understand the (minor) role that alleged communications played in the functioning of the banana market. Weichert also argues, in its reply to the Statement of Objections, that communications with competitors were commercially insignificant. Del Monte argues, in its reply to the Statement of Objections, that "*the information exchanges [...] are unlikely to facilitate explicit or tacit collusion. This is because the particular information exchanges in question do not in effect relate to information about future*

³³⁹ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 67.

conduct[...]."³⁴⁰ It is already explained in this section 5.2.4 why such communications did decrease uncertainty concerning the future setting of quotation prices of competitors and why they concerned the fixing of prices. Moreover, the Commission considers that even if parties claim that communications were not of a particular significance to participants, this would not alter the Commission's finding. It is sufficient to establish that the parties maintained anticompetitive contacts with competitors and participated at pre-pricing communications, which had an anticompetitive purpose. As concerns Dole, it admits that information received from competitors, including through pre-pricing communications, improved its ability to more precisely gauge the state of supply and demand in the market and admits that it took into account information received, in conjunction with "many other factors" when setting its quotation price³⁴¹. These statements contradict Dole's arguments that the role of communications with its competitors was "minor".

- (305) Moreover, certain addressees argue that the information revealed in such communications was publicly available or could be obtained from other sources (such as customers or publications which publish market forecasts). Another argument submitted to the Commission is that such communications did not reveal any sensitive data. The Commission notes in this regard that there is a vital distinction to be made between competitors independently gleaning information or even discussing future pricing with customers and third parties on the one hand, and discussing with competitors price setting factors and even the evolution of prices before deciding upon their quotation prices on the other hand. The parties did not demonstrate that the publications they refer to revealed competitors' views on the topics discussed or disclosed in pre-pricing communications or competitors' expectations or intended course of action in relation to prices. Moreover, even if information discussed or disclosed by parties was known to customers or other trade players or otherwise, this would not contradict the conclusion that such discussions among competitors were anti-competitive.
- (306) Certain addressees argue that these communications were not anticompetitive in the light of transparency created by the common market for bananas and obligations imposed by it. The Commission observes that none of regulatory measures applicable in the relevant period required or encouraged to pursue the concerted practice found in this decision. Therefore, the Commission takes the view that the regulatory regime does not in any way justify the need for the parties to discuss or disclose price trends and/or indications of quotation prices and/or price setting factors with their competitors before quotation prices are set, or even merely to inform them on these matters.
- (307) Moreover, Weichert, Del Monte and Dole argue that their exchanges of information with competitors were not secret but known in the trade. According to these parties, such absence of secrecy must be taken into account *inter alia* when evaluating the legal and economic context, the purpose of communications and the very existence of infringement. Weichert claims that the Food and Agriculture Organisation of the United Nations (FAO), the Commission and other public and private entities

³⁴⁰ Page 15 of Annex 1 to [...] reply to the Statement of Objections (Report "Economic Assessment of an exchange of information on the Northern European supply of bananas").

³⁴¹ Page 215 of [...] reply to the Statement of Objections.

(including customers) knew about exchanges of information between the parties (and also with other trade players). Certain addressees also argue that the same or similar information was made available not only to the participants in communications but also to others. Furthermore, Weichert argues that the Commission "solicited and obtained detailed commercial market information from industry participants and their trade associations" and sought to obtain "industry's *consolidated* views" on recent and often continuing market developments. To support these claims, Weichert refers to Commission's correspondence with a trade association and notes that it covered pricing and arrival information (as well as association's views on the importance of seasonality and supply restrictions imposed by the licensing regime).³⁴² Weichert argues that the Commission thereby directly encouraged the collection and consolidation of market data from the industry participants. The Commission notes that as far as these arguments concern exchanges of banana arrival information, they are not relevant to this decision (see recitals (136) and (272)). As concerns exchanges of quotation prices after they were set, the fact that these exchanges may have been known to third parties does not alter the Commission's findings. The same applies to alleged awareness by public institutions (see also recital (319)). In any event, the evidence adduced or arguments presented by parties do not demonstrate that public institutions, customers or third parties knew about pre-pricing communications and contents thereof. Letters of the customers, submitted by Weichert with its reply to the Statement of Objections and presented at the Oral Hearing, and documents suggesting that information was made available by Weichert to others refer only to banana arrivals information and quotation price information after they were set and announced. Moreover, Weichert's quotation price lists collated quotation price information, which as Weichert argues was public information anyway. In the letters provided by Weichert in response to the Statement of Objections and presented at the Oral Hearing customers state that "*[i]t is widely known that InterWeichert and other banana importers have regularly exchanged information concerning arrivals volumes and official prices for many years. This exchange of information was neither secret nor did it have any negative consequences for us as a customer of InterWeichert.*"³⁴³ However, there are no indications that customers or public authorities knew about pre-pricing communications, and in particular, about the precise scope thereof. In the same manner, there are no indications that third parties were aware that exchanges of quotation prices served to monitor individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between them beforehand. Therefore, those documents do not demonstrate that the full extent of the cartel was known to the public or institutions.³⁴⁴ Moreover, the Commission considers that even if third parties knew about them, that would not exclude the parties from liability for the infringement established by this decision. Even if it were true that the parties had not kept these communications secret, discussed the same or similar issues with customers or revealed the same or similar information to others, this would not alter

³⁴² Weichert letter of 28 February 2008, Cross-disclosures of Regulation 1049/2001 documents to DG Competition. Tabs 1-9 attached to this letter concern Directorate General for Agriculture (DG AGRI) correspondence with Bundesverband Deutcher Fruchthandelsunternehmen e.V. (BDF), in particular 8 monthly reports from BDF to DG AGRI and DG AGRI's reply thanking for information and indicating that it was very helpful.

³⁴³ See for example Weichert's Exhibit 10 for the Oral Hearing.

³⁴⁴ See in this sense Joined Cases T-259/02 etc. *Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2006] ECR II-5169, paragraph 506.

the findings of the Commission.³⁴⁵ Finally, the Commission does not consider that the fact that the Commission may have received monthly reports from a trade association and indicated to it that such information was helpful could lead to a conclusion that the Commission knew or encouraged the concerted practice found by this decision. Nothing in this correspondence suggests knowledge of pre-pricing communications among the parties. Moreover, the information in these reports is of a general nature (not specified per competitor), presented on a monthly (not weekly) basis *ex post* and it was received from a trade association. Therefore, the Commission does not accept the above arguments of parties.

- (308) In addition, Weichert appears to argue that it was encouraged by the FAO to commence exchanges of information on banana arrivals and quotation prices set by banana importers with competitors. However, Weichert did not adduce any evidence that it was under such pressure by any public institution or in the light of any regulatory measures which would justify its involvement in concerted practice established by this decision. Therefore, such argument is not relevant for the Commission's findings.
- (309) As stated in recital (159), Dole argues that certain individuals involved in pre-pricing communications did not have ultimate responsibility to set prices. The Commission observes that such responsibility of individuals involved in concerted practices is not necessary to attribute liability. It is settled case-law that "*it is not necessary for there to have been action by, or even knowledge on the part of the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices*".³⁴⁶ Moreover, the Commission provided other reasons why it cannot accept this argument of Dole in Chapter 4 (see in particular recital (159)).
- (310) Finally, it is irrelevant that, as some addressees argue, pre-pricing communications may have been "exceptional" when seen in the context of "general" exchanges of information, which may have taken place between parties and other banana suppliers over many years. This does not justify the cartel arrangements between parties.

The parties arguments concerning legal qualification

- (311) Dole, Weichert and Del Monte claim that there is no legal precedent for the conduct alleged in the Statement of Objections and indicate that the infringement alleged is "novel". These parties argue that the Commission's reliance on hard-core cartel cases cited in the Statement of Objections is misplaced. *Inter alia*, these parties point out that in contrast to the cases cited by the Commission in the Statement of Objections, they had no multilateral meetings. Moreover, certain addressees also claim, in their reply to the Statement of Objections, that their communications with competitors were a pure exchange of information allowing them to make better informed pricing decisions, not price fixing. Dole argues that communications with competitors were

³⁴⁵ See for example Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 60.

³⁴⁶ Cases 100-103/80, *SA Musique Diffusion Française v. Commission* [1983] ECR 1825, paragraph 97. See also Case T-9/99, *HFB and others v Commission* [2002] ECR II-1487, paragraph 275, Case T-15/99, *Brugg Rohrsysteme v Commission* [2002] ECR II-1613, paragraph 58, Case T-236/01 *Tokai Carbon v Commission* [2004] ECR II-1181, paragraph 277.

mere information exchanges, therefore the actual and potential effects of an information exchange must be assessed in the line of *inter alia* the *UK Agricultural Tractor Registration Exchange* case³⁴⁷. In particular, Dole submits that the structural characteristics of the market and the characteristics of the information exchange itself must be considered. Dole argues that "[...]the information exchanges could not possibly have led to price coordination, based on the criteria set forth by the ECJ in the *UK Tractors case*"³⁴⁸. Weichert and Del Monte also refer to the Commission's decision and/or Court Judgment in the *UK Agricultural Tractor Registration Exchange* case. In addition, Dole and Del Monte argue that contrary to the standards set out in the *UK Agricultural Tractor Registration Exchange* case, in the present case the parties exchanged the same or similar information also with customers and/or other market players. Dole also argues that at the time of the conduct it could not have considered that it was anticompetitive.

- (312) The Commission observes that throughout this decision it is explained why the Commission relies on particular case-law of the Community Courts. As for the alleged novelty of the infringement, the Commission notes that as the Court of First Instance stated in *Tate & Lyle* infringements of horizontal nature which concern the fixing of prices have always been regarded as particularly harmful. In that case the Court of First Instance considered that a concerted practice or agreement, which involved discussing with competitors or informing competitors about pricing intentions, constituted "[...]classic type of infringement of competition law, the illegality of which has been stated by the Commission many times ever since its first interventions in competition matters[...]". The Court held that arrangements in that case concerned the fixing of prices.³⁴⁹
- (313) The Commission considers that it is not relevant, for establishing an infringement, that the parties did not have meetings but communicated orally by phone on a bilateral basis. The form of communications which participants have chosen is not relevant. The Commission also observes that in this case the participants would set their quotation prices weekly and individuals involved in the discussions may have been based in different countries. By choosing means of communications that may be convenient the parties cannot avoid liability for their actions.
- (314) As for the argument that parties had no knowledge that they were infringing Article 81 EC Treaty or that the infringement was not intentional, the Commission notes that "[i]t is settled case-law that, for an infringement of the competition rules of the Treaty to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules. It is sufficient that it could not have been unaware that its conduct was aimed at restricting competition."³⁵⁰

³⁴⁷ The Judgment of the European Court of Justice in Case C-7/95 P *John Deere v Commission* [1998] I-3111, the Judgment of the Court of First Instance in Case T-35/92 *John Deere v Commission* [1994] ECR II-957, Commission Decision in Case IV/31.370 and 31.446 - *UK Agricultural Tractor Registration Exchange*, OJ 1992 L 68, p. 19.

³⁴⁸ [...] reply to the Statement of Objections page 194-198 and page 216-222.

³⁴⁹ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 135 and 103.

³⁵⁰ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 127. See also Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others v Commission* [1983] ECR 3369, paragraph 45; Case 246/86 *Belasco and Others v Commission* [1989] ECR 2117,

The Commission observes that the undertakings involved in the concerted practice were large undertakings with the legal and economic knowledge necessary to enable them to recognise that their conduct constituted an infringement. Moreover, they were the main (or among the main) competitors in the industry at issue. It is clear that their communications with competitors concerned or revealed future pricing intentions. Therefore, the Commission considers that parties cannot reasonably argue that they acted neither negligently nor deliberately. In these circumstances the parties acted deliberately, whether or not they were aware that, in so doing, they were infringing the prohibition laid down by Article 81 (1) of the EC Treaty. Moreover, as the Commission observed in recital (312) and elsewhere in section 5.2, there is settled case-law, which states illegality of such concerted practices and that such practices concern price fixing.

- (315) As concerns the argument that pre-pricing communications between parties were pure exchanges of information, which can infringe Article 81 EC Treaty only if anticompetitive effects are established, the Commission notes that contrary to the assertions by these parties, the Commission has found that pre-pricing communications had an anticompetitive object (see recitals (263) et seq.). It is settled case-law that if concerted practices by their very nature have the object of restricting or distorting competition within the common market within the meaning of Article 81(1) EC Treaty, they constitute an infringement and the Commission does not need to appraise the effects thereof, since concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object³⁵¹. The present case must be distinguished from the *UK Agricultural Tractor Registration Exchange* case³⁵². The *UK Agricultural Tractor Registration Exchange* case concerned the exchange of *ex-post* information which enabled to identify each competitor's sales (very detailed product and geographic information on retail sales), as well as information on dealer sales and imports of own products. In that case the Commission found, given the specific circumstances of the case, that such exchange of *ex-post* information infringed Article 81 (1) EC Treaty. Pre-pricing communications are not, however, *ex-post* exchanges of information about transactions already completed as in the *UK Agricultural Tractor Registration Exchange* case, but they gave rise to the disclosure of the course of conduct which competitors contemplated adopting in the market concerning their future setting of quotation prices. The concerted practice had as its object the restriction of competition within the meaning of Article 81 of the EC Treaty (see recitals (263) - (271)). Therefore, the Commission does not need to analyse the structure of the market and/or characteristics of the communications or information communicated in the light of criteria set out in the *UK Agricultural Tractor Registration Exchange* case (see also recital (280)). Neither in this case the Commission needs to appraise actual effects of the concerted practice (see recitals (218), (219) and (236)). Moreover, the fact that competitors may have discussed the same or similar topics with customers and/or other market participants cannot alter the

paragraph 41; Case T-141/89 *Tréfileurope v Commission* [1995] ECR II-791, paragraph 176; Case T-310/94 *Gruber + Weber v Commission* [1998] ECR II-1043, paragraph 259.

³⁵¹ Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission* [2002] ECR II-1487, paragraph 217. See also Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, paragraphs 158-166 and Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 121.

³⁵² See footnote 347.

Commission's findings in this case (see also recital (325) and recitals referred to therein).

Arguments concerning Thursday exchange of quotation prices

- (316) As a preliminary observation concerning the arguments presented by the parties in response to the Statement of Objections, the Commission does not find that the exchange of quotation prices between the parties after these prices had been set in itself gave rise to a distinct infringement of Article 81(1) (see recital (273)). Therefore, the Commission will not address in this decision the arguments of the parties which are not relevant in the light of this conclusion. Nevertheless, the Commission finds that exchange of quotation price information enabled the parties to monitor the individual parties' quotation pricing decisions in the light of pre-pricing communications (see recital (273) et seq.). The Commission addresses parties' arguments which concern this finding. Moreover, a number of arguments concerning this exchange of information are dealt with elsewhere in this decision (see in particular sections 5.2.2.2, 5.2.3.2 and recitals (278) et seq.).
- (317) In its reply to the Statement of Objections Weichert argues that exchange of quotation prices could not serve as monitoring mechanism for price fixing. According to Weichert, this information was not valuable to the parties and anyway there was no prior collusion to fix prices. In its reply to the Statement of Objections, Dole argues, in particular referring to the judgment of the European Court of Justice in *Woodpulp*, that the Commission has wrongly concluded that the exchange of quotation price information was intended to monitor the pricing conduct of the addressees of the Statement of Objections. Dole argues that the exchange of quotation price information cannot support price fixing. Dole points out that the parties did not share actual prices. Moreover, Dole claims that competitors' information was only a part of the information discussed during the meeting at which Dole quotation price was set. Furthermore, Weichert claims that it started to collect quotation price information in order to assist the FAO and claims that the Commission (and other FAO members) has known, not objected to and even approved the scheme.³⁵³
- (318) As the Court of Justice reiterated in *Aalborg*, "[...] even though the information thus exchanged was in the public domain or related to historical and purely statistical prices, its exchange infringes Article 85(1) of the Treaty where it underpins another anti-competitive arrangement. That interpretation is based on the consideration that the circulation of price information limited to the members of an anti-competitive cartel has the effect of increasing transparency on a market where competition is already much reduced and of facilitating control of compliance with the cartel by its members."³⁵⁴ The Commission has stated in this section 5 of the present decision for the reasons explained that pre-pricing communications formed a concerted practice with an anticompetitive objective, and the exchange of quotation prices enabled the parties to monitor individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between them beforehand. It is irrelevant if information exchanged or the very exchange of information was not secret, valuable or that information was available by other means. Moreover, the Commission has

³⁵³ *Inter alia*, page 72 et seq. [...] reply to the Statement of Objections.

³⁵⁴ Joined Cases C-204/00 P etc. *Aalborg and others v Commission* [2004] ECR I-123, paragraph 281.

provided further reasons for its finding that such exchange facilitated pre-pricing communications (section 5.2, in particular recital (273) et seq.). Indeed, when the infringement concerns the coordination of quotation prices, the subsequent exchange of such quotation prices, once they are set, between the participants in cartel arrangements by its very nature serves to monitor the quotation prices of competitors set after such pre-pricing communications. It is irrelevant that the parties did not exchange actual prices; this is not found in this decision nor was claimed in the Statement of Objections. Finally, even if the exchange of quotation prices might not initially (when it commenced) have been intended to support price fixing, it forms part of the infringement because it facilitated the functioning of the cartel. Therefore, the Commission does not accept respective arguments of parties.

- (319) Weichert's arguments that its exchange of quotation prices with competitors was conducted in order to assist the FAO and that the Commission or other public institutions knew of and approved the scheme, the Commission observes that it does not find in this decision that the exchange of quotation prices in itself gave rise to a distinct infringement. Weichert did not adduce any evidence which could demonstrate that the institutions mentioned endorsed or otherwise approved Weichert's exchange of quotation prices with Dole being aware of the context in which these exchanges took place during the period of the infringement, particularly of pre-pricing communications between these parties. Moreover, the Commission has explained that the fact that the exchange of quotation prices might have been known to others, including public institutions, would not alter its findings in this decision (see in particular recital (307)). Finally, Weichert did not demonstrate that it was under any pressure which would justify its involvement in concerted practice established by this decision. Therefore, the Commission does not accept the aforementioned arguments of Weichert.

Arguments concerning Commission's burden of proof

- (320) Weichert and Dole argue that in the Statement of Objections the Commission has failed to discharge to the requisite standard the burden of proof in order to establish an infringement of Article 81(1) EC Treaty and various elements thereof. Del Monte also questions, in its reply to the Statement of Objections, the fulfilment of this burden of proof. These parties argue that there are alternative plausible explanations for their practices and evidence which rebuts the Commission's findings on the practices alleged in the Statement of Objections. According to Dole, evidence shows unilateral, not coordinated behaviour. Moreover, certain parties challenge the Commission's reliance on specific evidence.
- (321) The Commission observes that in the light of the arguments presented by the parties in response to the Statement of Objections and at the Oral Hearing, the Commission has reassessed the overall evidence relied in the Statement of Objections. For the findings in this decision, the Commission relies on precise and consistent evidence to establish the existence of an infringement of Article 81 of the EC Treaty and each addressee's responsibility for this infringement.
- (322) In this decision the Commission has set out the elements of evidence on which it relies and addressed the parties' arguments concerning specific evidence. Moreover, the Commission, insofar as appropriate, has also taken into account documents and

elements brought forward or referred to by the addressees in their responses to the Statement of Objections, at the Oral Hearing or thereafter. The Commission observes that so far as these documents and elements concern arguments which are not relevant in the light of the Commission's findings in this decision it is not necessary to address them in this decision. As concerns "alternative plausible explanations", the Commission has addressed these arguments in this section 5.2.4.

- (323) Certain addressees have referred to customers' letters, a letter from a member of the general public to the Commissioner³⁵⁵ or a letter from a trade association to the Commissioner(s)³⁵⁶ in order to support their claims *inter alia* that there were no cartel arrangements between competitors alleged in the Statement of Objections, that their communications were public and that they had no anti-competitive purpose. Concerning these documents from third parties, the Commission observes that they concern exchanges of banana arrival information and of quotation prices after they were set. Even if these documents may show that third parties may have been aware of exchanges of banana arrival volume information and of Thursday exchanges of quotation prices after they were set by each banana importer, they do not concern Commission's findings in this decision concerning pre-pricing communications which took place before the parties set their quotation prices. In the same manner, they cannot concern the role of the Thursday exchange of quotation prices in the sense of enabling the parties to monitor individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between them beforehand. Through this exchange of quotation prices the parties became aware of that information more simply, rapidly or directly than they would via the market (see recital (276)).
- (324) Concerning Dole's and certain other addressees' argument, in response to the Statement of Objections, that various documents in the Commission's investigation file show unilateral or independent conduct of the parties, the Commission observes that even if a participant in cartel conduct may seek to exploit cartel arrangements for its own ends, or even cheat, this does not diminish its responsibility for participation in that conduct. It is settled case-law that an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.³⁵⁷ Moreover, it is not necessary, in order to establish an infringement, to show that the infringement totally eliminated competition. According to the settled case-law each economic operator must determine independently the commercial policy which he intends to adopt in the common market. This requirement strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market³⁵⁸ (see recitals (216) et seq. and section 5.2.4).

³⁵⁵ See footnote 332.

³⁵⁶ See recital (119).

³⁵⁷ See for example Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230; Judgement of the Court of First Instance in T-59/02 *Archer Daniels Midland Co v. Commission* [2006] ECR II-3627, paragraph 189. See also Joined Cases 96/82 etc. *IAZ and Others v Commission* [1983] ECR 3369, paragraph 25.

³⁵⁸ Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

- (325) Certain addressees (Dole, Del Monte and Weichert) also argue that information discussed in pre-pricing communications was public and/or available from other sources to them. The Commission has already addressed these arguments in this decision (see in particular recitals (302), (305), (307), (308), (319), (234), (276)). Certain addressees (Dole, Del Monte), moreover, refer to the notion of so-called "radio banana" in the trade for bananas due to which, according to these addressees information in the bananas trade was quickly disseminated and "everybody" knew that competitors were talking to "everybody".³⁵⁹ The Commission considers that these arguments do not alter the Commission's findings stated in this decision. The Commission has indicated in many parts of this decision that it is not relevant, that competitors may have discussed similar topics with customers or other banana traders or that some aspects of their concerted practice found in this decision may have been known to others (see *inter alia* recitals (305), (307), (308), (319), (276)). Therefore, the respective arguments of addressees cannot be accepted.
- (326) Moreover, certain addressees argue that the Commission gave undue importance to [...] statements [...]. Dole *inter alia* argues that to establish the object of the alleged infringement the Commission relied only on [...] submissions, which according to Dole have no probative value.
- (327) In this decision the Commission has stated reasons why the Commission relied on specific [...] statements [...]. Moreover, the Commission has stated reasons for its conclusions concerning the purpose of collusive arrangements established in this decision and outlined the elements on which it relied to achieve such conclusions. Finally, the Commission does not accept the argument that the Commission gave undue importance to [...] statements. In the Statement of Objections the Commission has referred also to statements of other parties and documentary evidence. In this decision the Commission has relied on the overall body of evidence, including the parties' replies to requests for information and on documentary evidence.
- (328) Concerning Weichert's claim that the Commission cannot rely [...] statements given that Weichert had no access to records, transcripts or notes of meetings [...] with the Commission, [...], the Commission observes that neither in the Statement of Objections nor in this decision the Commission has relied on any [...] record of which Weichert had no access (see also recital (258)). During the procedure of access to the

³⁵⁹ In its reply to the Statement of Objections, page 39, [...] states that "[c]ustomers (ripeners, wholesalers, retailers, and others) eagerly broadcast offers from the different importers and their perspectives on the status and prospects of the market; and the importers themselves tuned into what they call 'Radio Banana', i.e. the steady stream of talk and gossip between customers and suppliers about the market." Dole referred to the "radio banana" at the Oral Hearing (slide 28 of [...] presentation "[e]xchanges were publicly known and their existence is undisputed, e.g.: [...] Customers ('Radio Banana')"). Del Monte also used the term "radio banana" during its submissions at the Oral Hearing. Moreover, to its "Post hearing briefing paper" (letter of 17 March 2008) Del Monte attached the afore-mentioned slide 28 of [...] presentation at the Oral Hearing. Moreover, [...] in its presentation attached to its letter of 9 April 2008 claims that "[t]he information exchanges between importers were simply discussions of public non-commercially sensitive information. Discussions like these took place between everyone in the market because this is how the transparent banana market has always functioned for everyone involved. Every market participant talks with each other about the market and the weather and expected trends and anticipated price developments (trends up or down). This is what meant by "Radio Banana." (page 45).

Commission's file Weichert was granted access at the Commission's premises to records [...], and Weichert exercised such right. [...].

5.2.5. *Implementation*

- (329) Several addressees of this decision in their replies to the Statement of Objections argue that they did not implement concerted practices alleged in the Statement of Objections. Although the Commission is not obliged to show an implementation to find an infringement of Article 81(1), such implementation can be demonstrated in this case.
- (330) The facts described in Chapter 4 demonstrate that pre-pricing communications were of such a nature that they led to implementation. Pre-pricing communications took place before the parties set their quotation prices. They took place repeatedly and over the long period of time. The parties consistently set their quotation prices on Thursday morning each week (see section 4.4.2.1). Therefore, in those weeks where they had pre-pricing communications with competitors, the parties then set their own quotation prices aware of their competitors' views concerning price setting factors and/or, on occasions, of their competitors' views or intentions concerning price trends and/or indications of quotation prices. The Commission finds that pre-pricing communications between parties did have an impact on the conduct on the market. Therefore, the cartel arrangements were implemented.
- (331) Moreover, during the period when pre-pricing communications took place, there was also the mechanism of exchange of quotation prices in place and it was used by the parties (see section 4.5 and recitals (273) et seq.). Indeed, parties had bilateral contacts during which they exchanged quotation prices set by each of them (see section 4.5). This exchange of quotation prices on Thursday mornings served for monitoring parties' quotation price decisions in the light of pre-pricing communications which took place between parties beforehand. This enabled the parties to verify directly between them the quotation prices which other participants had set. This subsequent exchange of information reinforced the implementation of collusive arrangements.
- (332) In conclusion, the Commission considers that parties cannot claim that collusive arrangements described in this decision were not implemented.

5.2.6. *Effect upon trade between Member States*

- (333) The continuing collusive arrangements between the parties had an appreciable effect upon trade between Member States.
- (334) Article 81 of the EC Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market.
- (335) The European Court of Justice and Court of First Instance have consistently held that, *"in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between*

Member States".³⁶⁰ In any event, whilst Article 81 of the EC Treaty "*does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect*"³⁶¹.

- (336) As demonstrated in the "Description of the sector" and "Inter-state trade" sections in Chapter 2 of this decision, the market for bananas in Northern European region is characterised by a substantial volume of trade between Member States (see section 4.4.2.2, in particular recital (131)).
- (337) The application of Article 81 of the EC Treaty to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States³⁶².
- (338) In the present case the cartel arrangements covered Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden, which forms a significant part of the Community. The existence of the collusive arrangements that are described in Chapter 4 of the present decision, must have resulted, or was likely to result, in the diversion of trade patterns from the course they would otherwise have followed³⁶³. In that respect the Commission observes that bananas were imported into a few Northern European ports (see recital (33)) and from there they were distributed throughout the region or could be transported elsewhere (see recital (131)).

5.3. Non-application of Article 81(3) of the EC Treaty

- (339) The Commission has concluded in the Statement of Objections that there are no indications suggesting that the conditions of Article 81(3) of the EC Treaty could be fulfilled in this case. Moreover, the parties did not notify any agreement or practice, which would have been a precondition for the application of Article 81(3) of the EC Treaty under Article 4(1) of Regulation No 17/62.³⁶⁴ Accordingly, an exemption under Article 81(3) of the EC Treaty cannot be granted in this case.
- (340) Restriction of competition being the sole object of practices which concern the price fixing, there is no indication that concerted practices between the parties can have entailed any efficiency benefits or otherwise promoted technical or economic progress. Horizontal practices relating to prices, like the concerted practices which are subject to this decision, are by definition the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers. The Commission observes that Article 81(3) of the EC Treaty lists four cumulative conditions which must be

³⁶⁰ See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others* [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 etc., *Cimenteries CBR* [2000] ECR II-491, paragraph 3930.

³⁶¹ See Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 17; see also Case T-374/94, *European Night Services* [1998] ECR II-3141, paragraph 136.

³⁶² See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

³⁶³ See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

³⁶⁴ OJ 13, 21.2.1962, p. 204. See, in this sense, for example, Joined Cases T-259/02 etc. *Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2006] ECR II-5169, paragraph 213.

fulfilled in order for concerted practices to be exempted from the prohibition of Article 81(1) of the EC Treaty.

- (341) Dole argues, in its reply to the Statement of Objections, that even assuming that "information exchanges" violated Article 81(1) (which Dole contests) an exception under 81 (3) should be applied, because the conditions are satisfied: (1) they were needed to ensure efficient clearing of a market characterised by rigidity of supply of highly perishable goods; (2) they did not go beyond what was necessary to ensure such efficient clearing; (3) they facilitated prompt clearance of the market and reduced transaction costs, and as such promoted efficiency and consumer welfare; (4) they did not afford the possibility of eliminating competition. Dole adds that it did not notify any agreement or practice since it never considered them anticompetitive.
- (342) The Commission cannot accept these arguments. First, as concerns the purpose of concerted practice, the Commission has stated its findings in section 5.2.4. The Commission therefore does not accept Dole's argument concerning the purpose of arrangements. Second, the Commission has found that by these arrangements competitors coordinated the setting of quotation prices. This concerted practice went well beyond what could be justified or indispensable to attain any possible pro-competitive objective. Third, the Commission does not consider that such collusion, which concerned the fixing of prices, could promote consumer welfare. Moreover, the Commission considers that Dole has not demonstrated that alleged benefits compensated consumers for any actual or likely negative impact caused to them by the restriction of competition found in this decision. Fourth, the Commission considers that the concerted practice found in this decision afforded the parties the possibility of eliminating competition in respect of a substantial part of the products in question in Northern European area. The Commission observes that the competition regarding the product concerned was already weakened through the lessened degree of uncertainty (see recital (272)). Moreover, the concerted practice at issue concerned the fixing of prices, which is one of the most severe infringements of competition. These factors make the possibility of eliminating competition even higher. Therefore, the Commission considers that Dole has not demonstrated that the concerted practice did not afford the possibility of eliminating competition.
- (343) The Commission does not, in particular, consider that the concerted practices found in this decision were indispensable to ensure efficient clearing of the product, the reduction of transaction costs with customers or any other pro-competitive objective in the sense of Article 81(3) of the EC Treaty. Therefore, an exemption under Article 81(3) of the EC Treaty is not applicable in this case.

5.4. Council Regulation No 26/62

- (344) Council Regulation No 26/62³⁶⁵ applying certain rules of competition to production of and trade in agricultural products provides that Article 81 applies to all agreements, decisions and practices which relate to production of or trade in the products listed in Annex II (now Annex I) to the EC Treaty which includes fruit.

³⁶⁵ OJ 030, 20.04.1962, p. 993 – 994.

- (345) By way of exception Article 2 of Regulation 26/62 provides that Article 81 shall not apply to agreements, decisions and practices of three types:
- (a) those which “form an integral part of a national market organisation”;
 - (b) those which “are necessary for attainment of the objectives set out in Article 39 of the Treaty [now Article 33]”³⁶⁶;
 - (c) agreements, decisions and practices “of farmers, farmers’ associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty [now Article 33] are jeopardized”.
- (346) The exceptions set out at (a) and (c) do not apply in this case. The organisation of the market of bananas is a common one, so that the exception at (a) is excluded. The exception at (c) is excluded as well since practices described in Chapter 4 involve parties other than farmers. The exception at (b) cannot apply either. The exception provided for under Article 2 (1) of Regulation 26/62 applies only to agreements, concerted practices or decisions “necessary for attainment of the objectives set out in Article [33] of the Treaty”. As the Court of Justice pointed out in its preliminary ruling in *Oude Luttikhuis* “[t]hat description implies that it must be demonstrated that the agreement is necessary for attainment of all those objectives”.³⁶⁷ The concerted practice at issue does not in any way help to attain any objective, listed at Article 33 (1) of the EC Treaty. In particular, the concerted practice cannot be considered as helping to increase agricultural productivity or to ensure a fair standard of living for the agricultural community. The concerted practice concerned the fixing of prices for bananas imported into the Northern European region. It in particular affected the further distribution of the product within the Community. Moreover, the concerted practice does not help to stabilise markets or to assure the availability of supplies in the sense of Article 33 (1) EC. The Commission observes that during the period of the infringement Council Regulation (EEC) No 404/93³⁶⁸ of 13 February 1993 on the common organization of the market in bananas was in effect with the objective of stabilising the market and ensure the availability of supplies.³⁶⁹ Finally,

³⁶⁶ Article 33 (1) of the EC Treaty provides: “[t]he objectives of the common agricultural policy shall be: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) ensure that supplies reach consumers at reasonable prices.” OJ C 325, 24.12.2002 (Consolidated text) and OJ C 340, 10.11.1997 (Consolidated version 1997).

³⁶⁷ Case C-399/93 *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA* [1995] ECR I-4515, paragraph 25. See also Case 71/74 *Frubo v Commission* [1975] ECR 563, paragraphs 24, 25 and 26.

³⁶⁸ OJ L 47, 25.2.1993, p. 1. Repealed by Council Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299, 16.11.2007, p. 1.

³⁶⁹ See Case C-280/93 *Germany v. Council* [1994] ECR I-4973, paragraph 50.

the Commission considers that the concerted practice does not help to achieve the objective to ensure that supplies reach consumers at reasonable prices. The concerted practice between competitors, which concerned the fixing of prices cannot be considered as attaining such objective. Consequently, the concerted practice is not exempted from the application of Article 81 (1) of the EC Treaty.

- (347) The Commission observes that Regulation 26/62 was repealed by Council Regulation (EC) No 1184/2006³⁷⁰ of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products. However, during the period of the infringement established by this decision, Regulation 26/62 was applicable and therefore it shall govern the exceptions for arrangements concerning bananas in 2000-2002, provided only the conditions for such exceptions established therein were met. However, the Commission concludes that the concerted practice established in this decision was not exempted from the application of Article 81 (1) of the EC Treaty.
- (348) Del Monte argues, in its reply to the Statement of Objections, that Regulation 26/62 precludes the application of Article 81(1) EC Treaty to information exchanges alleged in the Statement of Objections. In particular, Del Monte argues that the increased transparency through the information exchange was necessary to reduce the danger of disequilibrium outcomes in the supply of a highly perishable product to consumers; a less transparent market would have led to (at least temporary) supply shortages as well as quality deteriorations and/or the destruction of produce and thus, ultimately, would have resulted in the destruction of value and higher average prices. The objectives of the common market organisation for bananas were to provide an adequate income for producers, to assure the availability of supplies, and to stabilise markets (Del Monte refers to the Preamble of Regulation 404/93). The market transparency was one of the main objectives of Regulation 404/93/EEC (Del Monte refers to Article 8(1)).
- (349) The Commission disagrees that the concerted practice found in this decision was exempted under Regulation 26/62. The Commission considers that collusive arrangements at issue, which concerned the fixing of prices, do not in any way help to attain any objective listed at Article 33 (1) of the EC Treaty (see recital (346)). The stabilisation of markets, envisaged under Regulation 404/93, does not cover horizontal practices which concern the fixing of prices. Such a practice does not fall within the scope of transparency sought by virtue of Regulation 404/93. Moreover, according to the case-law this exemption may only apply if an agreement, concerted practice or decision is necessary for the attainment of all the objectives set out in Article 33 (1) EC Treaty. The Commission considers that the parties have not demonstrated the necessity of the concerted practice, nor that the concerted arrangements were necessary to achieve all the objectives set out in Article 33 (1) EC Treaty (see recital (346)).

5.5. Economic arguments

- (350) Dole, Weichert and Del Monte have made a number of economic arguments that are presented in their replies to the Statement of Objections and are considered elsewhere in this decision (see in particular sections 4.4.2 and 5.2.4). These arguments *inter alia* concern the economic and legal context, the relevance of quotation prices and the

³⁷⁰ OJ L 214 , 04.08.2006, p. 7.

plausibility of anticompetitive object of the concerted arrangements alleged in the Statement of Objections. In addition, Dole, Weichert and Del Monte put forward specific economic analyses, which purport to show that the conduct alleged in the Statement of Objections did not have any effects. Although it is not necessary for the Commission to establish that the infringement had effects in the market place (see in particular recitals (218), (219), (236) and (299)), these specific arguments raised in Dole and Weichert studies are considered below. Concerning economic arguments of Del Monte, the Commission observes that the figures provided in its economic assessment mainly concern the period after 1 January 2003³⁷¹. Given that these arguments do not concern the period of the infringement, the Commission does not address them. However, the general arguments submitted by Del Monte in its economic study (in particular, concerning the Community licence regime, the relevance of quotation prices and the plausibility of anticompetitive object) are addressed in sections 2.3.1, 4.4.2 and 5.2.4.

- (351) As a preliminary remark and although the impact of a cartel need not be considered other than where the Commission intends to apply point 31 of Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003³⁷², it should be noted that, according to case-law, the impact of a cartel should not be assessed at the level of one undertaking or even a group but only can be considered at the level of the global cartel. The Court of Justice held, concerning a Commission decision that was adopted prior to the first Commission's guidelines on the method of setting fines³⁷³, that "*when considering how the effect of the infringement has been taken into account, the Court of First Instance did not have to examine the individual conduct of the undertakings when [...] the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it had participated*"³⁷⁴. It should therefore be concluded that a report which examines the impact of a cartel on a single or a few undertakings does not match the requirements set up by case-law and cannot be conclusive in this respect. This applies also to other arguments provided by the other parties on the impact they claim they experienced individually.
- (352) In its economic assessment study, Weichert submits that "*[t]his paper shows that the presumption that exchanges of price and quantity information between competitors are likely to have an adverse impact on competition is not justified in the specific market context[...]*"³⁷⁵. The statistical and econometric analysis submitted by Weichert cannot be accepted as reliably establishing the conclusions that it seeks to draw for

³⁷¹ Del Monte points out that Del Monte Germany started to directly sell Del Monte branded bananas in Northern Europe only after 1 January 2003 (page 1 of Annex 1 to [...] reply to the Statement of Objections (Report "Economic Assessment of an exchange of information on the Northern European supply of bananas")).

³⁷² OJ C 210, 1.9.2006, p. 2. Point 31 of the 2006 Fines Guidelines provides that "*[t]he Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount*".

³⁷³ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ C 9, 14.1.1998, p. 3.

³⁷⁴ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 152.

³⁷⁵ Page 2 of Appendix 1 to [...] reply to the Statement of Objections (RBB report "Economic assessment of alleged coordination in the market for bananas").

several reasons. First, Weichert argues that the actual price was not aligned with the quotation price. Analysing the distribution of the quotation price relative to the actual price charged³⁷⁶ is not accurate, since *co-movements* (upwards or downwards) matter the most.³⁷⁷ Second, Weichert shows the difference between weekly average actual prices and quotation prices, and argues that the only reason why they move in the same direction is seasonal variations. Instead of considering average prices to eliminate seasonality in the time series³⁷⁸, appropriate methods of deseasonalisation should have been used, before comparing official and actual price series cleared from seasonal variations. In any case the Commission does not claim that actual prices and quotation prices are closely correlated. Third, Weichert argues that in any given week prices charged show a large dispersion by customers. The Commission fails to see the relevance of the argument. In any case, it would be more relevant and precise to provide these results year by year instead of only for a 2000-2005 average.³⁷⁹ Fourth, Weichert uses econometric techniques to perform a before-and-after analysis in order to evaluate whether banana prices paid by customers in the Community were indeed different during the "cartel period" compared to afterwards. The Commission considers that even if the analysis had been made comparing the period before and after the end of 2002, the methodology has weaknesses: lack of precision as regards the computation of the dependant variable ("banana prices paid by customers in the EU"), lack of tables explicitly presenting the entire model and summarizing its main results, possible omission of relevant variables such as fixed effects and supply variables, lack of normality, stationarity tests, as well as robustness checks.

- (353) In its economic analysis study, Dole submits that "*[t]aking [the] particular market context into account shows that the purpose of the exchange cannot have been to fix prices because it was incapable of having this effect.*"³⁸⁰ The statistical and econometric analysis carried out by Dole to support this conclusion cannot be accepted as reliably establishing the conclusions that it seeks to draw for several reasons. First, Dole argues that the correlation between the Aldi price and the average actual price is higher than the correlation between the quotation price and the average actual price. The calculation is based on an average from 2001-2005. Dole has not explained why it only provided average figures and not the figures for each year, and why the data for the year 2000 is totally missing. In any case, the high correlation between the weekly rate of change of actual prices and the weekly rate of change of Aldi prices³⁸¹ can be driven by some common influence other than competitive interaction (known as spurious correlation), such as inflation, seasonal variations, a common demand trend or the influence of the cartel conduct on changes in the prices paid by both Aldi and

³⁷⁶ Figures 2 and 3, RBB report "Economic assessment of alleged coordination in the market for bananas", RBB Economics, 20 November 2007.

³⁷⁷ Figure 4, RBB report "Economic assessment of alleged coordination in the market for bananas", RBB Economics, 20 November 2007.

³⁷⁸ Figure 5, RBB report "Economic assessment of alleged coordination in the market for bananas", RBB Economics, 20 November 2007.

³⁷⁹ Figures 9 and 10, "Economic assessment of alleged coordination in the market for bananas", RBB Economics, 20 November 2007.

³⁸⁰ Page 39 of Annex 3 to [...] reply to the Statement of Objections ("Economic analysis of the allegations in the Statement of Objections", Alison Oldale, Janusz A. Ordovery and Jorge Padilla, 20 November 2007).

³⁸¹ Tables 8 and 9, "Economic analysis of the allegations in the Statement of Objections", Alison Oldale, Janusz A. Ordovery and Jorge Padilla, 20 November 2007.

others. A regression analysis would be more accurate.³⁸² Second, like Weichert, Dole makes a regression analysis of price developments before and after the Commission's inspections in 2005. Even if the analysis had been made comparing the period before and after the end of 2002 (or 2001), the methodology used in Dole's study³⁸³ is flawed. There is no specific information indicating whether the dependant variable is a *weekly*, a *monthly*, *quarterly* or a *yearly* average price and most of the regression variables are not significant at all or only significant at a 10% level, which can not be considered as highly relevant. Dole's own estimated equation, without accepting that it is econometrically sound, instead suggests that the quotation price was the most significant determinant of Dole's actual prices.

5.6. Procedural arguments

- (354) Dole and Weichert argue, in their replies to the Statements of Objections, that the Commission has failed to provide full and immediate access to the Commission's investigation file (claiming that there were delays in providing relevant documents, extensive redactions in various documents due to confidentiality claims of other undertakings). They claim that there were illegible pages in the copy of Commission's investigation file provided to them (on a DVD-ROM), delays in providing further relevant documents and a series of erroneous or misleading references in the Statement of Objections.
- (355) In addition, Weichert claims that the Statement of Objections had certain generic references to bundles of documents or erroneous references. Weichert argues that the Directorate General for Competition refused to provide assistance under the Commission's access to file in competition cases rules with the identification of potentially exculpatory documents not in the file but allegedly held by the Commission. It states that its rights of defence were impaired because the Commission's file does not contain transcripts and/or agreed minutes of certain meetings [...] and that the Commission refused to grant access to notes of these meetings. It argues that the Commission's refusal to disclose the list of all meetings [...].
- (356) The Commission observes that the Directorate General for Competition dealt with all procedural arguments brought forward to it during the period for reply to the Statement of Objections promptly and without unnecessary delay. Moreover, some of the issues were subsequently addressed to the Hearing Officers and dealt with by them. Also, in their replies to the Statement of Objections the parties did not bring forward any argument which would lead to a different assessment of these questions. In particular, DG Competition addressed the following letters to one or more parties:
- On 17 August 2007, the parties received an updated DVD-Rom containing the accessible part of the Commission's investigation file (on the initial DVD about 175 pages of publicly available information (Sopisco News) had not been included) (ID 1251).

³⁸² Figures 3 and 4, "Economic analysis of the allegations in the Statement of Objections", Alison Oldale, Janusz A. Ordover and Jorge Padilla, 20 November 2007.

³⁸³ Figures 3 and 4, "Economic analysis of the allegations in the Statement of Objections", Alison Oldale, Janusz A. Ordover and Jorge Padilla, 20 November 2007.

- On 21 August 2007 DG Competition informed Dole, who had requested better legible copies of about 55 pages of the file that most of these documents are of no better quality in the file than those provided to the parties in the first place. As a courtesy, Dole was provided with improved copies of certain documents (ID 1254).
- On 31 August 2007 and on 7 November 2007 the parties were provided with a copy of an unsolicited e-mail to Commissioner Kroes by a member of the public (file p. 51357) (ID 1287, 1503 et seq.).
- [...].
- On 12 September 2007 the parties were given access to the non-confidential version of an inspection document (file p. 51001 and 51002) (ID 1373).
- On 21 September 2007 DG Competition replied to Dole's letter asserting that 2406 pages of the file would be illegible. In particular, Dole was informed that a considerable part of the claims concerned their own documents and that many documents deemed to be illegible on the access to file DVD were of comparable quality to those in DG Competition's investigation file (ID 1379).
- By letter of 24 September 2007 DG Competition replied to Weichert's often generic contestations of certain confidentiality claims of other parties. Weichert was given access to summaries of certain redacted information which DG Competition had asked the respective parties to review (ID 1389). All parties were provided with these summaries and 10 pages of enlarged copies of small font submissions by Dole on 25 September 2007 (ID 1402).
- By letter of 24 September 2007 DG Competition replied to Weichert's claims that 2632 pages of the file were illegible and that there were erroneous and voluminous references in the Statement of Objections. In particular, Weichert was informed that a considerable part of the illegibility claims concerned their own documents and that many documents deemed to be illegible on the access to file DVD were of comparable quality to those in DG Competition's investigation file (ID 1390).
- By letter of 26 September 2007 Del Monte was provided with better legible copies of 9 pages (ID1404).
- Upon request of an addressee of the Statement of Objections, Del Monte was asked to revise its non-confidential summaries of redacted information in its replies to requests for information. Updated versions of file pages 40489-40492, 40494-40497, 40501, 40557, 40561, 40896, 42695, 42697, 42703-42705, 42753-42755, 42757-42758, 42769, 41088 and 42852 containing these summaries were transmitted to the parties on 28 September 2007 (ID 1412).
- By letter of 15 October 2007 Weichert was informed that DG Competition did not consider Weichert's claims for access to certain redactions in other parties' submissions to be justified. Weichert was given access to two pieces of information where Dole had agreed to lift their confidentiality claims (file p 50572 and 51033) (ID 1443). Subsequently, also the other parties were provided with these two pieces of information (ID 1444).

- By letter of 17 October 2007 concerning illegibility claims Dole was informed that they had already received new copies of more than half of the pages they requested. Dole received new copies of a further 7 pages of the file (ID 1458).
- On 5 November 2007 the parties were informed that Del Monte had agreed to give access to some information previously claimed confidential. New versions of file pages 40496, 42695 and 42757-42758 were sent to them (ID 1494 et seq).

Dole, Weichert and Del Monte had sufficient time to take into account the additional information provided to them in their respective replies to the Statement of Objections. Chiquita, on the other hand, who submitted its reply to the Statement of Objections on 25 September 2007, was provided with the opportunity to make additional observations regarding the information provided to it after 25 September 2007.

(357) Concerning the arguments that certain pages of the Commission's investigation file were illegible, the respective parties were informed that copies of the documents in the DVD-ROM which was provided to them were, in general, of comparable quality to the documents in the Commission file. As for alleged delays in the access to certain documents in the Commission's investigation file, the Commission notes that the parties did receive access to respective documents and were able to refer to them in their replies to the Statement of Objections. As for redactions in documents submitted by other parties due to confidentiality claims, the Commission notes that the Directorate General for Competition and, concerning one specific redaction, subsequently the Hearing Officer³⁸⁴, upon requests of certain addressees of the Statement of Objections, dealt with their claims concerning such redactions and replied to them. Furthermore, the Commission disagrees that certain references in the Statement of Objections were erroneous or related to bulky or numerous documents.³⁸⁵ The Commission has corrected one reference made in the footnotes of the Statement of Objections and informed the parties about this correction (on 28 September 2007, well before the final deadline to reply to the Statement of Objections).³⁸⁶ Concerning Weichert's claims that the Commission should have procured documents for Weichert's defence which are outside the Commission's investigation file, but which according to Weichert might have been potentially exculpatory, the Commission notes that both the Directorate General for Competition and the Hearing Officer in his decision have dealt with the respective claims.³⁸⁷

³⁸⁴ In his letter of 9 November 2007 the Hearing Officer accepted the confidentiality claim of an addressee of the Statement of Objections which DG Competition had intended to disclose upon request by another addressee of the Statement of Objections.

³⁸⁵ The Commission addressed such claims by Weichert in its letter of 24 September 2007 – D/7132 (ID 1390). [...]s allegations in their reply to the Statement of Objections (page 28 et seq.) are of a very generic nature.

³⁸⁶ The parties were informed that the reference to file pages 28108-28109 et seq. (Submission 29) in footnote 178 of the Statement of Objections should read file pages 50401-50402 (Submission 30).

³⁸⁷ DG Competition's letter of 7 September 2007 – D/6688 (ID 1329), letter of 4 October 2007 – D/7428 (ID 1426), letter of 9 November 2007 – D/8588 (ID 1520), letter of 15 November 2007 – D/8786 (ID 1537); see also the Hearing Officer's letter to Weichert of 24 October 2007. In his decision the Hearing Officer decided that the Commission should take all appropriate steps to retrieve certain of the documents, the access to which was requested by Weichert, should they exist, and provide them to Weichert. As a result, one document was provided to Weichert.

- (358) As for Weichert's request to have access to minutes, recordings or transcripts from meetings between Chiquita and DG Competition in which Chiquita's employees participated, the Commission observes that it is not required to make recordings or transcripts of such meetings nor to draft minutes of them. Indeed, point 13 of the Access to File Notice provides that "*there is no obligation on the Commission departments to draft any minutes of meetings with any person or undertaking.*"³⁸⁸ In order to bring forward their submissions to the Commission, immunity applicants need to make corporate statements and to provide documents to the Commission under the Leniency Notice. According to settled case-law, corporate statements submitted by leniency applicant in accordance with the leniency notice constitute evidence, which the Commission may use subject to certain conditions.³⁸⁹ However, notes taken by members of the case team would constitute these officials' own interpretation of what was said at the meetings, they would be classified as internal documents and would be not accessible. The claims made by Weichert in this regard, its request to be provided with a list of the relevant meetings [...] were specifically answered by DG Competition and/or in decisions taken by the Hearing Officer.³⁹⁰

5.7. Conclusions on application of Article 81 of the EC Treaty

- (359) The Commission concludes that:

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

6. ADDRESSEES

6.1. Principles

- (360) In order to identify the addressees of this decision, it is necessary to determine the legal entities to which responsibility for the infringement should be imputed.
- (361) The Commission considers that the addressees of this decision should be held liable for the anti-competitive behaviour described in this decision. As a general consideration, the subject of Community competition rules is the "undertaking", a concept that has an economic scope and that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The "undertaking" that participated in the infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the cartel conduct. The term "undertaking" is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that "in prohibiting undertakings inter alia from entering into agreements

³⁸⁸ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325 of 22.12.2005, p.7. See also Case T-38/02, *Groupe Danone v. Commission* [2005] ECR II-4407, paragraph 66.

³⁸⁹ See for example Case T-15/02 *BASF AG v. Commission* [2006] ECR II-497, paragraphs 495-506.

³⁹⁰ DG Competition's letter of 16 October 2007 – D/7722 (ID 1448), letter of 9 November 2007 – D/8587 (ID 1519); also the Hearing Officer's letter to Weichert of 6 November 2007.

or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) of the EEC Treaty [[now Article 81(1)] of the EC Treaty] is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision”.³⁹¹

- (362) The community law concept of "undertaking" has always been a functional one. The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or its precise legal form under national law.³⁹² For each undertaking that is to be held accountable for infringing Article 81 of the Treaty in this case one or more legal entities are identified which would bear legal liability for the infringement in this case. According to the case law, “Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market”.³⁹³ If a subsidiary does not determine its own conduct on the market independently, the company 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.
- (363) It is settled case-law of the Court of Justice and the Court of First Instance that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct in 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.³⁹⁴ It follows also from the case-law that it is, in principle, 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.³⁹⁵

³⁹¹ See Case T-11/89 *Shell v Commission*, [1992] ECR II-757, paragraph 311. See also Case T-352/94 *Mo och Domsjö AB v Commission*, [1998] ECR II-1989, paragraphs 87-96, Case T-43/02 *Jungbunzlauer v. Commission*, [2006] ECR II-3435, paragraph 125; Case T-314/01 *Avebe v Commission*, [2006] ECR II-3085, paragraph 136; Case T-330/01, *Akzo Nobel v Commission*, [2006] ECR II-3389, paragraph 83.

³⁹² Although an ‘undertaking’ within the meaning of Article 81(1) is not necessarily the same as a company having legal personality, it is necessary for the purposes of enforcing decisions to identify the legal or natural person to whom the decision will be addressed. See Case T-305/94 *PVC II*, [1999] ECR, II-0931, paragraph 978. See also Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987, paragraph 39, Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v ETI and others*, not yet reported, paragraphs 38 and 43.

³⁹³ Court of Justice in Case 48/69 *Imperial Chemical Industries v. Commission*, [1972] ECR 619, paragraphs 132-133; Case 170/83 *Hydrotherm*, [1984] ECR 2999, paragraph 11 and Court of First Instance in Case T-102/92 *Viho v Commission*, [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin v Commission*, [2003] ECR II-4071, paragraph 290.

³⁹⁴ Case T-314/01 *Avebe v Commission*, footnote 391 above, at paragraph 135; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 117; and Case C-294/98 P *Metsä-Serla Oyj and Others v Commission* [2000] ECR I-10065, paragraph 27.

³⁹⁵ See Case T-314/01 *Avebe v Commission*, footnote 391 above, at paragraph 136. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P *Dansk Rørindustri and Others v Commission*, footnote 394 above, paragraphs 118 to 122; Case C-196/99 P *Aristrain v Commission*

- (364) According to the settled case-law of the Court of Justice and the Court of First Instance, the Commission can, however, generally assume that at the time of the infringement, the parent company was able to exercise decisive influence on a wholly-owned subsidiary and actually did so without needing to check whether the parent company has in fact exercised that power.³⁹⁶ However, the parent company and/or subsidiary can reverse this presumption by adducing sufficient evidence that the subsidiary “decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an ‘undertaking’”.³⁹⁷
- (365) Where an infringement of Article 81 of the EC Treaty is found to have been committed, it is necessary to identify natural or legal persons who were responsible for the operation of the undertaking at the time when the infringement was committed so to answer for it.
- (366) When an undertaking that has committed an infringement of Article 81 of the EC Treaty subsequently disposes of the assets which contributed to the infringement, it continues to be answerable for the infringement if it has not ceased to exist.³⁹⁸ If the undertaking which has acquired the assets carries on the violation of Article 81 of the EC Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period in which it participated through these assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed.³⁹⁹ The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability.⁴⁰⁰ Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

[2003] ECR I-11005, paragraphs 95 to 99; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 527.

³⁹⁶ Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 60, [2005] ECR II-10; Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27-29; and Court of Justice in Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50. See also Case T-314/01 *Avebe v Commission*, referred to in footnote 391 above, at paragraph 136: “*In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent*”.

³⁹⁷ Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 61.

³⁹⁸ Case T-6/89 *Enichem Anic v Commission (Polypropylene)*, [1991] ECR II-1623; Case C-49/92P *Commission v Anic Partecipazioni*, [1999] ECR I-3125, paragraphs 47-49.

³⁹⁹ See Case C-279/98 P *Cascades v Commission*, [2000] ECR I-9693, paragraphs 78-79: “*It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it*”.

⁴⁰⁰ See Court of First Instance in Case T-305/94 *PVC II*, [1999] ECR II-931, paragraph 953.

6.2. Application in this case

(367) It is established by the facts as described in Chapter 4 that the entities identified in sections 6.2.1, 6.2.2 and 6.2.3 have been involved in, or bear liability for, the infringement within their respective undertakings.

6.2.1. Chiquita

(368) The evidence described in Chapter 4 of this decision shows that Chiquita International Services Group N.V. and Chiquita Banana Company B.V. directly participated in the cartel contacts at least from 1 January 2000 until at least 1 December 2002. Chiquita International Ltd. directly participated in the cartel contacts at least from 1 January 2000 until at least 28 February 2001.

(369) During the time period of the infringement Chiquita International Ltd. (CIL), Chiquita International Services Group N.V. (CISG) and Chiquita Banana Company B.V. (CBC) were [...] owned and controlled by Chiquita Brands International, Inc. (CBII). Therefore the Commission presumes the exercise of decisive influence of the Chiquita Brands International, Inc over these subsidiaries' conduct on the market.

(370) In addition, the Commission considers that there are further elements which confirm (and thus corroborate the above-mentioned presumption) that Chiquita Brands International, Inc. exercised decisive influence over its subsidiaries. In particular, this is shown by the reporting lines of the officials directly involved in the collusive contacts. Such reporting lines would result in the Chiquita Brands International, Inc's full knowledge of its subsidiaries' commercial policy and would allow it to exercise regular control and direction. Moreover, during the overall period of the infringement, including the period after 1 March 2001, CIL exercised decisive influence over CISG and CBC. In particular, this is shown by the reporting lines of the officials employed by CISG and CBC, who were directly involved in the collusive contacts.

(371) In particular, [...] who during the time period of the infringement was [...] and [...] directly reported to Mr [...] of CBII. [...] who during the time period of the infringement was [...] reported to [...]. Mr [...].⁴⁰¹

(372) [...].⁴⁰²

(373) [...].⁴⁰³

(374) It is therefore the Commission's intention to hold Chiquita Brands International, Inc., Chiquita International Ltd., Chiquita International Services Group N.V. and Chiquita Banana Company B.V. jointly and severally liable for Chiquita group's involvement in the infringement between 1 January 2000 and 1 December 2002.

⁴⁰¹ See file p. 50528 ([...] reply to the Commission's questionnaire of 30 March 2007, Annex 4) and file p. 50531-50532, Annex 1 ([...] reply to the Commission's questionnaire of 13 April 2007, Annex 1).

⁴⁰² See file p. 50528 ([...] reply to the Commission's questionnaire of 30 March 2007, Annex 4) and file p. 50531-50532 ([...] reply to the Commission's questionnaire of 13 April 2007, Annex 1). Note: in these replies Mr [...]s surname is spelled [...].

⁴⁰³ See file p. 50528 ([...] reply to the Commission's questionnaire of 30 March 2007, Annex 4) and file p. 50531-50532 ([...] reply to the Commission's questionnaire of 13 April 2007, Annex 1).

6.2.2. *Dole*

- (375) The evidence described in Chapter 4 of this decision shows that Dole Fresh Fruit Europe OHG (DFFE) has directly participated in the cartel contacts at least from 1 January 2000 until at least 31 December 2002.
- (376) During the time period of the infringement DFFE was indirectly fully owned and controlled by Dole Food Company, Inc. Therefore the Commission presumes the exercise of decisive influence of Dole Food Company, Inc. over this subsidiary's conduct on the market. In its reply to the Statement of Objections Dole does not contest this finding.
- (377) Moreover, the file contains also further elements which confirm (and thus corroborate the above-mentioned presumption) that Dole Food Company, Inc. exercised decisive influence over its subsidiaries. In particular, this is shown by the reporting lines of the officials directly involved in the collusive contacts. Such reporting lines would result in the Dole Food Company, Inc.'s full knowledge of its subsidiaries' commercial policy and would allow it to exercise regular control and direction.
- (378) In particular, during the time period of the infringement, [...], [...] at DFFE reported to [...], [...] of DFFE, who in turn reported to [...] of [...], [...].⁴⁰⁴ Mr [...] in turn reported directly to [...] of Dole Food Company, Inc. Throughout the period of the infringement, [...] of Dole Food Company, Inc. reported directly to Mr [...], [...] of Dole Food Company, Inc.⁴⁰⁵ Mr [...] left Dole in December 2002. Other Dole employees involved in the cartel arrangements found in this decision, namely [...] ([...], DFFE), [...] ([...], DFEE) and [...] ([...], DFEE) reported to a Sales Manager at DFFE (Mr [...] to a Sales Team Manager).
- (379) It is therefore the Commission's intention to hold Dole Food Company, Inc. and Dole Fresh Fruit Europe OHG jointly and severally liable for Dole group's involvement in the infringement between 1 January 2000 and 31 December 2002.

6.2.3. *Weichert*

- (380) The evidence described in Chapter 4 of this decision shows that Internationale Fruchtimport Gesellschaft Weichert & Co. KG. (Weichert) has directly participated in the cartel contacts from at least 1 January 2000 until at least 31 December 2002. Individuals involved in the cartel arrangements found in this decision held management positions and/or were employed by Weichert (see also recital (69)). In particular, [...] during the time period of the infringement were [...] at Weichert. [...] and [...] during the time period of the infringement were Weichert's [...] responsible for [...] and reported to the management. Mr [...] worked [...] as Weichert's employee responsible for [...] and also reported to the management. The Commission has sufficient evidence to consider that the managers of Weichert in turn reported to Del

⁴⁰⁴ See file p. 42997 ([...] reply to the request for information of 10 February 2006, Annex, Volume 1, response to question 1(f)).

⁴⁰⁵ See file p. 45231 ([...] reply to the request for information of 3 April 2007).

Monte prior to 1 January 2003.⁴⁰⁶ Weichert does not contest this description of positions and reporting lines of the individuals.

- (381) During the period of the infringement Fresh Del Monte Produce Inc. (Del Monte) held a participation of 80% in Weichert via its wholly owned subsidiary Westeuropa-Amerika-Linie GmbH (WAL). Until 31 December 2002, the remaining stakes (20%) in Weichert were held by natural persons, [...] and a limited liability company, [...].⁴⁰⁷ Effective from 1 January 2003 Del Monte sold the 80% shareholding to [...], a wholly owned subsidiary of Fyffes plc, one of the largest tropical produce importers and distributors in Europe. (see section 2.2.3)
- (382) Del Monte was during the infringement period a limited partner ("Kommanditist") of Weichert, a limited partnership ("Kommanditgesellschaft" - KG) under German law⁴⁰⁸ by way of a Partnership Agreement (the statute or by-law of Weichert KG)⁴⁰⁹. Rather than a subsidiary of Del Monte, Weichert was a partnership between Del Monte and the Weichert family (initially [...] and since [...] including also [...])⁴¹⁰. While the representatives of the Weichert family were the general managing partners with personal and unlimited liability for Weichert ("Komplementär") [...], Del Monte took the role of a partner providing the main financial input/holding the main financial stake with limited liability⁴¹¹. The commercial relationship between the partners in this joint undertaking was established through the Partnership Agreement⁴¹², on the one hand, and an exclusive distribution agreement for bananas concerning Northern Europe (the "Distribution Agreement 1988" or "Distribution Agreement")⁴¹³, on the other hand. The Partnership Agreement and the Distribution Agreement together show that this partnership had a common purpose of importing and marketing bananas in

⁴⁰⁶ See file p. 38100-38101 ([...] reply to the request for information of 10 February 2006) and recitals (387)-(390) and (392) below.

⁴⁰⁷ According to [...]. See Sections [...] of the Partnership Agreement of Internationale Fruchthandels-Gesellschaft Weichert & Co KG [...], file p. 11226, 11231, 11235 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13259, 13264, 13268 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006). See also file p. 38095-38097 ([...] reply to the request for information of 10 February 2006) and file p. 40488-40489 ([...] reply to the request for information of 10 February 2006).

⁴⁰⁸ See for that, for example, [...]’s presentations at the Oral Hearing.

⁴⁰⁹ See footnote 407 above.

⁴¹⁰ See Section [...] of the Partnership Agreement, file p. 11228 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13261 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006). See also Annex 5.6.3.3. to [...]’s reply to the Statement of Objections (a letter of Del Monte to Mr [...] of 9 January 1997), for the fact that [...]. As explained in footnote 407 above, [...]. Note also that the Partnership Agreement [...], file p. 11226 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13259 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴¹¹ [...] (file p. 11226 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p.13259 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴¹² See file p. 11224-11240 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and file p. 13257-13273 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴¹³ See file p. 11314 - 11319 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13289 - 13294 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

Northern Europe under the regulatory framework applicable in the Community (see above at Chapter 2.3.3.).

- (383) The Distribution Agreement concerned bananas supplied by Del Monte for the purpose of importing them into the Community under the rules of applicable regulatory framework (see Chapter 2.3.3 above), [...] and the (exclusive) sale of Del Monte branded bananas to the Northern European market by Weichert. In geographical terms, this agreement covered the Northern European region concerned by this decision, namely Sweden, Finland, Denmark, the Benelux countries, Germany and Austria.⁴¹⁴ 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 2002⁴¹⁵.
- (384) The presumption of the exercise of decisive influence referred to in recital (364) is not applicable in respect of Del Monte. The Commission has therefore examined whether Del Monte was able to influence and effectively influenced Weichert in determining Weichert's market behaviour during the infringement period concerned in the present decision and concludes that this was the case. This conclusion is based on the available facts and documents in the file concerning the relationship between Del Monte and Weichert, which show that Del Monte (jointly with the general partners [...]), 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.
- (385) During the 2000-2002 infringement period Weichert was influenced decisively by the partners which jointly set up this company as a KG in common agreement. [...] were the managers of the company and the latter two were also directly involved in the collusive contacts described in Chapter 4 to the present decision. These managers personally instructed all employees that were also involved in the collusive contacts and the employees reported more or less directly to these managers. Until the end of 2002, these managers of Weichert, in turn, reported to Del Monte.⁴¹⁶
- (386) Until 31 December 2002, Del Monte held jointly with the general partners [...] a supervision and management role over Weichert, as in particular the following facts illustrate:

Important strategic decisions in Weichert required the consent of all partners.

- (387) According to Section 7(1) of the Partnership Agreement, [...].⁴¹⁷ Section 7(2) of the Partnership Agreement [...]. In Section 7(3), the Partnership Agreement [...].⁴¹⁸ [...]. Furthermore, Section 7(4) [...]. In the Commission's view, this specific set-up under

⁴¹⁴ For the geographical scope covered by the Distribution Agreement see footnote 15.

⁴¹⁵ See file p. 40490-40491 [...] reply to the request for information of 10 February 2006). In response to the request for information of 6 June 2006, [...] states that Del Monte Germany became active on the German market from 1 January 2002. See file p. 40894 [...] reply to the request for information of 6 June 2006). See also file p. 38101-38102 [...] reply to the request for information of 10 February 2006).

⁴¹⁶ See file p. 38100-38101 [...] reply to the request for information of 10 February 2006).

⁴¹⁷ See file p. 11224-11240 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13257-13273 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006). See in particular Section 7 of the Partnership Agreement.

⁴¹⁸ [...].

the statutes of Weichert as a KG clearly provides the limited partner with the legal rights and means necessary to influence the course of the KG's business. Moreover, [...] ⁴¹⁹ [...].

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.

- (388) [...] ⁴²⁰ Weichert also submits that its "official price", which was determined each Thursday morning, was determined by Weichert in consultation with Del Monte. ⁴²¹ 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. ⁴²²
- (389) The documentary evidence in the file confirms this type of contacts between Weichert and Del Monte and shows that Del Monte exerted pressure to influence on Weichert's pricing policy directly. There are documents in the file which show discussions between Weichert and Del Monte regarding Weichert's pricing policy. ⁴²³ These documents clearly demonstrate that Weichert explained its pricing decisions (including decisions on rebates) to Del Monte and that the latter supervised Weichert's pricing vis à vis the "official price" apparently in line with Del Monte's expectations. For example, in a fax of 28 January 2000 addressed to [...], [...] of Del Monte requested an explanation about price difference between "final price" and "expected price" in the following terms: "(...) *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 commercialization of the bananas, to discuss about market conditions and prices ... I was told that Interfrucht [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 [...]. In the meantime, I am expecting to get your explanation on this ill-timed promotional activity.*" ⁴²⁴

⁴¹⁹ See Sections [...] and [...] of the Partnership Agreement.

⁴²⁰ See file p. 38101 and 38104-38105 ([...] reply to the request for information of 10 February 2006).

⁴²¹ See file p. 38112 ([...]’s reply to the request for information of 10 February 2006).

⁴²² See file p. 38533 ([...] response to the Request for Information of 15 December 2006).

⁴²³ See file p. 51092-51093. See also file p. 38551, 38556, 38558, 38579 and 38581 (Annexes 2.1-2.4, 2.10-2.11 to [...]’s reply to the request for information of 15 December 2006).

⁴²⁴ See file p. 51092-51093. On the very same day [...] replied apologising for a misunderstanding that had occurred during [...]’s phone conversation with the person in Weichert and saying that "we are happy to have the possibility to explain personally the situation in our next week's meeting" (file p. 38551). File p. 38556 and 38558 show again fax exchanges between [...] of Del Monte and [...] on 6 April 2000 where the former asks (with reference to a Tuesday report) for full details on how Weichert gets a much lower actual price from an official price. [...] explains that "the reason for the relatively large gap between the official quotation and the actual price is that the increase from DM 33,00 to DM 35,00 could never be realized". File p. 38579 shows yet another fax from [...] to [...] whereby Del Monte gives instructions regarding pricing policy, extending this time also to volume policy: "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". File p. 38581 is a letter dated 23 July 2002

(390) Weichert also submits 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"*. This is supported by a memo, dated 12 June 2000, to [...] and [...], where [...] of Del Monte threatens a reduction in banana volumes and requests Weichert to keep Del Monte informed daily on its price negotiations. The memo reads as follows: *"(...) 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 licenses (...) Please make sure to keep us informed, on a daily basis, of the outcome of your price negotiations with your customers"*.⁴²⁵

(391) These facts demonstrate that Del Monte was during the period of the infringement in a position/disposed of the right to influence Weichert's pricing policy and to exert influence on the day-to-day management of Weichert's business, and that it in practice also exerted such influence.

Del Monte was in the position to and in fact regularly received price and market information from Weichert.

(392) [...] ⁴²⁶. [...] ⁴²⁷. [...] ⁴²⁸. [...] ⁴²⁹. [...] ⁴³⁰

(393) The Commission considers that the described control and information mechanisms (see recitals (387)-(392)) would at least have allowed Del Monte to influence the course of Weichert's commercial conduct, extending to the day-to-day business management. The described evidence also shows (see in particular recitals (389)-(390)) that Del Monte effectively exercised this influence.

Arguments of parties

(394) In its reply to the Statement of Objections Del Monte argues that in order to hold Del Monte liable for Weichert's conduct, this would require (i) that Del Monte was in a position to determine Weichert's conduct on the market in all material respects and (ii) that Del Monte actually made use of that power. Del Monte submits that it had no decisive influence over Weichert's market conduct. According to Del Monte, neither the Distribution Agreement nor the Partnership Agreement conferred any legal or factual management rights or functions on Del Monte. It submits that Weichert is set up as a limited partnership and that limited partners are excluded by law from the management (sec. 164 HGB) and from the representation (sec. 170 HGB) of the partnership. Del Monte also argues that under the Distribution Agreement the parties

from Del Monte's Regional Internal Auditor to Weichert, whereby the former was asking reasons why Weichert's prices on certain import lots/weeks in 2001 had been lower than Del Monte's UTC brand prices and/or lower than what SOPISCO trade press had reported as being lowest 'actual' price projected for certain weeks.

⁴²⁵ See file p. 38533 and 38577 ([...]s reply to the request for information of 15 December 2006 and Annexes 2.9 and 2.10).

⁴²⁶ See file p. 38102 ([...]s reply to the request for information of 10 February 2006).

⁴²⁷ See file p. 38476.

⁴²⁸ See file p. 38388 – 38475.

⁴²⁹ See file p. 18108-18141.

⁴³⁰ See file p. 18108-18141.

were independent contractors and that Weichert acted as an independent distributor of Del Monte branded bananas in Northern Europe.

- (395) Del Monte also argues that neither the Distribution Agreement nor the Partnership Agreement granted it supervisory rights or functions beyond the typical rights afforded to minority shareholders to protect their financial interests. It submits in particular that section [...] of the Partnership Agreement established that [...] and that such [...] correspond to instruments that typically protect the interests of [...]. It claims that the Commission would have based the preliminary conclusion on Del Monte's relationship with Weichert on Weichert's statement that there was an "influence of Del Monte due to its majority shareholding", which according to Del Monte is a misleading statement.
- (396) Weichert considers that in the Statement of Objections the Commission has rightly acknowledged that Del Monte exercised decisive influence over Weichert during the period 2000-2002.⁴³¹ Weichert considers that Del Monte had decisive influence over Weichert on the basis of Del Monte's contractual rights regarding strategically and competitively important decisions pursuant to the Partnership Agreement and as a result of Weichert's commercial dependency on Del Monte and Del Monte's close involvement regarding Weichert's day-to-day operations.
- (397) As the Court of First Instance pointed out in *Avebe v Commission*, it is settled case-law that 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.⁴³² The Court also found in *Avebe*, on the basis of established case-law, that it is, in principle, 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.⁴³³
- (398) It follows that the management power one undertaking has over another can constitute the factual evidence that demonstrates decisive influence over the other undertaking. Accordingly, in this case, the management power of Del Monte with respect to the commercial/market conduct of Weichert and the fact that Del Monte exercised that power has been demonstrated in recitals (387)-(392). As demonstrated in recital (389), Del Monte did exert pressure on the managing partner in charge of the day-to-day business as regards the pricing policy followed by Weichert. Moreover, Del Monte had the possibility to influence Weichert through its control over Weichert's supplies within the framework of the Distribution Agreement and indeed a document in the file shows that it did so (see recitals (389) and (426)).

⁴³¹ Page 269 of [...] reply to the Statement of Objections.

⁴³² See Case T-314/01 *Avebe v Commission*, footnote 391 above, in paragraph 135. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission*, footnote 394 above, paragraph 117, and Case C-294/98 P *Metsä-Serla Oyj and Others v Commission*, footnote 394 above, paragraph 27.

⁴³³ See paragraph 136 in the *Avebe* judgment, footnote 391 above, and the following case-law referred therein: *Dansk Rørindustri and Others v Commission*, paragraphs 118 to 122; Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraphs 95 to 99; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 527.

- (399) Concerning Del Monte's argument on the legal form of Weichert, it should be taken into account that, while the provisions of the German Commercial Code ("Handelsgesetzbuch" - HGB) principally assign the right to manage the ordinary business of a KG to the general partner ("Komplementär"), these provisions are to a very large extent not mandatory and can be derogated from by a diverging limited partnership agreement. According to established German case law⁴³⁴ the HGB allows for a limited partnership agreement to lawfully deviate from the original concept of a standard KG, as described in the HGB, by assigning management functions and control rights between the partners of a KG differently. Consequently, control and management rights may be assigned to a limited partner or a general partner may be excluded from these rights – always on the basis of a mutual agreement between the partners. A limited partner may be assigned full statutory control of a KG, may be assigned some management power or may be granted extensive control rights.
- (400) Pursuant to Sec. 164 HGB, limited partners are normally excluded from the management of a KG'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 (the day-to-day management operations of the KG). According to the HGB (Sec. 161(2) and Sec. 115 HGB read in conjunction with Sec. 116 HGB), management of the day-to-day business is normally entrusted to the general partner.
- (401) However, as the HGB (Sec. 161(2) in conjunction with Sec. 109 HGB) leaves wide autonomy to the partners to decide other rules to apply to their KG, general partners can be excluded from the management function or limited partners can be conferred wider rights⁴³⁵. Concerning actions going beyond the day-to-day management of the business, limited partners normally do have a say in any case. According to the HGB limited partners can object to actions by the managing partners. They are at least afforded control rights (see for example Sec. 166 HGB) which allow them to question the extraordinary actions taken by the managing partner.
- (402) In the present case, the general and limited partners of Weichert by the Partnership Agreement assigned control and management power to the limited partner, Del Monte. First, [...] (see recital (387)). While the Partnership Agreement confers [...]. Second, Del Monte had [...] (see Section [...] of the Partnership Agreement⁴³⁶; see also recital

⁴³⁴ See the judgment of the German Federal Supreme Court (Bundesgerichtshof, hereinafter "BGH") of 9 December 1968 (BGHZ 51, 198) which clearly sets out that the assignment of management rights in a KG is *at the disposition of the partners* and may even be assigned to the limited partner by way of a partnership agreement. To put it differently, the default rule "unlimited partner is managing partner" foreseen in the HGB is not *jus cogens*. See also the BGH judgment of 27 June 1955 (BGHZ 17, 392 (397) which goes in the same line. In fact, where only one partner enjoys management rights by virtue of the partnership agreement, withdrawal of this management right causes the "sleeping" management rights of all other partners to be revived (BGHZ 51, 198 (201)) and voting in the partnership assembly of a managing partner who puts his private interests over the interests of the company - where both conflict - is void (BHGZ 48, 251 (256)).

⁴³⁵ This autonomy has been used by [...] Weichert for example concerning [...]. See Sections [...] of the Partnership Agreement, file p. 11226 and 11228 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13259 and 13261 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴³⁶ See file p. 11230 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13263 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

(392)). Evidence in the file also shows that Del Monte was at the time of the infringement in a position / disposed of the means to influence Weichert's pricing policy and to exert influence on the day-to-day management of Weichert's business, and that it in practice also exerted such influence (see recitals (388)-(390)). In addition, following the Partnership Agreement, [...].⁴³⁷ These provisions meant that Del Monte had [...]. The [...], which as such did not contain any provisions on [...], must be read as a part and parcel of the general set up governing Weichert. Del Monte did enter into the Partnership Agreement governing the management of Weichert voluntarily and it decided to go along with the Weichert family for the distribution of the product concerned by this decision in the Northern European Member States under the Distribution Agreement. This Distribution Agreement strengthened Del Monte's economic and legal capacity to exert influence on the day-to-day management of Weichert's business and indeed as evidence demonstrates Del Monte did rely on these means to put pressure on Weichert (see recitals (389) and (426)). It is in particular so viewed in the overall context and in the light of legal and economic means which were available to Del Monte to exercise its influence over Weichert's business.

- (403) Hence, the facts show that the general and limited partners of Weichert used the possibility provided in the HGB for the partners to autonomously assign management and control functions in their KG and that they assigned such functions also to the limited partner, Del Monte. Given this, the fact that the rights Del Monte had under the Partnership Agreement, among other things, at the same time protected its financial interests does not exclude holding Del Monte liable for the actions of Weichert. Contrary to what Del Monte seems to claim, it can not be regarded as a minority shareholder without any real influence on Weichert.
- (404) Moreover, Del Monte's argument that the Commission would have found influence of Del Monte due to its majority shareholding, completely disregards the context in which the relevant Weichert's statement is cited by the Commission. As is evident from recital (390), the principal issue in that statement is the fear of Del Monte stopping or reducing supplies should Weichert's official price not be in line with Del Monte's expectations. The documentary evidence referred to in the same recital supports this Weichert's statement on the risk of retaliation. Moreover, the Commission does not consider the 80% shareholding in itself as sufficient to attribute liability for Weichert's behaviour to Del Monte (see also recital (384)). However, 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 (as a large multinational company is unlikely to forego any influence on a profit generating financial engagement of 80 %) and makes such a scenario more credible. Taken together with the rights to influence the management of Weichert's business and the exercise of such influence in practice (see recitals (387)-(393)), contrary to Del Monte's claim, the size of the shareholding supports the conclusion that Del Monte had decisive influence on Weichert.
- (405) Del Monte more generally claims that neither the Partnership Agreement nor the Distribution Agreement conferred on it any management or supervisory role in

⁴³⁷ See Section [...] of the Partnership Agreement, file p. 11230 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13263 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

Weichert, limited ex-post only reporting by the management of Weichert for the (sole) purposes of the Distribution Agreement, in other words no influence at all on Weichert's marketing activities. Del Monte submits that [...].

- (406) Del Monte claims that even with regard to issues that went beyond the partnership's ordinary course of business, it had no determining influence on Weichert despite its 80% (limited) partnership interest. It submits that [...].⁴³⁸
- (407) As explained in recitals (399)-(401), the HGB provides for wide autonomy of the partners in setting up the specific rules applying to their KG on the basis of a voluntary agreement between them. The terminology used by Del Monte is misleading, as it suggests that there was impossibility for the limited partner to influence the management of the KG by virtue of the applicable law. This argument ignores the fact that the partners are largely free under German commercial law to design the statute of their KG by mutual agreement. Section [...] and [...] of the Partnership Agreement state that [...]. The latter obligations concern decisions which have to be taken in order to meet statutory requirements. However, many decisions which influenced the course of Weichert's commercial conduct fell under Sections [...] and [...] of the Partnership Agreement (see recital (387)).⁴³⁹
- (408) Furthermore, the Partnership Agreement [...] ⁴⁴⁰. This provision can be enforced before national courts. [...] ⁴⁴¹.
- (409) Section [...] of the Partnership Agreement, that Del Monte refers to, says that [...].⁴⁴²
- (410) The Commission concludes that Del Monte had legal means to influence Weichert's strategic business decisions and in fact did so.
- (411) Regarding Weichert's reporting to Del Monte, Del Monte states that the general partners of Weichert "informed" Del Monte about "certain market developments" that were relevant for their relationship, and that this information took the format [...] referred to in recital (392). It claims, however, that there is no evidence in the Commission file that would support an allegation that [...]. According to Del Monte, the fact that it was [...]. Del Monte says that it had [...].
- (412) In its reply to the Statement of Objections, Weichert claims in respect of the [...] activity referred to in recital (392) that Del Monte imposed [...].
- (413) [...]. Moreover, as mentioned in recital (387), Section [...] of the Partnership Agreement, [...] [...]. The reason for the information actually supplied by Weichert, however, can not be determined by the legal obligations alone, but require a reading of

⁴³⁸ To support this view, Del Monte refers to a letter dated 26/6/1997 from Mr. [...] to [...] of Del Monte, [...]s reply to the Statement of Objections p. 44 and Annex 5.6.3.4., confidential version).

⁴³⁹ [...].

⁴⁴⁰ See file p. 11230 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13263 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁴¹ The aforementioned provision of Section [...] of the Partnership Agreement is as follows: [...].

⁴⁴² [...]. See Sections [...] of the Partnership Agreement. File p. 11231-11232 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13264-13265 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

the context in which this information was asked and the time it was supplied to establish with a sufficient degree of certainty what purpose the information served. Moreover as the document quoted in recital (392) shows, Del Monte also sent Weichert detailed instructions on certain reporting by sending a template and requesting Weichert to report accordingly.

- (414) [...] However, the Partnership Agreement allows [...] ⁴⁴³. The claim that [...] is therefore not credible on the basis of the legal possibilities provided in under the Partnership Agreement alone as well as in view of the document referred to in recital (392). The explanation advanced by Del Monte shows that it also had a major interest in exercising control over prices charged by Weichert, [...]. Moreover, as described, Del Monte was at the time of the infringement in a position / disposed of the means to influence Weichert's pricing policy, and that it in practice also exerted such influence by supervising Weichert's pricing and having Weichert to explain pricing decisions (including decisions on rebates) (see recitals (388)-(390)).
- (415) The Commission notes that a proactive compliance with the line of conduct suggested and asked for by Del Monte - including by application of pressure and attempted threat of reducing supply volumes – are in no way required to establish decisive influence on the part of Del Monte.
- (416) Del Monte further argues that it could not have had decisive influence over Weichert as there was no de facto coordination of conduct or strategy. Weichert was not regarded as a subsidiary of Del Monte and pursued diverging interests ⁴⁴⁴. It submits that [...]. Or in other words: that it was a purely "financial investor". Del Monte submits that neither it nor Weichert perceived their relationship as one between parent and subsidiary. It claims that when it acquired a limited partnership interest in Weichert, it was clear that the experienced Weichert-team would only accept it as a financial investor and would not allow it to influence the strategy or day-to-day conduct on the market. Del Monte raises the argument on the financial investor role also with reference to its argument that limited partners are excluded by law from the management and representation (see recital (394)). It submits that due to such legal provisions the typical role of a limited partner is, therefore, the role of a passive financial investor. Del Monte argues that, as Weichert was never included in Del Monte's consolidated financial statements, this would also indicate that Del Monte had no control over Weichert.
- (417) As regards Del Monte's argument that it did not have decisive influence because Weichert was not a subsidiary of Del Monte, it should first be pointed out that following the Court of First Instance judgement in case *Avebe*, in particular any management power that one undertaking may have over the other can suffice to demonstrate that decisive influence actually was exerted. ⁴⁴⁵ Moreover, in the present case Del Monte and Weichert were not just "two companies", as Del Monte puts it. As set out in recital (363), according to the case law different companies belonging to the

⁴⁴³ See Section [...] of the Partnership Agreement, file p. 11230 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13263 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁴⁴ To support its argument Del Monte refers to Weichert's Auditor Report 2000. See for that [...]s reply to the Statement of Objections – annex 5.6.3.1., confidential version. [...].

⁴⁴⁵ See Case T-314/01 *Avebe v Commission*, footnote 391 above, in paragraph 136.

same group form an economic unit and therefore an undertaking within the meaning of Article 81 of the Treaty if the companies concerned do not determine independently their own conduct on the market. In the present case Del Monte and the general partners from the Weichert family were partners that formed a common partnership in the form of a KG and it has been established in recitals (387)-(393) that Weichert did not determine independently its own conduct on the market. Therefore, it can be held that Del Monte and Weichert form an economic unit for the purposes of the application of Article 81 EC Treaty.

- (418) Nothing in the file indicates that Del Monte acted exclusively as "financial investor". On the contrary, Del Monte, as a banana producer and with a keen interest to have a presence in the Northern European Member States (as is indicated by the fact that it lacked any licences to import bananas to the Community and made a partnership with a local company to overcome that problem⁴⁴⁶), provided the main financial input in the partnership and reaped the equivalent part of the profits generated by Weichert. In addition, the relationship between the partners was governed by a combination of a limited partnership agreement and exclusive distribution agreement, which made Weichert the sole (or certainly main) interface of Del Monte in sales of bananas in the countries concerned. Even if the interests of the partners may have differed, they nevertheless engaged in a very close partnership characterised by mutual dependence. Given the extensive rights foreseen for the limited partner under the Partnership Agreement, Del Monte can not be regarded as a pure financial investor. In particular, the type of involvement in the day-to-day business management as demonstrated by the evidence referred to in recitals (388)-(389) clearly goes beyond the role of a simple financial investor. That the Partnership Agreement should not have been applied in every aspect in such a way as to satisfy Del Monte, can hardly be sufficient reason not to hold it liable for the conduct of the KG when Del Monte as a partner - at the very least - could have raised its concerns over the management of the KG formally in its statutory bodies.
- (419) The exclusion by Del Monte of Weichert from its consolidated financial statements does not demonstrate that Del Monte had no decisive influence on Weichert; or that Del Monte and Weichert formed no undertaking for the purposes of the application of Article 81 of the Treaty and in respect of the infringement set out in this decision; or that liability for Weichert's market behaviour cannot be attributed to Del Monte.
- (420) Del Monte also argues that, whereas even a certain degree of economic dependence would not be sufficient to support the conclusion that a supplier exercised a decisive influence over a distributor, Weichert was not at all economically dependent on Del Monte. In this context Del Monte claims that Weichert's argument on fears that Del Monte would stop supplying Weichert is misleading. It argues that it would not have been able to do so under the terms of the Distribution Agreement and that it had no interest in putting Weichert's licences at risk by not delivering sufficient fruit. Del Monte says that for it the bottom line as far as a possible reduction of volumes was concerned was not the volume of bananas it was bound to deliver under the Distribution Agreement, but the volume of bananas corresponding to the licences owned by Weichert. Since Del Monte was [...] it would never have threatened to reduce supplies below the level of Weichert's licences. Furthermore, Del Monte claims

⁴⁴⁶ [...]’s reply to the Statement of Objections p. 55.

that it was not the sole supplier of Weichert arguing that the Distribution Agreement only restricted Del Monte's freedom to supply other German distributors. Finally, Del Monte argues that as after 1993 it could not apply for banana import licences, it was entirely dependent on Weichert for the sale of its bananas, while Weichert could have sourced bananas wherever it wanted.

- (421) Regarding to [...] Del Monte contests that [...].
- (422) Contrary to Del Monte's submissions in its response to the Statement of Objections, Weichert submitted at the Oral Hearing that, in the framework of the Distribution Agreement, it was "dependent" on Del Monte's supply of the product and "had to follow Del Monte's requests"⁴⁴⁷. Moreover, in its response to the Statement of Objections Weichert points out that Del Monte was its sole supplier: Weichert was bound to buy from Del Monte and could not source bananas from any other importer. Clearly, the parties' submissions are contradictory. To reach its conclusions, the Commission bases itself on contemporaneous documents in the file.
- (423) While the prime responsibility for daily management the KG's marketing activities was assigned to [...], Del Monte was in a position to influence on that daily management and in fact effectively exerted such influence. In particular, documentary evidence in the file shows that Del Monte did not hesitate to intervene with Weichert's price decisions when they deviated from Del Monte's interests and to complain about such deviations⁴⁴⁸. Moreover, Weichert's fear from threats as regards supplies is supported by a document in the file⁴⁴⁹, which shows that Del Monte exerted pressure on Weichert to influence Weichert's pricing decisions in line with Del Monte's interests and that Del Monte made threats to reduce supply volumes if Weichert would not follow prices that Del Monte wanted.
- (424) Moreover, while Weichert would not have always followed Del Monte's instructions, the described evidence shows that it was, however, under considerable influence by Del Monte as regards to its day-to-day business management. The Commission notes that while Weichert's alignment of prices with Dole may be a possible way of explaining events, it does not support the conclusion Del Monte draws from it unequivocally. Hence, Weichert can not be considered to have behaved independently in the market either. In addition, the Commission must reject Del Monte's claim that other competitors (namely Chiquita and Dole) would have made statements in their submissions to the Commission during the investigation which would corroborate Del

⁴⁴⁷ [...]s stated in its presentation at the Oral Hearing that "*Del Monte had an exclusive sale and purchasing agreement with Weichert: Del Monte was Weichert's sole supplier, Weichert was therefore dependent on Del Monte's supply and Weichert had to follow Del Monte's requests*".

⁴⁴⁸ A document in the file shows Del Monte having complained that Weichert did not seek approval from or at least inform Del Monte before entering in a promotion and requesting explanation about price difference between final price, and expected price. See recital (389) above and file p. 51092-51093 (fax dated 28/1/2000 from [...] of Del Monte to [...]).

⁴⁴⁹ In a memo (referred to in recital (390) above) dated 12 June 2000 to [...], [...] of Del Monte threatens with a reduction in banana volumes if Weichert would not follow Del Monte's price wishes and requests Weichert to keep Del Monte informed daily on its price negotiations in the following terms: "*(...) 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 licenses (...) Please make sure to keep us informed, on a daily basis, of the outcome of your price negotiations with your customers*". See file p. 38577.

Monte's argument that it "expected" Weichert to announce official prices on a certain level in relation to largest competitors [...]. The statements of the two competitors that Del Monte refers to do not say anything about any such Del Monte's expectations.

(425) [...].⁴⁵⁰ [...].⁴⁵¹ [...].⁴⁵² [...].

(426) [...].⁴⁵³ [...].⁴⁵⁴ [...].⁴⁵⁵ [...]. In addition, correspondence between Del Monte and Weichert demonstrates the perception of the situation between them at the time and shows that Del Monte indeed used threats to reduce supply volumes as a means to exert its influence over Weichert's pricing.⁴⁵⁶ [...]. Del Monte was able to weigh different interests and to choose to use or not to use such means. However, such means were available to Del Monte [...] and Del Monte could and indeed did use it for the purpose of its control over Weichert (see the document quoted in footnote 456 and in recital (390)). [...](see footnote 15). Therefore, if Del Monte reduced supply volumes to the licensed quantities, that would still effectively prejudice Weichert's economic interests. These observations support the Commission's view that Del Monte had effective means to exercise its control over Weichert's day-to-day business activities.

(427) Del Monte claims that the fact that Weichert employed its own sales force long before it started its partnership relationship with the Weichert family is a clear indication that Del Monte was not able to exercise decisive influence over Weichert's conduct on the market. Del Monte points out that Weichert itself states that the individuals who had bilateral contacts with competitors relating to prices were all employed by Weichert. Del Monte submits that [...]. However, according to Sections [...] of the Partnership Agreement⁴⁵⁷ [...].

(428) Del Monte also argues that the partnership – under the direction of its general partners – often employed (its own) lawyers to assert its interest against Del Monte. The fact that a partner in a limited liability partnership resorts to legal advice in order to assert

⁴⁵⁰ [...] See file p. 11314 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13289 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵¹ See [...], file p. 11318 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13293 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵² See file p. 11318 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p.13293 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵³ See file p. 11314 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13289 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵⁴ See file p. 11317 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13292 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵⁵ Text of the agreement reads: "[...]". See file p. 11317-11318 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13292-13293 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵⁶ See Del Monte's fax to Weichert dated 12/06/2000 in which Del Monte "threatens" "*to consequently reduce Weichert's supplies to the level of Interfrucht's own licenses.*", file p. 38577.

⁴⁵⁷ See file p. 11228-11229 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13261-13262 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

his rights against the other partners does in no way demonstrate that the partner holds all rights by law, but rather that he is not willing to give up any rights he holds or may hold. Everyone can consult a lawyer and make use of his services against anyone he believes to disrespect his rights or legal position or in order to obtain legal advice concerning its own rights and/or duties.

- (429) According to Del Monte the Weichert family always considered Weichert to be their family business and would never have accepted ceding control (or management functions) to a non-family member. This argument of Del Monte only reports perceptions and suspected intentions of the other partners. The provisions of the Partnership Agreement and the means of control conferred on and exercised by Del Monte demonstrate that on the contrary Del Monte had decisive influence over Weichert (see recitals (387)-(392) and (402)). This does not require that control would have had been ceded completely from Weichert family to Del Monte.
- (430) Del Monte argues that its lack of influence on the commercial strategy followed by Weichert was the reason why the Distribution Agreement had been terminated in 1997. Del Monte also argues the following concerning negotiations on a possible extension of the Distribution Agreement: [...]; Del Monte repeatedly requested [...].
- (431) The Commission notes that [...].⁴⁵⁸ [...].⁴⁵⁹ As it is indicated in a letter provided to the Commission by Del Monte, "[...]". It is also indicated in the same letter that "[...]".⁴⁶⁰ [...].⁴⁶¹ [...].⁴⁶² [...].⁴⁶³ However, these factors have no impact on the assessment of liability and Del Monte's possibility to influence Weichert's business decisively during the duration of the partnership between the partners.
- (432) Finally, Del Monte argues that there is no objective justification for holding the limited partner Del Monte liable and not the general partners [...]. The community law concept of an undertaking is explained in recitals (361) and (362). In line with this concept, the Commission has found in the present case that Weichert formed together with Del Monte an economic unit as Weichert did not determine independently its own conduct on the market. The Commission has thereby identified the economic unit concerned and addressed the Statement of Objections to both entities involved in that unit, Weichert and Del Monte. This does not require that the other legal or natural persons holding shares in Weichert would also be held liable for the infringement

⁴⁵⁸ See [...], file p. 11314 (Annex 10 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13289 (Annex 4 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁵⁹ See Section [...] of the Partnership Agreement, file p. 11225 (Annex 5 to confidential version of [...] reply to the request for information of 10 February 2006) and p. 13258 (Annex 2 to confidential version of [...] reply to the request for information of 10 February 2006).

⁴⁶⁰ See [...]s reply to the Statement of Objections – Annex 5.6.3.6. (letter dated 6/7/1994), confidential version.

⁴⁶¹ See file p. 11325 ([...] confidential reply to the request for information of 10 February 2006 – Annex 14; Del Monte's letter to Weichert dated 10/7/1997).

⁴⁶² See [...]s reply to the Statement of Objections p. 57 – Annex 5.6.3.16. (Del Monte's fax to Weichert dated 23/04/2001), confidential version.

⁴⁶³ See [...]s reply to the Statement of Objections p. 57 – Annex 5.6.3.25. (Weichert's letter to WAL dated 23/4/2001), confidential version.

together with Weichert and Del Monte. This conclusion is in line with the Commission's decision practice.⁴⁶⁴

- (433) In accordance with the above assessment, the Commission holds Fresh Del Monte Produce Inc and Internationale Fruchtimport Gesellschaft Weichert & Co. KG jointly and severally liable for the involvement of Weichert in the infringement from 1 January 2000 until 31 December 2002.

6.3. Conclusion

- (434) Based on the foregoing, it has been established that the following legal entities bear liability for the infringement of Article 81 of the EC Treaty subject to this decision:
- Chiquita Brands International Inc., Chiquita International Ltd., Chiquita International Services Group N.V. and Chiquita Banana Company B.V. jointly and severally (hereinafter "Chiquita");
 - Dole Food Company, Inc. and Dole Fresh Fruit Europe OHG jointly and severally (hereinafter "Dole"); and
 - Internationale Fruchtimport Gesellschaft Weichert & Co. KG and Fresh Del Monte Produce Inc. jointly and severally (hereinafter "Del Monte/Weichert").

7. DURATION OF THE INFRINGEMENT

7.1. Starting and ending date

- (435) On the basis of the facts described in Chapter 4, the Commission considers that Dole and Weichert (together with Del Monte) were involved in the cartel arrangements at least from 1 January 2000 until 31 December 2002. Chiquita was involved in the cartel arrangements at least from 1 January 2000 until 1 December 2002.
- (436) While there are strong indications that collusive arrangements among the parties occurred already before 2000, the exact date on which the infringement started prior to 2000 cannot be established with certainty (see recitals (93) et seq.). Hence, the Commission's assessment under competition rules and the application of any fines is limited to the period from 1 January 2000.
- (437) Also with regard to the end date of the infringement there are indications that collusive arrangements between parties continued even after 2002 (see, in particular, recital (98) and recital (176)). However, it is not possible to ascertain the exact date after 2002 when Dole and Weichert stopped their collusive contacts (see recital (98)). As for contacts between Dole and Chiquita, the Commission has found that it is not possible to ascertain the exact date in December 2002 when their communications ceased (see recital (97)). Therefore, the Commission's assessment under competition rules and the

⁴⁶⁴ See in this respect for instance Commission decision of 21 October 1998 in case No IV/35.691/E-4 – *Pre-insulated Pipe Cartel*, at recitals 157-160; OJ L 24 of 30.1.1999. See also judgement of the Court of First Instance of 20 March 2002 in case T-9/99 *HFB Holding et al* [2002] ECR II-1487, paragraphs 54, 66-67.

application of any fines is limited to the period until 1 December 2002 in relation to Chiquita and until 31 December 2002 in relation to Dole and Weichert.

(438) [...] Also Del Monte, Dole and Weichert do not, in their replies to the Statement of Objections, contest the duration of the arrangements for the period 2000 to 2002.

(439) It follows that the duration of the infringement by each of the parties is as follows:

- Chiquita Brands International Inc., Chiquita International Ltd., Chiquita International Services Group N.V. and Chiquita Banana Company B.V.: from 1 January 2000 until 1 December 2002, that is to say, 2 years and 11 months;
- Dole Food Company, Inc. and Dole Fresh Fruit Europe OHG: from 1 January 2000 until 31 December 2002, that is to say, 3 years; and
- Internationale Fruchtimport Gesellschaft Weichert & Co. KG and Fresh Del Monte Produce Inc.: from 1 January 2000 until 31 December 2002, that is to say, 3 years.

7.2. Application of limitation periods

(440) Pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing or repeated infringements, the limitation period only begins to run on the day the infringement ceases.⁴⁶⁵ Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period and each interruption starts time running afresh.⁴⁶⁶

(441) In this case, the Commission investigation started with the surprise inspections pursuant to Article 20(4) of Regulation No 1/2003 on 2 and 3 June 2005. Hence, for illegal conduct which ceased prior to 2 June 2000 no fines may be imposed unless infringements started before that date and were continuing or repeated with the same object. However, none of the parties stopped its involvement in the infringement before 2 June 2000.

8. REMEDIES

8.1. Article 7 of Regulation (EC) No 1/2003

(442) Where the Commission finds that there is an infringement of Article 81 of the EC Treaty it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.

(443) Given the manner in which the cartel arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this decision is addressed to bring the infringement to an end (if they have not already done so) and

⁴⁶⁵ Article 25(2) of Regulation No 1/2003.

⁴⁶⁶ Article 25(3) to (5) of Regulation No 1/2003.

henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which would have the same or a similar object or effect.

- (444) Such prohibition applies to all secret meetings and multilateral or bilateral contacts between competitors with the object and/or effect of restricting competition between them or enabling them to coordinate their market behaviour.

8.2. Article 23(2) of Regulation (EC) No 1/2003

- (445) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where either intentionally or negligently, they infringe Article 81 of the EC Treaty. Under Article 15(2) of Regulation No 17 which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10 % of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

- (446) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard must be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003⁴⁶⁷ (hereafter, “the 2006 Fines Guidelines”).

8.3. The basic amount of the fines

8.3.1. Calculation of the value of sales

- (447) The basic amount of the fine to be imposed on the undertakings concerned should be set by reference to the value of sales.
- (448) According to the 2006 Fines Guidelines, the basic amount of the fine consists of an amount of between 0 % and 30 % of a company's relevant sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the company's participation in the infringement, and an additional amount of between 15 % and 25 % of the value of the company's sales, irrespective of duration.
- (449) In determining the basic amount of the fine to be imposed, the Commission starts from the value of the undertaking's sales of the goods or services to which the infringement relates in the relevant geographic area. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.
- (450) In this case for Dole and Weichert the last full business year before the end of the infringement is 2002. For Chiquita, the last full business year before the end of the infringement is 2001.
- (451) The value of Chiquita's, Dole's and Weichert's sales of fresh bananas in the relevant business year was as follows:

– Chiquita EUR 365 800 000

⁴⁶⁷ OJ C 210, 1.9.2006, p. 2.

- Dole EUR 198 331 150⁴⁶⁸
 - Weichert EUR 82 571 574
- (452) In order to avoid double-counting the Commission deducts from the addressees' sales figures the value of fresh bananas sold to other addressees, which subsequently were sold in the Northern European region. The sales figure for Chiquita is thus reduced by EUR [...], while the sales figure for Dole is reduced by EUR [...]. No change is required to the sales figure of Weichert.
- (453) The bananas forming part of the sales figures purchased from the other addressees, are subtracted from the sales figures of each undertaking. The revised sales figures of the addressees used for the purpose of fine setting is therefore as follows:
- Chiquita EUR 347 631 700
 - Dole EUR 190 581 150
 - Weichert EUR 82 571 574

8.3.1.1. Gravity

- (454) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales. In order to decide whether the proportion of value of sales to be considered in a given case should be at the lower or at the higher end of that scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

(a) Nature

- (455) Horizontal practices relating to prices are by their very nature among the most harmful restrictions of competition, as they distort competition on a key parameter of competition.⁴⁶⁹ The concerted practice found in this decision concerned the fixing of prices. The parties participated in a single and continuous infringement by concerted practice by which they coordinated quotation prices for bananas in the Northern European region. Dole argues, in its reply to the Statement of Objections, that when assessing the gravity of the infringement the Commission must take into account the extent to which the Community quota regime set forth in Regulation 404/93 was capable of affecting conditions in the banana market. Weichert also submits, in its reply to the Statement of Objections, that when assessing the gravity of the infringement the Commission must assess the role of the regulatory environment, in particular the high level of transparency created by the common market organisation. Weichert also argues that fines cannot be justified on the account of the impact of the alleged infringement on the market ("absence of consumer detriment"). Del Monte argues, in its reply to the Statement of Objections, that the conduct had no impact on

⁴⁶⁸ Dole's turnover number is calculated [...] ([...] reply to the request for information of 12 June 2008).

⁴⁶⁹ See for example Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 103 and 135.

the market (on volumes and prices). These parties in essence argue that the concerted practice alleged in the Statement of Objections first, could not have or had a limited impact due to the regulatory regime; second, had no influence on volumes (or such influence was (highly) unlikely); third, had no impact on (actual) prices.

- (456) As to the parties' arguments concerning the Community regulatory regime, the Commission considers that the reasoning provided in this decision also applies with respect to the assessment of the nature of the infringement (see in particular section 4.4.2.2 and recitals (278) et seq., (306) and (308)). The Commission takes into account the specific overall regulatory regime in adjusting the basic amount of the fines (see recital (467)). As for the parties' arguments concerning the impact of the concerted practice, in this recital the Commission addresses these arguments so far as they concern the nature of the infringement. Concerning the arguments that the concerted arrangements had no impact on volumes or that such impact was unlikely, the Commission observes that supply restrictions are not found in this decision (see also, *inter alia*, recital (292)). Correspondingly, the Commission assesses the nature of the infringement within the scope of its findings in this decision. As for the arguments that the concerted arrangements had no impact on (actual) prices, the Commission observes that the cartel arrangements concern quotation prices. The Commission has found that quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices (see section 4.4.2.1). The Commission considers that they were sufficient means to achieve the anticompetitive object (see in particular recitals (128) and (284)). Therefore, the concerted practice did concern the fixing of prices, which pertained to quotation prices. For the purpose of assessment of the nature of the infringement in this case, the Commission takes into account that the concerted practice described in this decision concerned quotation prices, in particular that it did not directly relate to actual prices, and all the circumstances of this case. However, this cannot be viewed as having relevance for the legal assessment of the object of the infringement in this decision. Moreover, as the Court of First Instance has stated in *Hoechst* "[...]when the implementation of a cartel is established, the Commission cannot be required to demonstrate systematically that the agreements actually allowed the undertakings concerned to attain a higher level of prices than that which would have prevailed in the absence of a cartel."⁴⁷⁰ As concerns the exchange of quotation prices after they had been set by the parties (monitoring mechanism, see section 4.5), in the light of the circumstances of this case, the Commission considers that this exchange of quotation prices is not of such nature as to be taken into account in setting the basic amount of the fine. It constituted an element of cooperation between the parties, however, the Commission does not consider that it affected the gravity of the overall infringement in this case.

(b) Combined market share

- (457) The combined market share of the undertakings for which the infringement could be established is estimated to be at least around 40-45 % as explained in section 2.3.1.

(c) Geographic scope

⁴⁷⁰ See Case T-410/03 *Hoechst v. Commission*, not yet reported, paragraph 348.

(458) As regards the geographic scope, the infringement covered Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden. With the exception of Luxembourg, all of the addressees supplied bananas to these Member States for at least part of the period 2000-2002.⁴⁷¹

(d) Implementation

(459) As described in section 5.2.5 of this decision the arrangements were implemented.

8.3.1.2. The percentage to be applied for the proportion of the value of sale

(460) Given the specific circumstances of this case, taking into account the criteria discussed in section 8.3.1.1, the proportion of sales to be taken into account should be 15 %.

8.3.1.3. Duration

(461) Point 24 of the 2006 Fines Guidelines on fines provides that "*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 [...] 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*".

(462) The period to be taken into account for Chiquita is 1 January 2000 to 1 December 2002 and for Dole and Del Monte/Weichert it is 1 January 2000 to 31 December 2002. Using the methodology outlined in recital (461), this means that the multiplier applied in respect of duration would be 3 for all addressees.

8.3.1.4. Additional amount

(463) Point 25 of the 2006 Fines Guidelines provides that "*[...]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 [...] in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements*".

(464) Given the specific circumstances of the case, taking into account the criteria discussed in section 8.3.1.1, the percentage to be applied for the additional amount should be 15 %.

8.3.1.5. Conclusion on the basic amount

(465) The basic amounts of the fines to be imposed on each undertaking should therefore be as follows:

All amounts are in EUR

Chiquita	208 000 000
Dole	114 000 000

⁴⁷¹ Weichert did not supply bananas to [...].

Del Monte/Weichert	49 000 000
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8.4. Adjustments to the basic amount

8.4.1. Aggravating circumstances

(466) No aggravating circumstances have been found.

8.4.2. Mitigating circumstances

(467) The fact that during the relevant period the banana sector was subject to a very specific regulatory regime is taken into consideration, in favour of all the parties, as a mitigating circumstance as well as that the coordination related to the quotation prices. In light of the very particular circumstances of this case, a reduction of 60 % is applied to the basic amount of the fines for all the parties.

8.4.2.1. Dole

(468) In its response to the Statement of Objections Dole argues that the Commission should have regard to all mitigating circumstances including in particular the following: first, it is well-established that, in setting a fine for breach of Community competition rules, the Commission must take into consideration the degree of complexity of the competition analysis that supports a finding of anticompetitive practice (Dole refers to the Commission decisions in *Deutsche Post*⁴⁷², *1998 Football World Cup*⁴⁷³ and the judgment of the European Court of Justice in *Akzo*⁴⁷⁴). Dole argues that in this case, even if the novelty of the Commission's findings cannot exclude a fine *a priori* on the grounds stated by Dole, this should at the very least amount to a significant mitigating factor justifying the non-imposition of a fine; second, during the period in which the infringement took place, Dole engaged in vigorously competitive conduct on the market; third, the information exchanges were not institutionalized in any way and did not provide for any retaliatory measures in case of failure to cooperate; fourth, Dole promptly terminated the conduct as soon as the Commission intervened and fifth, throughout the investigation, Dole has fully cooperated with the Commission beyond its legal obligation to do so, notably through many voluntary submissions.

(469) In response to Dole's first argument, the Commission notes that the analysis of the conduct of the parties in this case does not present any particular complexity or novelty which should amount to a mitigating circumstance. Concerning the second argument, the 2006 Fines Guidelines indicate that it may find a mitigating circumstance where the undertaking party to an anti-competitive agreement provides evidence that its involvement in the infringement was substantially limited and that it actually avoided applying it. Dole has not provided evidence that it avoided applying coordination of quotation prices in this case. The documents provided by Dole with its reply to the Statement of Objections and documents in the Commission's file to which

⁴⁷² Case COMP/36.915 – *Deutsche Post AG – Interception of cross-border mail*, Commission decision of 25 July 2001.

⁴⁷³ Case IV/36.888 - *1998 Football World Cup*, Commission decision of 20 July 1999.

⁴⁷⁴ Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, paragraph 163.

Dole refers in order to support the claim that Dole (and other importers) acted unilaterally, rather than in a concerted manner, do not satisfy the criteria set out in the 2006 Fines Guidelines (see also recital (293)). They do not show either "substantially limited involvement" nor that Dole actually avoided applying the concerted arrangements. Moreover, the Commission observes that the respective documents provided by Dole with its reply to the Statement of Objections mainly concern the year 2004. It would not be regarded as a mitigating circumstance that the cartel arrangements were not institutionalised. Moreover, in this case the anti-competitive arrangements did follow an established pattern (see in particular section 4.2.3). Had there been evidence of retaliatory measures or other forms of coercion in this case, this would amount to an aggravating circumstance; its absence cannot be considered in mitigation. The 2006 Fines Guidelines state that prompt termination of secret agreements or practices, and in particular cartels, cannot give rise to any mitigating circumstance. The Commission has already indicated that the pre-pricing communications between parties were not publicly known (see in particular recital (307)). The fact that Dole may have ended other practices, namely the exchange of volume data, which were part of the Commission's investigation but not found to be infringements in the present decision cannot be regarded as justifying a reduction in the fines for the conduct that is found in this decision to be cartel conduct. Concerning the termination of the exchange of quotation price information after they were set, in this decision the Commission does not find that this exchange was a distinct infringement, but that it enabled the parties to monitor individual parties' quotation pricing decisions in the light of pre-pricing communications which took place between them beforehand during the period when the parties took part in pre-pricing communications (see recital (273)). Therefore, termination of this exchange after the end of the duration of the infringement cannot be regarded as a mitigating circumstance. Moreover, the Commission does not take into account this exchange of quotation prices once they had been set when setting the basic amount of the fine (see recital (456)). As regards Dole's final argument that it cooperated with the Commission beyond its legal obligation to do so, notably through its many voluntary submissions, the Commission does not find that Dole exceeded its legal obligations to cooperate with the Commission and that with regard to Dole's voluntary submissions, these were essentially made for the purposes of substantiating its arguments concerning the conduct under investigation. In any case, it must be pointed out that the infringement in the present case falls within the scope of application of the Leniency Notice, which concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports (point 1 of the Leniency Notice).⁴⁷⁵ Dole cannot therefore validly argue that the Commission should take into account the extent of its cooperation as an attenuating circumstance. In light of the above, the Commission does not apply point 29 (4) of the 2006 Fines Guidelines in this case. In conclusion, no mitigating circumstances have been found for Dole, except as stated in recital (467).

8.4.2.2. Weichert

⁴⁷⁵ See, in this sense, Case T-15/02 *BASF AG v. Commission* [2006] ECR II-497, paragraph 586. See also, to that effect, Joined Cases C-189/02 P etc. *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 380 to 382.

- (470) In its reply to the Statement of Objections Weichert argues that the Commission should have regard to the following mitigating circumstances: first, the novel and unprecedented nature of the Commission's allegations. Weichert argues that it could not reasonably have contemplated that the Commission would seek to characterise the bilateral information exchanges as an "*elaborated network of bilateral arrangements designed to coordinate pricing of bananas*". Weichert therefore considers that fines are for this reason alone unjustified and that the imposition of fines would not serve any deterrent purpose but would on the contrary in the present circumstances be both disproportionate and unfair. In addition, Del Monte argues that "the information exchanges described in the [Statement of Objections]" are not hardcore infringements of Article 81 EC; second, the key role of the regulatory environment. Weichert argues that the alleged anti-competitive conduct was in material respects inextricably linked to the surrounding legislative and regulatory framework. In addition, Weichert claims that this conduct was known and authorised or at least encouraged by the Commission and other public authorities; third, the absence of consumer detriment. Weichert submits that fines cannot be justified on account of the alleged infringements on the market. Weichert argues that this impact is entirely non-existent and the Commission has failed to demonstrate the gravity of the alleged infringement in this respect. According to Weichert, no implementation of the alleged common understanding has been demonstrated. Weichert argues that it is not open to the Commission to assume the existence of consumer detriment as (a) a number of customers of Weichert have attested to the fact that they were aware of and were not harmed by the exchange of information; and (b) there was no artificial reduction of output or volume diversion at any time during the relevant period (as demonstrated in particular by the empirical evidence in the attached RBB report⁴⁷⁶). Del Monte, in its reply to the Statement of Objections, argues that the alleged arrangements had no impact on volumes and prices; fourth, Weichert claims that it has continually co-operated with the Commission throughout the course of the investigation beyond its legal obligation to do so. Del Monte also claims, on its own behalf, that it fully and comprehensively cooperated with the Commission and indicates that Del Monte has so far never been subject to investigations by competition authorities; fifth, Weichert submits that it terminated the alleged infringement following the Commission's inspections; sixth, Weichert argues that to the extent communications on "general market conditions" constitute the "gravamen" of the Commission's investigation, its participation in the alleged infringement was limited since it participated in them only on some infrequent occasions.
- (471) Contrary to Weichert's suggestion, the Commission does not consider that the infringing conduct in this case is novel or unprecedented, or that Weichert could not have contemplated that the conduct established in this decision would be characterised as horizontal practices relating to prices. Concerning the legal qualification of the concerted practice, the Commission has already addressed the parties' arguments (see in particular recitals (311)-(315)).
- (472) The specific regulatory regime relating to bananas is taken into account in mitigation of the fines imposed (see recital (467)). However, the regulatory regime cannot be regarded as having encouraged or condoned the infringing conduct found in this

⁴⁷⁶ Appendix 1 to [...] reply to the Statement of Objections (RBB report "Economic assessment of alleged coordination in the market for bananas").

decision. The conduct with respect to which Weichert put forward evidence which it claims shows that the Commission was aware of information exchanges and encouraged them is not the pre-pricing communications. Likewise, there are no indications that third parties were aware of exchanges of quotation prices after they were set in the context of pre-pricing communications. Nothing in the documents provided by Weichert suggests Commission's knowledge of pre-pricing communications between parties (see also recital (307) of this decision). The third argument is in substance that the infringement had no actual effects on the market and was not implemented. In this regard, the Commission has set out the reasons for which it finds that the infringement in this case was implemented (see in particular section 5.2.5). Moreover, the Commission considers that effects could be expected from the conduct described in this decision. Indeed, 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. The Commission notes that, for setting a fine for the infringement established in this decision, actual effects of the conduct could be relevant only under point 31 of the 2006 Fines 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". However, the Commission is not applying point 31 of the 2006 Fines Guidelines in this decision. Therefore, it is not necessary to establish that there were actual effects on the market.

- (473) The argument of Weichert that there was no artificial diversion or restriction of volumes seeks to support the claim that the cartel had no actual effects on the market and has been considered (see recital (472)), as is the case for the claim that customers were aware of "information exchanges" among the parties (see also recitals (307) and (319)).
- (474) The Commission does not find that Weichert effectively cooperated with the Commission beyond Weichert's legal obligation to do so. Weichert's responses to Commission's requests for information within established deadlines are within the scope of the undertaking's obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation⁴⁷⁷. Concerning provision of documents or evidence, Weichert provided them to the Commission either in response to Commission's requests for information or in order to support its arguments. In any case, it must be pointed out that the infringement in the present case falls within the scope of application of the Leniency Notice, which concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports (point 1 of the Leniency Notice).⁴⁷⁸ Weichert cannot therefore validly argue that the Commission should take into account the extent of its cooperation as an attenuating circumstance. In light of the above, the Commission does not apply point 29 (4) of the 2006 Fines Guidelines in this case. The same applies to Del Monte. Furthermore, the fact that Weichert may have ended practices alleged in the Statement of Objections, which were part of the Commission's investigation but not found to be part of the infringement in the present decision cannot be regarded as

⁴⁷⁷ See Case 374/87 *Orkem v. Commission* [1989] ECR 3283, paragraph 27.

⁴⁷⁸ See, in this sense, Case T-15/02 *BASF AG v. Commission* [2006] ECR II-497, paragraph 586. See also, to that effect, Joined Cases C-189/02 P etc. *Dansk Rørindustri and Others v Commission*, [2005] ECR I-5425, paragraphs 380 to 382.

justifying a reduction in the fines for the conduct that is found in this decision to be cartel conduct.

- (475) Finally, concerning Weichert's argument that its participation in pre-pricing communications was limited because it participated in them on some infrequent occasions, the Commission finds that Weichert's communications formed an established and consistent pattern of communications and that they took place over a long period of time (three years) (see sections 4.2.3.2 and 4.5). Therefore, the Commission cannot accept Weichert's argument that its pre-pricing communications took place only on some infrequent occasions.
- (476) Based on the evidence at the Commission's disposal, the Commission concludes that Weichert should be held liable taking into account its participation in the cartel arrangements (see section 5.2.3). There is no sufficient evidence to conclude that Weichert was aware of Dole's pre-pricing communications with Chiquita or that it could reasonably have foreseen them, while Dole and Chiquita were aware of (or, as concerns Chiquita, it at least foresaw) the overall cartel scheme. Consequently, given the circumstances of the case, a reduction of 10 % is applied to the basic amount of the fine determined for Weichert (who shall be liable jointly and severally with Del Monte). No other mitigating circumstances have been found for Weichert, except as stated in recital (467).

8.4.3. *Specific increase for deterrence*

- (477) Point 30 of the 2006 Fines Guidelines provides that "*[t]he Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particular large turnover beyond the sales of goods or services to which the infringement relates*".
- (478) The Commission does not apply any specific increase for deterrence in this case to any of the addressees.

8.4.4. *Conclusion on the adjusted basic amounts*

- (479) The adjusted basic amounts of fines to be imposed on the parties are as follows:

All amounts are in EUR

Chiquita	83 200 000
Dole	45 600 000
Del Monte/Weichert	14 700 000

8.5. **Application of the 10 % turnover limit**

- (480) The second subparagraph of Article 23 (2) of Regulation (EC) No 1/2003 provides that "*[f]or each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year*".

- (481) The adjusted basic amounts of the fines for the addressees are below 10 % of the 2007 world wide turnovers of respectively Chiquita, Dole and Del Monte. Consequently no reduction of the fines is made as a result of the aforementioned 10 % turnover limit.

8.6. Application of the Leniency Notice

- (482) As indicated in Chapter 3, the investigation in this case was initiated after information was brought to the attention of the Commission by Chiquita, which applied for immunity under the terms of the Leniency Notice.

8.6.1. Chiquita

- (483) Chiquita was the first undertaking to inform the Commission about a secret cartel concerning sales of bananas. Chiquita applied for immunity on [...] under the terms of the Leniency Notice. [...].
- (484) Prior to the application, the Commission had not undertaken any inspection into the alleged cartel nor did it have in its possession any evidence to carry out an inspection. As the information provided by Chiquita enabled the Commission to adopt a decision to carry out inspections pursuant to Article 20(4) of Regulation No 1/2003, Chiquita was granted conditional immunity from fines pursuant to point 8(a) of the Leniency Notice. The inspections took place on 2-3 June 2005.
- (485) In their replies to the Statements of Objections both Dole and Weichert argue that the Commission was mistaken in granting conditional immunity to Chiquita. Del Monte has also raised similar doubts in its letter of 17 March 2008. These addressees argue that practices about which Chiquita provided information were not secret and that Chiquita gave incorrect information to the Commission. The Commission does not agree with these arguments. On the contrary, it finds that Chiquita provided information to the Commission as its own internal investigation progressed, and did so in a timely way. The information provided by Chiquita enabled the Commission to make unannounced inspections concerning a suspected secret cartel.
- (486) In order to qualify for immunity from a fine, the Leniency Notice requires applicants for immunity pursuant to point 8(a) to meet the cumulative conditions set out in point 11 of the Leniency Notice, in addition to the conditions which entitled them to benefit from conditional immunity under point 8(a). Point 11(a) of the Leniency Notice lays down the obligation for the immunity applicant to cooperate fully, on a continuous basis and expeditiously throughout the administrative procedure, and to provide all evidence that comes into its possession or is available to it. The condition in point 11(a) is drafted widely. Point 11(b) and (c) require the immunity applicant to end its involvement in the suspected infringement no later than the time at which it submits evidence under point 8 and not have taken any steps to coerce other undertakings to participate in the infringement.
- (487) According to the evidence in the Commission's possession, Chiquita terminated its involvement in the infringement at the latest at the time at which it first submitted evidence to the Commission. Furthermore there is no evidence that Chiquita exerted pressure on other addressees to join the cartel arrangements. Finally the Commission

is of the opinion that Chiquita has fulfilled the requirements of Point 11(a) of the Leniency Notice.

(488) In conclusion Chiquita should be granted immunity from any fines that would otherwise have been imposed on it.

8.7. Ability to Pay

(489) Point 35 of the 2006 Fines Guidelines provides that "*[i]n exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.*"

8.7.1. [...]

(490) [...]

Assessment of the Commission

(491) [...]

8.8. The amounts of the fines to be imposed in this decision.

(492) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows

- Chiquita
 - Chiquita Brands International Inc. EUR 0
 - of which jointly and severally with:
 - Chiquita International Ltd., Chiquita International Services Group N.V. and Chiquita Banana Company B.V. EUR 0
- Dole
 - Dole Food Company, Inc. EUR 45 600 000
 - of which jointly and severally with:
 - Dole Fresh Fruit Europe OHG EUR 45 600 000
- Del Monte/Weichert
 - Fresh Del Monte Produce Inc. EUR 14 700 000
 - of which jointly and severally with:

– Internationale Fruchtimport Gesellschaft Weichert & Co. KG

EUR 14 700 000

HAS ADOPTED THIS DECISION:

Article 1

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

- a) Chiquita Brands International Inc. from 1 January 2000 until 1 December 2002;
- b) Chiquita International Ltd. from 1 January 2000 until 1 December 2002;
- c) Chiquita International Services Group N.V. from 1 January 2000 until 1 December 2002;
- d) Chiquita Banana Company B.V. from 1 January 2000 until 1 December 2002;
- e) Dole Food Company, Inc. from 1 January 2000 until 31 December 2002;
- f) Dole Fresh Fruit Europe OHG from 1 January 2000 until 31 December 2002;
- g) Internationale Fruchtimport Gesellschaft Weichert & Co. KG from 1 January 2000 until 31 December 2002;
- h) Fresh Del Monte Produce Inc. 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:

- a) Chiquita Brands International Inc., Chiquita International Ltd., Chiquita International Services Group N.V. and Chiquita Banana Company B.V., jointly and severally: EUR 0;
- b) Dole Food Company, Inc. and Dole Fresh Fruit Europe OHG, jointly and severally: EUR 45 600 000;
- c) Internationale Fruchtimport Gesellschaft Weichert & Co. KG and Fresh Del Monte Produce Inc., jointly and severally: EUR 14 700 000.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account No:

642-0029000-95 of the European Commission with:

Banco Bilbao Vizcaya Argentaria S.A.
Avenue des Arts, 43
BE-1040 Brussels

IBAN: BE76 6420 0290 0095
SWIFT: BBVABEBB

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in that Article, insofar as they have not already done so.
They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

Chiquita Brands International Inc.
250 East Fifth Street
Cincinnati, Ohio 45202
USA

Chiquita International Ltd.
7 Reid Street Suite 109
HM 2181 Hamilton
BERMUDA

Chiquita International Services Group N.V.
Rijnkaai 37
B-2000 Antwerp
BELGIUM

Chiquita Banana Company B.V.
Schelluinsestraat 46B
4203 NM GORINCHEM
NEDERLAND

Dole Food Company, Inc.
One Dole Drive
Westlake Village
CA 91362-7300
USA

Dole Fresh Fruit Europe OHG
Stadtdeich 7

20097 Hamburg
Deutschland

Internationale Fruchtimport Gesellschaft Weichert & Co. KG

Banksstrasse 28
20097 Hamburg
Deutschland

Fresh Del Monte Produce Inc. c/o Del Monte Fresh Produce Company

241 Sevilla Avenue
Coral Gables,
Florida 33134
USA

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 15 X 2008

For the Commission

Neelie KROES
Member of the Commission