



EUROPEAN COMMISSION

Brussels, 12.10.2011
C(2011) 7273 final

COMMISSION DECISION

of 12.10.2011

addressed to:

- Chiquita Brands International, Inc.**
- Chiquita Banana Company BV**
- Chiquita Italia SpA**
- FSL Holdings NV**
- Firma Leon Van Parys NV**
- Pacific Fruit Company Italy SpA**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the
European Union
(COMP/39482 – Exotic Fruit (Bananas))**

(Only the English text is authentic)

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...]

TABLE OF CONTENTS

1.	INTRODUCTION	7
2.	THE INDUSTRY SUBJECT TO THE PROCEEDINGS	7
2.1.	The product	7
2.2.	The market players	7
2.2.1.	Undertakings subject to these proceedings	7
2.2.1.1.	Chiquita.....	7
2.2.1.2.	Pacific	10
2.2.2.	Other market players.....	11
2.3.	Description of the Industry	11
2.3.1.	The supply	11
2.3.1.1.	Banana brands in the Southern European region.....	13
2.3.1.2.	The two layers of the business in Southern Europe.....	13
2.3.1.3.	Pricing.....	16
2.3.1.4.	Negotiations with customers in Italy	16
2.3.1.5.	Negotiations with customers in Greece and Portugal.....	18
2.3.1.6.	Other factors	19
2.3.2.	The regulatory framework	20
2.3.3.	Flexibility of supply.....	22
2.3.4.	The demand	25
2.3.5.	The geographic area covered	25
2.4.	Trade between Member States.....	25
3.	PROCEDURE.....	26
4.	DESCRIPTION OF THE EVENTS	28
4.1.	Background and overview	28
4.2.	Evidence of the infringement.....	29

4.2.1.	Introduction.....	29
4.2.2.	Evidence with regard to the overall infringement: Chiquita's statements made during the inspections and in subsequent corporate statements.....	30
4.2.3.	Evidence with regard to the meeting of 28 July 2004	32
4.2.4.	Evidence with regard to follow-up contacts in August 2004	37
4.2.5.	Evidence with regard to further contacts in February-April 2005	39
	The timing of collusive contact in relation to week 15 of 2005	43
4.3.	Assessment of other arguments of the parties	44
4.3.1.	Pacific's general observations	44
4.3.2.	Alleged legitimate contacts with competitors.....	45
4.3.3.	Pacific's arguments based on Chiquita statements	48
4.3.4.	Arguments relating to Mr [...]’s role, experience and character	50
5.	APPLICATION OF ARTICLE 101(1) OF THE TREATY	53
5.1.	Non-application of the EEA Agreement.....	53
5.2.	Jurisdiction.....	53
5.3.	Council Regulation No 26	53
5.4.	Application of Article 101(1) of the Treaty.....	54
5.4.1.	Article 101(1) of the Treaty	54
5.4.2.	The nature of the infringement	54
5.4.2.1.	Agreements and concerted practices.....	54
	Principles.....	54
	Application in this case.....	56
	Assessment of Pacific's arguments.....	58
5.4.2.2.	Single and continuous infringement	60
	Principles.....	60
	Application in this case.....	62
	Assessment of Pacific's arguments.....	63
5.4.3.	Restriction of competition	65
5.4.4.	Effect upon trade between Members States.....	68
5.5.	Procedural arguments of the parties	69
5.5.1.	Claims relating to the Commission's investigation	69

5.5.2.	Access to file claims	72
5.5.3.	Legal professional privilege claims	73
5.6.	Application of Article 101(3) of the Treaty	75
6.	ADDRESSEES	75
6.1.	General principles	75
6.2.	Liability in this case	77
6.2.1.	Chiquita	77
6.2.2.	Pacific	81
6.2.3.	Conclusion	86
7.	DURATION OF THE INFRINGEMENT	86
8.	REMEDIES	87
8.1.	Article 7 of Regulation (EC) No 1/2003	87
8.2.	Article 23(2) of Regulation (EC) No 1/2003	88
8.3.	Calculation of the fines	88
8.3.1.	Methodology for setting the amount of the fine	88
8.3.2.	The value of sales	89
8.3.3.	Determination of the basic amount of the fine	90
8.3.3.1.	Gravity	90
	Nature	90
	Combined market share	91
	Geographic scope	92
	Implementation	92
	Conclusion on gravity	92
8.3.3.2.	Duration	92
8.3.4.	The percentage to be applied for the additional amount	92
8.3.5.	Calculation and conclusion on basic amounts	92
8.4.	Adjustments to the basic amounts of the fine	93
8.4.1.	Aggravating circumstances	93
8.4.2.	Mitigating circumstances	93
8.4.3.	Conclusion on adjustments of the basic amounts	94
8.4.4.	Deterrence	94

8.4.5.	Application of the 10% turnover limit.....	94
8.5.	Application of the Leniency Notice.....	94
8.6.	Conclusion: final amount of individual fines	96

COMMISSION DECISION

of 12.10.2011

addressed to:

- Chiquita Brands International, Inc.
- Chiquita Banana Company BV
- Chiquita Italia SpA
- FSL Holdings NV
- Firma Leon Van Parys NV
- Pacific Fruit Company Italy SpA

relating to a proceeding under Article 101 of the Treaty on the Functioning of the
European Union
(COMP/39482 – Exotic Fruit (Bananas))

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 10 December 2009 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 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,

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU" or "Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

² OJ L 123, 27.4.2004, p. 18.

³ OJ.

Whereas:

1. INTRODUCTION

- (1) This Decision relates to a cartel in the import, marketing and sales of bananas in Greece, Italy and Portugal.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

- (2) The product subject to the proceedings is bananas (fresh fruit). Both un-ripened (green) bananas and ripened (yellow) bananas are covered by this Decision.
- (3) Bananas are considered to be a 52-week product, traded on a week-to-week basis, the demand for which somewhat varies seasonally (for example, higher demand in the first half of the year and lower demand in the warm summer months).⁵ Bananas can be sold branded or unbranded and can originate from domestic production within the Union, from ACP⁶ countries or from non-ACP countries.⁷ Non-ACP bananas are mostly imported to the Union from the Caribbean region, Central and South America as well as from some African countries. They are carried in refrigerated ships to European ports.

2.2. The market players

2.2.1. Undertakings subject to these proceedings

- (4) The undertakings to which this Decision is addressed are hereinafter collectively referred to as "the parties" or "the addressees".

2.2.1.1. Chiquita

- (5) 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 second brand is Consul) in over 60 countries. The company is one of the largest banana producers in the world and the largest supplier of bananas in Europe. Chiquita's total turnover in 2008 amounted to EUR 2 455 million⁸ worldwide.⁹

⁴ OJ.

⁵ See, for example, ID 2043, p. 5-6 (Chiquita's reply to the 1st request for information).

⁶ The African, Caribbean and Pacific group of third countries which are signatories to the Cotonou Agreement.

⁷ See, for example, the 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 and recital (26).

⁸ Chiquita had sales of USD 3 609 million in 2008 (<http://phx.corporate-ir.net/phoenix.zhtml?c=119836&p=irol-newsArticle&ID=1258329&highlight=>) (Dollar figures are converted to EUR using the average exchange rate of the European Central Bank for 2008: EUR 1 = USD 1.4708).

⁹ See <http://www.chiquita.com>.

- (6) Chiquita Brands International, Inc. (CBII) is the ultimate parent company of the group and it is publicly listed on the New York Stock Exchange. The Chiquita group is involved in sales and marketing of bananas in Europe via several wholly owned subsidiaries. In the Southern European region these were during the period of the infringement (at least from 28 July 2004 until marketing week 15 of 2005) Chiquita Italia SpA, Alpha Fruit Hellas SA and since 2006 Chiquita Portugal. CBII owns Chiquita Banana Company BV - which is active in the sale and distribution of bananas in Europe - via Chiquita Brands LLC,¹⁰ an operating company which conducts the Chiquita branded fresh and processed food business through its subsidiaries.¹¹
- (7) According to Chiquita, the ultimate responsibility for the banana business in the Southern European region¹² lies with [...], who is the [...].¹³
- (8) Chiquita submits that volumes imported follow an annual plan which is proposed by Mr [...]. On top of that, [...] was given the responsibility to distribute differently than established in the annual business plan between the countries along a shipping route. If for example, the market situation in Italy was problematic, he could decide to try to sell more in Portugal or Greece.¹⁴
- (9) As regards Italy, Chiquita Italia SpA¹⁵ is the company via which Chiquita is operating in the Italian business. [...] has been the [...] since 2002¹⁶ and [...] has been [...] and [...] since 2000 (see recital (12)). As [...] he was responsible for the weekly sales to Italian customers and recommended the weekly price to be finally decided by [...]. As [...] he had supervisory responsibility for the sales, that is to say, calling and negotiating with customers, weekly volumes and prices in Italy and Portugal.¹⁷ [...] reported to [...].¹⁸
- (10) As regards the Greek business, until 2006 Chiquita operated via Alpha Fruit Hellas S.A.,¹⁹ which is currently in liquidation and, since 2006, has operated via Chiquita Hellas Anonimi Eteria Tropikon Ke Allon Frouton (Chiquita Hellas).²⁰ [...] was [...]

¹⁰ ID 1714, p. 2 (Chiquita's reply to the 2nd request for information, annex 1) and ID 1716, p. 5, 7, 8, 10 (Chiquita's reply to the 2nd request for information).

¹¹ ID 1716, p. 8 (Chiquita's reply to the 2nd request for information).

¹² The term Southern European region as used by Chiquita in this context contains the Mediterranean Member States (Italy, Portugal, Spain, Greece, Malta and Cyprus), see [...].

¹³ [...], ID 1732, p. 253, 254 ([...]'s interview). [...] started working for Chiquita from December 1989, holding different positions that can be found in the table in recital (12). [...]

¹⁴ [...]

¹⁵ Chiquita Italia SpA (Compagnia Italiana Della Frutta SpA) has been a 100% subsidiary of Chiquita Banana Company BV. Until 2002, Chiquita operated in the Italian market for other products than bananas, via Chiquita Packaged Goods Distributing Srl which was owned by Chiquita Banana Company BV (42%), Chiquita Italia SpA (50%) and Eurobrands, SRL (8%) (non-Chiquita entity), which later on was merged into Chiquita Italia SpA, see ID 1714 (Chiquita's reply to the 2nd request for information, annex 1) and ID 1716, p. 11 and 13 (Chiquita's reply to the 2nd request for information).

¹⁶ ID 1732, p. 253 ([...]'s interview).

¹⁷ [...]

¹⁸ [...]

¹⁹ Alpha Fruit Hellas SA has been a 100% subsidiary of Evanston Holdings, Inc. 100% of the shares in Evanston Holdings, Inc. have been held for the benefit of Chiquita Brands LLC, see ID 1716, p. 4-5, ID 1714 (Chiquita's reply to the 2nd request for information).

²⁰ Chiquita Hellas Anonimi Eteria Tropikon Ke Allon Frouton (Chiquita Hellas) is wholly owned by Chiquita Banana Company BV (99%) and Chiquita Italia SpA (<1%), see ID 1714 (Chiquita's reply to

of Alpha Fruit Hellas S.A. in 2004 and has been a [...] of Chiquita Hellas Anonimi Eteria Tropikon Ke Allon Frouton (Chiquita Hellas) since 2006. Chiquita submits that the pricing decision for the Greek market is taken between the [...] for Greece - who reports to [...] - and his colleagues in the Chiquita office in Athens.²¹

- (11) As regards Portugal, Chiquita has operated via Chiquita Portugal Venda E Comercializaçao De Fruta, Unipessoal Lda (Chiquita Portugal) since 1 March 2006.²² During the period of the infringement, Chiquita operated on the Portuguese market via its exclusive agent [...].²³ [...] was involved in the pricing for Portugal in collaboration with the manager of the agent, [...], and as a [...] he was ultimately responsible for the banana business in the Portuguese market.²⁴
- (12) The representatives of Chiquita in the meetings or contacts described in Chapter 4 as well as key personnel reporting to them were the following:

NAME	COMPANY	POSITION	PERIOD
[...] ²⁵		[...]	[...]
	Chiquita Italia	[...]	[...]
	Chiquita Portugal	[...]	[...]
	Alpha Fruit Hellas	[...]	[...]
	Chiquita Hellas	[...]	[...]
	Chiquita Portugal Venda E Comercializaçao De Fruta, Unipessoal Lda	[...]	[...]
[...] ²⁶	Chiquita Italia	[...]	[...]
[...] ²⁷	Chiquita Portugal	[...]	[...]

the 2nd request for information, annex 1) and ID 1716, p. 9 (Chiquita's reply to the 2nd request for information).

²¹ [...]

²² ID 1726, p. 3 (Chiquita's reply to the 4th request for information).

²³ [...], ID 2043, p. 5 (Chiquita's reply to the 1st request for information), ID 1717, p. 4 (Chiquita's reply to 3rd RFI), ID 1314 ([...]'s reply to the request for information), ID 1131 (non-confidential version at ID 2037) (Chiquita – [...] Agency Agreement). Where (as in this case) an agent works for the benefit of its principal, the agent may in principle be treated as an auxiliary organ forming an integral part of the principal's undertaking who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit within this undertaking. See Case T-66/99 Minoan Lines v Commission, [2003] ECR p. II-5515, at paragraphs 98-151 and Commission Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 1, points 12 et seq.

²⁴ [...], ID 2043, p. 5, 17 (Chiquita's reply to the 1st request for information), ID 1314 ([...]'s reply to the request for information), see also recital (48).

²⁵ [...], [...], ID 1732, p. 253-254 ([...]'s interview), ID 1716, p. 9, 13 (Chiquita's reply to the 2nd request for information), ID 1719, p. 4, 9, 13 (Chiquita's reply to 4th request for information).

²⁶ [...].

[...] ²⁸		[...]	[...]
	Chiquita Hellas	[...]	[...]
[...] ²⁹		[...]	[...]

- (13) The entities of the Chiquita group involved in the banana business in Europe are hereinafter jointly referred to as "Chiquita".

2.2.1.2. Pacific

- (14) The company Firma Leon Van Parys NV (LVP) together with its subsidiaries carries out the import and sales of Bonita branded bananas in Europe. In Italy, Greece and Portugal, LVP operates via its wholly owned subsidiary Pacific Fruit Italy SpA (PFCI). LVP is owned by FSL Holdings NV (Belgium) (100 % shareholding minus one share) and by FSL Finance BV (Netherlands; 1 share). Those two companies are owned by TW Trading BV (Netherlands) [...], which is in turn owned by Transworld Trading NV (Netherlands Antilles).³⁰
- (15) LVP, PFCI and the entities belonging to the same group and involved in the banana business in Europe are hereinafter jointly referred to as "Pacific", "Pacific Fruit", "Bonita" or "Noboa", depending on the source of information.
- (16) The Bonita brand is owned by the Noboa Group. The Noboa Group (Corporación Noboa in Spanish) consists of around 110 companies and is the largest conglomerate in Ecuador. The group is involved, among other activities, in agriculture, banking, mining and sea transport. Its banana division, Exportadora Bananera Noboa S.A., is one of the largest banana exporters to the European market.³¹
- (17) The term Noboa Group or Corporation Noboa does not refer to a distinct entity or actually registered company. These are collective terms which identify all the companies gathered in the group. The corporate structure and ultimate parent company of the group are not reliably identifiable from public sources³². Pacific maintains that it does not have information available on the corporate structure above Transworld Trading NV.³³

²⁷ [...].

²⁸ [...], ID 1716, p. 9 (Chiquita's reply to the 2nd request for information), ID 1719, p. 9 (Chiquita's reply to 4th request for information).

²⁹ [...].

³⁰ See recital (283). ID 1919, p 1 (Pacific's reply to the 8th request for information).

³¹ See <http://bananalink.org.uk>; see also ID 1759, p. 16-18, ID 1792, p. 2-3, ID 1793 (Pacific inspection document) where it is mentioned that "Noboa (E.B.N.S.A)" which stands for Exportadora Bananera Noboa SA exports Bonita branded bananas.

³² According to the judgments of 16 May 2001 and 21 November 2002 of the United Kingdom High Court of Justice, Queens Bench Division, Commercial Court in case *Maria Elena De Molestina and others v. Alvaro Noboa Ponton and others*, a company named Fruit Shippers Ltd. (FSL) was established by the late Louis Noboa as the holding company for the businesses he controlled outside Ecuador (ID 1204, p. 1-56.). See also Forbes magazine (17 March 2003; <http://www.forbes.com>).

³³ ID 1900, p. 4 (Pacific's reply to the 6th request for information), ID 1934, p. 1 (Pacific's reply to the 9th request for information).

- (18) [...] was the [...] of PFCI from [...] until [...]. During the period of the infringement, [...] was [...] of LVP and [...] of PFCI.³⁴ During the period of the infringement, Mr [...] was PFCI's [...] for Italy, Mr [...] PFCI's [...] for, amongst other countries, Portugal and (until May 2005) for Greece. As of June 2005, Mr [...] took over the responsibility for Greece from Mr [...] whose assistant he had been prior to that date.³⁵

2.2.2. *Other market players*

- (19) In addition to the addressees of this Decision, there are other undertakings which have had significant banana sales in the Southern European region. These include major importers of bananas such as [...] and the [...] group. Other market players are smaller importers, independent ripeners, wholesalers and retailers of bananas.
- (20) [...] is the parent company of the [...] Group, which produces and markets fresh fruit and fresh vegetables and markets packaged and frozen fruit. It sells and markets bananas in the Southern European region via subsidiaries in Italy, Greece and Portugal.³⁶
- (21) [...] is a distributor for the [...] Group in Southern Europe. The [...] Group is a vertically integrated producer, marketer and distributor of fresh and fresh-cut fruit and vegetables, as well as a producer and distributor of prepared fruit and vegetables, juices, beverages, snacks, and desserts.³⁷ [...] is controlled by the vertically integrated [...] which also owns large ripeners and marketers of bananas (for example, [...] in Italy, [...] in Portugal and [...] in Greece) in the Southern European region.³⁸

2.3. **Description of the Industry**

2.3.1. *The supply*

- (22) The size of the banana business in Italy, Portugal and Greece is estimated to have been around EUR 525 million in 2004 and 2005.³⁹ Chiquita's market shares are estimated to have been around 40% in 2004 and 2005 in Italy, above 20% in 2004 and around 30% in 2005 in Portugal, and around 50% in 2004 and 2005 in Greece. Pacific's market shares are estimated to have been around 10% in 2004 and 2005 in Italy, around 10 % in 2004 and 2005 in Portugal, and around 15-20% in 2004 and around 10% in 2005 in Greece. In 2004 and 2005, [...] and [...] had a share of approximately 35-40% in the Italian business, approximately 45% in the Portuguese

³⁴ See e.g. ID 1859, p. 1 (Pacific's reply to the 3rd request for information), ID 1841, p 4 (Pacific's reply to the 1st request for information), ID 1073 (annex to Pacific's reply to the 6th request for information), see also section 6.2.

³⁵ See recital (289).

³⁶ ID 1588, p. 2-4 ([...]'s reply to the 2nd request for information). Any reference in this Decision made to [...] or the [...] Group refers to [...], as well as its directly or indirectly controlled subsidiaries active in the banana business in the Southern European region.

³⁷ For the scope of [...]'s business activities see <http://www.freshdelmonte.com/ourcompany/companyoverview.aspx>.

³⁸ ID 1498 ([...]'s reply to the 4th request for information). Any reference in this Decision made to [...] can refer to [...]and/or the [...] Group as a whole.

³⁹ ID 1704, 1705 (Chiquita's reply to the 2nd request for information), ID 1588, p. 13-15 ([...]'s reply to the 2nd request for information), ID 1910, p. 8 (Pacific's reply to the 7th request for information).

business and approximately 30-40% in the Greek business. Third parties other than these big four multinationals had a significant share in the business only in Portugal (approximately 25%).⁴⁰

- (23) The banana business operates in regular, time related cycles. Bananas are imported into Europe from the tropics. Bananas are harvested green (unripe) and once cut from the plant, they irreversibly start aging. Due to their perishable nature they are transported in refrigerated vessels. Banana shipping to Europe from Latin American ports takes approximately two weeks. Bananas shipped to Southern European ports mainly arrive weekly or every two weeks, according to regular shipping schedules. As each vessel has to return to the tropics after 6 to 7 weeks, each major banana importer operates a shuttle service which consists of several rotating vessels. Shuttle services to Europe serve either Northern Europe or the Mediterranean.⁴¹
- (24) There may also be trading volumes arriving in the Southern European region on vessels without pre-established regular schedules. To import bananas to the Southern European region the parties mainly use Southern European ports like Genova, Salerno, Vado Ligure, Civitavecchia (Italy), Aegion (Greece), Valencia, Marin (Spain) or Setubal (Portugal).⁴²
- (25) 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 ripened, and then delivered approximately a week later (yellow bananas). The yellow price is the price for ripened bananas, whereas the green price is the price for un-ripened bananas.⁴³ The trading to sell each week's deliveries must be concluded quickly since there is no easy or cheap way of correcting significant oversupply or mitigating any significant supply shortage.
- (26) Banana importers sell bananas to different types of customers: wholesalers, ripeners, supermarkets and other retailers. The banana trade operates on a weekly basis.⁴⁴ In principle, bananas can be sold as branded or unbranded⁴⁵ bananas.

⁴⁰ ID 1706, 1707 (annexes to Chiquita's reply to the 2nd request for information), ID 1910, p. 6-8 (Pacific's reply to the 7th request for information), ID 2029, ID 2033 (annexes to Chiquita's reply to the 1st request for information). ID 1893, p. 1, 2 (Pacific resubmitted inspection document), ID 1754, p. 2 (Mr [...]s explanations) and ID 2013, p. 19 (Chiquita inspection documents), however, indicate that Pacific's market share in Italy was higher (in the area of ca 15%).

⁴¹ See, for example, [...], ID 1732, p. 253-254 (interview with Mr [...]), ID 1919, p 2 (Pacific's reply to the 8th request for information), ID 1587, p. 4-5 ([...]s reply to the 2nd request for information), ID 1499 ([...]s reply to the 4th request for information).

⁴² [...], ID 1732, p. 256 (interview with Mr [...]), ID 1740 (Chiquita's reply to the 3rd point 11 letter), ID 1919, p 2 (Pacific's reply to the 8th request for information), ID 1060, p. 75 (Transferred transcript 13).

⁴³ See for example ID 1898, p. 5-6 (Pacific's reply to the 5th request for information), [...] and recital (34).

⁴⁴ A marketing week is a period of time during which a weekly price is applicable (recital 111 of Chiquita's reply to the Statement of Objections). A marketing week therefore does not necessarily fully coincide with a calendar week and it does not necessarily refer to the same period of time in Greece, Portugal and Italy, respectively. Chiquita's marketing week usually started on Monday for Italy, on Thursday for Greece and a few days prior to the arrival of the vessel in Portugal, see recitals (43) et seq.

⁴⁵ ID 1910, p. 10 (Pacific's reply to the 6th request for information) refers to "unbranded bananas" as private label sales under supermarket brands.

2.3.1.1. Banana brands in the Southern European region

- (27) As regards branded bananas, the banana business generally distinguishes three "tiers" of banana brands: premium "Chiquita" brand bananas for which importers can achieve the highest price, second-tier bananas ("[...] and [...] branded bananas) and third-brand bananas (so called "thirds" which includes a number of other banana brands, in particular the "Bonita" brand or Chiquita's "Consul" brand). This brand-division is reflected in the banana pricing.
- (28) In Italy, Chiquita obtained the highest price for its bananas marketed with its "Chiquita" brand, followed by bananas traded under "[...]" and "[...]" brands; the thirds like Pacific's "Bonita" were at the lower end of the scale.⁴⁶ During the period of the infringement, Chiquita also obtained the highest price in Greece followed by [...] and, as thirds, [...] and Pacific.⁴⁷ For Portugal, [...] branded bananas formed the first tier with the highest price and Chiquita the second tier, followed by [...] and Pacific.⁴⁸
- (29) The banana business uses so called "T1" and "T2" prices. T1 prices are prices for bananas which are "duty unpaid" (in terms of customs and the licence), T2 prices are prices for bananas that are "duty paid".⁴⁹
- (30) Pacific submits that it sold only Bonita branded bananas in Italy, Portugal and Greece during the period of the infringement.⁵⁰ Chiquita states that it sold Chiquita and Consul branded bananas in Italy, Portugal and Greece during the relevant period and that they did not have unbranded sales.⁵¹ Therefore, it is concluded that there were no sales by the parties under brands other than Chiquita, Consul and Bonita and that they did not have "unbranded" sales during the relevant period in those Member States.

2.3.1.2. The two layers of the business in Southern Europe

- (31) The banana business in Italy, Greece and Portugal operated in two layers: on the "green" level, where green selling importers sold unripened bananas to ripeners and wholesalers who themselves took care of the ripening for the following week(s), and on the "yellow" level, where ripeners as well as yellow selling importers and wholesalers who themselves had taken care of the ripening during the previous

⁴⁶ ID 1717, p. 7 (Chiquita's reply to the 3rd request for information). See also [...] or ID 1650, p. 12 (Annex to Chiquita's submission of 13 October 2009), ID 1919, p. 5 (Pacific's reply to the 8th request for information), similar ID 1501 ([...]'s reply to the 4th request for information). This was also confirmed by Italian customers, ID 1638, p. 6.

⁴⁷ ID 1717, p. 7 (Chiquita's reply to the 3rd request for information), similar ID 1501 ([...]'s reply to the 4th request for information), ID 1919, p. 5 (Pacific's reply to the 8th request for information).

⁴⁸ ID 1717, p. 6-7 (Chiquita's reply to the 3rd request for information), similar ID 1501 ([...]'s reply to the 4th request for information), ID 1919, p. 5-6 (Pacific's reply to the 8th request for information).

⁴⁹ Pacific submits that a T1 sale is made on the basis of the customer's licence, T2 sales are sales on the basis of the importer's licence (ID 1859, p. 12, Pacific's reply to 3rd request for information). See also ID 2043, p 9 (Chiquita's reply to the 1st request for information) and ID 1587, p 11-14 ([...]'s consolidated reply to the 2nd request for information), ID 1754, p. 2 (Mr [...]'s explanations).

⁵⁰ ID 1910, p. 9-10 (Pacific's reply to the 6th request for information).

⁵¹ ID 1716, p. 16 (Chiquita's supplementary reply to the 2nd request for information) and 1715 (annex thereto).

week(s) sold ripened bananas one (or maximum two) week(s) later to wholesalers, supermarkets or retailers.

- (32) Chiquita and Pacific sold almost exclusively green bananas in the Southern European region during the period of the infringement [...] sold during that period only green bananas in Greece and Portugal⁵², whereas in Italy around two thirds of its sales were yellow bananas and one third was green bananas.⁵³ In the Southern European region, [...] and the entities of the [...] Group controlling ripening facilities sold a little less than two thirds of their bananas yellow, the rest was sold green.⁵⁴
- (33) The "yellow" banana price on the "yellow" level consisted of the "green" banana price of the "green" level which had been set one (or sometimes two) week(s) before plus the margin charged for the services of ripening and other cost factors. In other parts of the Union this margin was more standardised. In the Southern European region, however, this margin was not at all uniform and, therefore, there was less correlation between prices for yellow and green bananas in that region".
- (34) Chiquita and Pacific explain that while the ripeners in Northern Europe are pure service providers that do not bear substantial commercial risks of the product, the ripeners in the Southern European region are independent distributors buying and selling the fruit and thereby trying to get the best possible deal to maximise their profits, resulting in less uniform costs. Moreover, ripeners could decide to keep the fruit longer in the ripening facilities and sell the fruit at a later stage if they consider that the market will go up the following week. According to Chiquita the market for yellow bananas 1 or 2 weeks later would not always have been able to follow the price movement of the green banana market.⁵⁵ According to Pacific the ripening fee agreed with the ripener was not fixed and varied normally between EUR [1-2] and [3-4].⁵⁶ [...] confirms this view for Italy and declares that the prices of yellow bananas were not calculated by reference to the price of green bananas, but were set independently on the basis of demand and supply of yellow bananas.⁵⁷ [...] submits that it is not aware of any stable relationship between green and yellow banana prices in the Southern European region.⁵⁸
- (35) This assessment is also confirmed by an internal memorandum found during the inspections at the premises of Chiquita Italia.⁵⁹ According to Chiquita, it was drawn up by [...] for Mr [...] and relates to an analysis of the Italian banana business shortly after the end of the licensing regime (that is to say, some time after 1 January 2006).⁶⁰ In particular, the memorandum observes that "[c]oncerning its own

⁵² For Portugal this changed in 2006.

⁵³ ID 1588, p. 10-11 ([...]'s reply to the 2nd request for information), ID 1588, p. 19-21 (annexes thereto).

⁵⁴ ID 1508, p. 3 (annex to [...]'s reply to the 4th request for information).

⁵⁵ ID 1717, p. 8 (Chiquita's reply to the 3rd request for information). See also Pacific's reply to the SO, p. 8.

⁵⁶ ID 1919, p. 7 (Pacific's reply to the 8th request for information), see also ID 1754, p. 2 (Mr [...]'s explanations).

⁵⁷ ID 1588, p. 9 ([...]'s reply to the 2nd request for information).

⁵⁸ ID 1506 ([...]'s reply to the 4th request for information)

⁵⁹ ID 2014, p. 5-6 (Chiquita inspection document AKe2).

⁶⁰ It is clear from the text that it was drawn up shortly after the end of the old licensing regime (that is to say, 31 December 2005). See also [...] and ID 1650, p. 2 (Chiquita's submission of 13 October 2009), where Chiquita states that the memorandum was written in 2006. As to the authorship, see also the

*structure, the Italian market has the approach, at least on the level of traditional importers, that it sees amongst Chiquita, Bonita, [...] and [...] the first two similar and complementary between themselves and anchored to a 'traditional vision' of the relationship with the market and, therefore, they would pursue supplying 'independent ripening' which in a way opposes to the dependent one of the other two residual importers, that is to say [...] and [...]. The dependent ripening thus defined already markets almost in its totality the bananas imported by the respective importers of reference with some exceptions..., in any event, they hold approximately 40-45 % of the market.'*⁶¹

- (36) In Italy, Greece and Portugal, Chiquita was selling during the period of the infringement almost exclusively green bananas to ripeners.⁶² Chiquita submits that it did not control any ripening facilities in Greece or Portugal during the relevant period. In Italy, Chiquita rented space in a ripening facility in Bologna whose capacity of approximately 150 000 boxes/year (which is less than 2% of the total imports) was completely sold to the open wholesale market.⁶³
- (37) During the period 2003-2006, Pacific sold only green bananas to wholesalers and ripeners in Greece and Portugal. As regards Italy, the vast majority of Pacific's bananas were sold green to wholesalers and ripeners.⁶⁴ Pacific is not vertically integrated and does not control any ripening capacity in Italy, Greece or Portugal.⁶⁵
- (38) In addition to its green sales, Pacific had very limited yellow sales to supermarkets (2-3% under the licensing regime, approximately 10% after liberalisation) in Italy. The contractual relationship between Pacific and those customers is governed by annual agreements covering the general terms and conditions of supply of bananas (quality, terms of delivery, rebates). These contracts do not normally specify any volumes or prices. The yellow price is determined weekly on Fridays on the basis of a negotiation by telephone between Pacific Fruit Italy and the respective supermarket and relate to the bananas to be supplied during the following week. The price agreed on Friday takes effect the following Monday and typically remains unchanged for the entire week. Pacific organises the ripening via independent ripeners. The customers do not commit to a volume for the following week, but, instead, inform the ripener on a daily basis of the volumes to be delivered the following day. Pacific bears the risk of delivery of sufficient volumes on any given day. At the end of each week,

written declaration signed by Mr [...] (ID 1650, p. 5 (annex to Chiquita's submission of 13 October 2009)).

⁶¹ [Italian Original: "Nella propria struttura il mercato italiano ha un'impostazione, almeno a livello di importatori tradizionali, che tra Chiquita, Bonita [...] e [...] vede le prime due simili e complementari tra loro e ancorate ad una 'visione tradizionale' del rapporto con il mercato e quindi sarebbero deputate a fornire la 'maturazione indipendente' che in qualche maniera si contrappone a quella dipendente dai due importatori residui e cioè [...] e [...]. La così definita maturazione dipendente ormai commercializza quasi totalmente le banane importate dai rispettivi importatori di riferimento salvo alcune eccezioni ..., in ogni caso, detiene approssimativamente in 40-45 % del mercato."]

⁶² ID 2043, p. 2 (Chiquita's reply to the 1st request for information), ID 1732, p. 257-258 (Interview with Mr [...] of Chiquita during the inspection). See also ID 2021, p. 43 (Chiquita inspection documents).

⁶³ ID 2043, p. 11 (Chiquita's reply to the 1st request for information).

⁶⁴ ID 1898, p. 5 and 7 (Pacific's reply to the 5th request for information), ID 1732, p. 256 (Interview with Mr [...] of Chiquita during the inspection).

⁶⁵ ID 1898, p. 2 (Pacific's reply to the 5th request for information).

Pacific invoices the weekly quantities to the supermarkets. There are no contractual arrangements between the ripener and the supermarket.⁶⁶

- (39) In relation to the supply of green bananas, neither Chiquita nor Pacific have any long term contractual arrangements or framework contracts with wholesalers and ripeners in Italy, Greece or Portugal. According to Chiquita, it has only oral agreements covering the supply of green bananas in the forthcoming week.⁶⁷

2.3.1.3. Pricing

- (40) Chiquita's green price is set per box (of 18.8 kg net) on a "free on truck" basis.⁶⁸ Chiquita submits that important elements for pricing in the Southern European region were Chiquita's own stock information about sales in the preceding weeks and information from its customers and their perception of the market. It further states that the Northern European Aldi price, which was set on Thursdays, and the Chiquita internal pricing call on Thursday mornings were important benchmarks.⁶⁹
- (41) Pacific's green price is set per box (of 18.14 kg) and includes the cost of fruit and shipping, duties, insurance, unloading of the ship, storage and loading of the trucks. The level of the price depends on general market conditions and factors like the weather, the price achieved in the previous weeks or market information received from customers. In Italy and Portugal, factors such as volumes previously purchased or the customer's distance to the port of discharge are also taken into account. Decisive factors in Portugal are also the Spanish banana price and the availability of bananas from the Canary Islands.⁷⁰
- (42) If in this Decision reference is made to the "price" without any further specification, this means the green T2 price (before rebates and discounts) for the first brand of the respective party (that is to say, Chiquita or Bonita).⁷¹

2.3.1.4. Negotiations with customers in Italy⁷²

- (43) Chiquita states that, in Italy, Mr [...] and Mr [...] usually set the initial price to be offered to customers on Monday mornings, roughly between 8.30 and 9.00 a.m. There were also weeks in which that decision was postponed to a later time in the day. Shortly thereafter, sales employees of Chiquita Italy would call customers to communicate the price and available quantities. Chiquita was not willing to negotiate its initial price, in particular during the first half of the year. During the second half of the year, Chiquita was more open to granting discounts of typically EUR 0.50/box

⁶⁶ ID 1898, p. 5-6 (Pacific's reply to the 5th request for information).

⁶⁷ ID 2043, p. 3 (Chiquita's reply to the 1st request for information), ID 1898, p. 7 (Pacific's reply to the 5th request for information).

⁶⁸ ID 2043, p. 8 (Chiquita's reply to the 1st request for information), see also ID 1314 ([...]'s reply to the request for information) which confirms "free on truck ex quay" for Portugal prior to 2006. ID 1726, p. 4 (Chiquita's reply to the 4th request for information).

⁶⁹ ID 2043, p. 6 (Chiquita's reply to the 1st request for information).

⁷⁰ ID 1898, p. 10-11 (Pacific's reply to the 5th request for information).

⁷¹ Chiquita calls the price before individual rebates and discounts "initial price", see recitals (43) et seq. below, for Pacific, in particular recital (45).

⁷² In principle, the addressee's submissions were confirmed by the Italian customers, ID 1638, p. 1-6 (summary of the replies to the request for information to Italian customers).

in particular for higher volumes. In Italy the vessel would usually arrive on Monday.⁷³ On Tuesdays and Wednesdays, the communications with customers continued before a final agreement was reached. In most weeks Chiquita did not change its initial price once it had been set and communicated to customers. If, in exceptional weeks, Chiquita amended its initial price, this did not take place before Wednesday. A reason for changes in the price was weak demand. Between Thursday and Saturday, Chiquita contacted the customers' haulage companies to pick up and transport the ordered quantities to the respective customer. Invoices were sent to customers between 3 to 7 days after delivery. Exceptionally, Chiquita would agree to modify the actual selling price when a customer was willing to take additional volumes.⁷⁴

- (44) In Italy, Pacific states that it negotiated sales and would sell green bananas throughout the week. 60 to 80% of sales took place from Monday at around 10 a.m. to Wednesday, the rest was sold between Thursday and Saturday. Pacific sold bananas from its stock in the port of Salerno. Sales were negotiated and executed six days per week and Mr [...] was "more often" indicating a price as a starting point for negotiations with customers. According to Pacific, the pricing decision was taken by Mr [...] on the spot. The price charged by Pacific typically varied by around EUR 1-1.50 in the same week depending on the specific situation of the customer. Sales are made on a spot basis and generally each telephone conversation constitutes a separate negotiation with the customer.⁷⁵ However, contrary to Pacific's submissions evidence on the file shows that [...] was also involved in the decisions on pricing or volumes.⁷⁶
- (45) Pacific submits that it did not set any price that was used as a starting point for negotiations with customers for Italy, Portugal or Greece.⁷⁷ This is, however, clearly contradicted by the explanations given by the responsible sales person, Mr [...], during the inspections at PFCI who stated that *"[t]he price is determined weekly: on Monday the 'green' and on the Thursday of the week before for the 'yellow' ... The same timing is applied by ... Chiquita, [...] and [...]. The estimated price (which can be modified during the week in relation to the demand) is immediately communicated by Dr [...] to LVP in Antwerp (in the person of [...]), similarly to the estimated volumes to be sold. Such a price represents an average of the price of 'green' and of*

⁷³ ID 1732, p. 257 (interview with Mr [...]).

⁷⁴ ID 2043, p. 3-4, 6, 8 (Chiquita's reply to the 1st request for information) See also ID 1650, p. 12 (Annex to Chiquita's submission of 13 October 2009): in that written statement signed by Mr [...] he moreover states that the final setting of the Chiquita price could take place *"in the course of the later morning"*.

⁷⁵ ID 1859, p. 12 (Pacific's reply to the 3rd request for information), ID 1898, p. 8-10 (Pacific's reply to the 5th request for information).

⁷⁶ For example see 1981, p. 4, 7, 31-32, 34, 39, 47, 51 (GdF documents). ID 1731, p. 118 (annex to Chiquita's Oral Statement 1) and the e-mail of 11 April 2005, section 4.2.5 below. A series of Pacific inspection documents also evidence Mr [...]s involvement in the decision making on prices and volumes and reporting to and from PFCI's parent companies (for example, ID 1761, p. 16-18, 46, 68, 84, 106 and 143; ID 1765, p. 5; ID 1766, p.2; ID 1770, p. 11; ID 1773, p. 9-13 and ID 1774, p. 3). Moreover, as "amministratore delegato" Mr [...] had wide powers including the right to represent the company externally, conclude contracts and hire or fire employees, ID 1919, p. 7 (Pacific's reply to the 8th request for information), see also ID 1920, p. 8-10 (extract of the Italian Company Register).

⁷⁷ ID 1849, p. 8, and ID 1859, p. 11 (Pacific's replies to the 2nd and 3rd request for information).

'yellow'." ⁷⁸ Moreover, Pacific submits that it collected "estimates of its average transaction prices for the following week" for the Southern European region on Mondays. ⁷⁹

2.3.1.5. Negotiations with customers in Greece and Portugal⁸⁰

- (46) For Greece, Chiquita's initial pricing decision was made by its Greek country manager on Thursday afternoon after the Chiquita internal European wide pricing call on Thursday morning. The initial price was communicated to customers on Thursday afternoon or Friday morning. Negotiations with the customers continued until Friday 4 p.m. Between 4 p.m. and 5.30 p.m. on Friday, Chiquita had to pass on the information about the quantity to be discharged to its port agent. Chiquita Greece tried to pre-sell all of its volume. The vessel normally arrived in Greece on Monday. Subsequently, the customers picked up the agreed quantities at the port. This actual selling price agreed was never modified. If Chiquita had excess fruit, which according to them happened infrequently during the summer months, it occasionally offered a revised price if a customer was willing to take additional volumes. ⁸¹
- (47) Pacific submits that Chiquita threatened customers in Greece with retaliation (such as refusals to supply) if the customer would start buying from Pacific. ⁸²
- (48) For Portugal, Chiquita submits that from approximately 2002 Chiquita's vessel arrivals in Portugal reached a certain, on average bi-weekly, frequency which subsequently further increased. Chiquita's vessels usually arrived in Portugal either late in the week (Fridays to Sundays) or early the following week (Mondays). On average 2-3 days in advance of the vessel's arrival, Mr [...] liaised with the agent, [...]. Contacts were initiated either by Mr [...] or Mr [...] of [...] depending who wanted to sell bananas in Portugal. Mr [...] provided Chiquita with information about the Portuguese market and gave his recommendations to Mr [...] who discussed and determined with the agent the price and the intended quantities to be discharged in Portugal at least 2 - 3 days prior to the arrival of the ship. The price and the volumes offered were subsequently "tested" in the market. Chiquita's ideas were simply accepted by the market or, on other occasions, Mr [...] came back with negative feedback from the customers either on the price or on the volume. Chiquita then decided whether or not to reduce the price to comply with the customers' demand. In approximately half of the weeks the original price remained unchanged. In the vast majority of the cases, the final price was decided 1 to 2 days prior to the vessel's arrival. There were also instances when Chiquita disagreed with the original price

⁷⁸ ID 1754, p. 2 (Mr [...]s explanations), [Italian original: "*Il prezzo è determinato settimanalmente: il lunedì il 'verde' e il giovedì precedente per il 'giallo' ... La stessa cadenza temporale è adottata [da] ... Chiquita, [...] e [...]. Il prezzo stimato (che può subire ritocchi nel corso della settimana in relazione alla domanda) viene comunicato immediatamente dal dott. [...] alla LVP ad Anversa (nella persona di [...]), analogamente ai volumi stimati per la vendita. Tale prezzo costituisce una media del prezzo del 'verde' e del 'giallo'.*"].

⁷⁹ ID 1934, p.5 (Pacific's reply to the 9th request for information).

⁸⁰ In principle, the addressee's submissions were confirmed by the Greek and Portuguese customers, ID 1636, p. 1-5, and ID 1639, p. 1-6 (summaries of the replies to the request for information to Greek and Portuguese customers).

⁸¹ ID 2043, p. 4, 6, 8 (Chiquita's reply to the 1st request for information).

⁸² ID 1859, p. 12 (Pacific's reply to the 3rd request for information), ID 1919, p. 6 (Pacific's reply to the 8th request for information).

proposals made by Mr [...] or was not satisfied with the reaction from the market. A few weeks per year, when the conditions were not attractive for Chiquita, it decided not to discharge in Portugal at all. According to Chiquita, the actual selling price, once agreed, was never modified.⁸³

- (49) In Portugal and Greece, Pacific only sells bananas when it has a vessel calling at the ports of Marin in Spain or Aegion in Greece, which usually happens every 15 days. The sales are made on a spot basis. Prices are agreed with the customers in those Member States over the telephone. Negotiations start approximately 10 days prior to the expected arrival of the vessel and deals are finalised by the time the vessel docks at the port. Pacific also submits that those discussions are "lengthy" and that Pacific does not have any price that is used as a starting point for negotiations with customers in those Member States as customers would first be asked to indicate the price level in the market. Only after having agreed on a price would the customer communicate their volume requirements.⁸⁴
- (50) In relation to Portugal, Pacific submits that until 2005 it jointly negotiated with two customers acting on behalf of a whole group of wholesalers/ripeners. In 2005 [...]. From 2006 Pacific [...]. During the whole period, Pacific also [...].⁸⁵

2.3.1.6. Other factors

- (51) In addition to the regulatory framework (see section 2.3.2), there was a degree of volume and price transparency⁸⁶ which included not only the importers but also intermediary service providers such as independent ripeners and wholesalers (also referred to as Radio Banana). The regular contacts between the importers, port agents and down-stream operators facilitated the flow of information.⁸⁷ Transparency was also enhanced by several sources of market intelligence, such as the well known private source Sopisco News. An issue of Sopisco News usually contained inter alia Italian, Spanish and Portuguese average prices of the current week (ex-post, in categories) and exact data on boxes exported from Latin American countries.⁸⁸ Pacific submits that statistical information about volumes loaded and the prices at

⁸³ ID 2043, p. 6, 8 (Chiquita's reply to the 1st request for information), ID 1717, p. 4 (Chiquita's reply to the 3rd request for information). See also ID 1314 ([...]'s reply to the request for information).

⁸⁴ ID 1859, p. 11-12 (Pacific's reply to the 3rd request for information), ID 1898, p. 8 (Pacific's reply to the 5th request for information).

⁸⁵ ID 1859, p. 11-12 (Pacific's reply to the 3rd request for information), ID 1898, p. 8-9 (Pacific's reply to the 5th request for information). Pacific's reply to the Statement of Objections, p. 20.

⁸⁶ Chiquita mentions as such sources, amongst others, Sopisco News, Japdeva (for weekly Costa Rican volumes), Corbana (Costa Rican volumes), Augura (Colombian weekly volumes), Asbama, Estadística (Ecuadorian volumes) and CIRAD, for details see ID 1060, p. 51-56 (Transferred Transcript 13). See also ID 1663, p. 1. Shipment data was, for example, also available from the ports of Lisbon and Setubal, ID 1662, p. 52-55 ([...]'s presentation of 15 January 2008). Chiquita, for example, kept statistics of the arrivals of its competitors (ID 1947, p. 10-13, annex to transferred transcript 1). For the volume and price data circulated within Pacific, see, for example, ID 1758, 1813, 1817, 1818, 1819, 1825 (Pacific inspection documents).

⁸⁷ As an example, an Italian port operator [...] circulated among different market participants (including, for example, Chiquita and Pacific) monthly reports on "competitive banana v[es]s[e]ls" containing data on arrivals of various importers' vessels and volumes in Southern Europe, thereby artificially increasing the transparency of the market (see ID 744).

⁸⁸ For examples of Sopisco News see ID 1947, p. 89-120.

source are published by various public/industry organisations or port authorities in Latin America⁸⁹.

- (52) In Northern Europe, the main importers set their banana quotation prices on Thursday mornings.⁹⁰ The Northern European quotation price does not, however, apply to the Southern European region.⁹¹ This Decision does not relate to the kind of quotation prices used by certain importers in the Northern European region.

2.3.2. *The regulatory framework*

- (53) During the time period concerned by this Decision, the import of bananas into the Union was regulated by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas⁹². From 1 July 1993 until 31 December 2005, 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.⁹³
- (54) Up to the end of 2005, three tariff quotas⁹⁴ applied⁹⁵. Under the so-called "A/B quota" ACP-bananas were duty free, while under that quota non-ACP bananas were subject to a tariff of EUR 75/tonne. A so-called "C-quota" was reserved for ACP bananas. In total the quotas made it possible to import 3 403 000 tonnes.⁹⁶ Both Chiquita and Pacific were registered as traditional operators A/B and were allocated A/B licences. Moreover, Chiquita was registered as traditional operator C and was allocated C licences.⁹⁷
- (55) Banana imports outside the quotas were subject to a customs duty of EUR 680/tonne and ACP bananas benefited from a tariff preference of EUR 300/tonne.

⁸⁹ Pacific's reply to the Statement of Objections, p. 25.

⁹⁰ On "quotation prices" and the "Northern European region" see the Commission's decision of 15 October 2008 in Case 39188 – Bananas, quoted at footnote 142.

⁹¹ [...], see also ID 1849, p. 8, and ID 1859, p. 11 (Pacific's replies to the 2nd and 3rd request for information) where Pacific declares that it did not set any initial reference price when it states that, for the period 2000-2005, it did not set any price that was used as a starting point for negotiations with customers for Italy, Portugal or Greece.

⁹² OJ L 47, 25.2.1993, p. 1. Repealed by Council Regulation (EC) No 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.

⁹³ See Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas, OJ L 316, 2.12.2005, p. 1.

⁹⁴ For details see the 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, p. 5 et seq.

⁹⁵ Under Regulation (EC) No 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.

⁹⁶ Special rules applied to accession countries: see Regulations (EC) No 838/2004 (OJ L 127, 29.4.2004, p. 52) and (EC) No 1892/2004 (OJ L 328, 30.10.2004, p. 50).

⁹⁷ ID 1717, p. 6 (Chiquita's reply to the 3rd request for information), ID 1919, p. 4 (Pacific's reply to the 8th request for information). In that reply, Pacific submitted that it had been registered as a traditional operator C with C licences, but then (ID 1351, 1352) Pacific "clarified" that this was not the case.

- (56) The large majority of the licensed quantities went to "traditional operators".⁹⁸ The reference quantity for each traditional operator was established on the basis of the average of its primary imports in previous years.⁹⁹
- (57) When submitting licence applications, operators had to lodge a security.¹⁰⁰ 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.¹⁰¹ Unused quantities covered by a given licence were allocated to the same operator upon application for 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. The security against a commitment to import on terms of the licence amounted to EUR 150/tonne.¹⁰² Bananas imported under licences could be freely distributed throughout all the Union.¹⁰³
- (58) In addition to their own licences, banana importers in effect purchased licences of other operators. Licence holders were entitled to transfer their licences pursuant to the applicable legal rules. In practice, importers largely used licences of other licence holders without a formal transfer of such licences.¹⁰⁴
- (59) In addition to Latin American and ACP bananas, there were certain quantities of Union-produced bananas for sale. In practice, the annual amount of Union-produced bananas was capped by the aid scheme which was in place to support Union production, mainly in French overseas departments and the Canary Islands. There was some domestic banana production in Greece and Portugal.¹⁰⁵

⁹⁸ The implementing Commission Regulation sets out provisions concerning so-called "non-traditional operators" (see Articles 6 et seq. of Regulation (EC) No 896/2001 of 7 May 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-37-38/02 *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.

⁹⁹ Until 1 July 2001 traditional operators received a single reference quantity for each year for imports of bananas from certain Latin American countries and/or ACP countries, 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 a single reference quantity for each year for imports of bananas from third countries or from ACP countries, respectively, 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. (For details, see Articles 3 et seq. and Articles 28 et seq. of Regulation (EC) No 896/2001, as amended, in particular by Regulation (EC) No 1439/2003). See also Case T-139/01 *Comafrika SpA et al v. Commission* [2002] ECR II-799, paragraphs 145 et seq.

¹⁰⁰ That is to say, a certain amount in EUR (ECU) per tonne of bananas, for details see Articles 8, 19 and 24 of Regulation (EC) No 896/2001.

¹⁰¹ For details see Articles 14 et seq. of Regulation (EC) No 896/2001.

¹⁰² See Article 8(1) of Commission Regulation (EC) No 896/2001.

¹⁰³ See Article 17 of Regulation 404/93.

¹⁰⁴ Article 20 of Regulation (EC) No 896/2001. See for example [...], ID 1060, p. 79, 85-86, 104-107, 110-115 (Transferred transcripts 15, 16, 17, 18), ID 1919, p. 4-5 (Pacific's reply to the 8th request for information), ID 1638, p. 7 (summary of Italian customer replies), ID 2021, p. 33 (Chiquita inspection documents).

¹⁰⁵ The Union's compensatory aid scheme applied to the production of bananas on Madeira and in the Azores, the Algarve, Crete and Lakonia; Portugal and Greece accounted for 3,4% of the Union

2.3.3. Flexibility of supply

- (60) As a result of the Community's banana import regime there was a certain increased transparency as regards allocated licences for the import of bananas into the Community. However, in spite of the legal regulation there were several factors which show that certain flexibility on the market existed with respect to volumes to be imported to the various Member States.
- (61) Firstly, licences were issued for the whole Community and were not limited to a particular Member State or particular brand. Licences could be used at any entry point in the Community.¹⁰⁶ Therefore, the total volume imported into any given Member State in any given year was neither predetermined by the allocation of licences to certain market participants active in that country, nor by the place of import into the Community.
- (62) Secondly, in addition to their own and purchased licences, banana importers "leased" licences of other operators by using licenses of other license holders without a formal transfer of such licenses.¹⁰⁷ Chiquita, and to a limited extent also Pacific, purchased licence entitlements from other operators¹⁰⁸.
- (63) Even though the trading of licences did not increase the overall volume of bananas imported into the Union, it enabled the market operators to increase their volume of bananas sold on the market in any Member State, optimise the cost structure, maintain the security of supplies and react to the fluctuations on the demand side of the market.
- (64) Thirdly, the importers were able (within certain limits) to speed up, slow down or to divert vessels transporting bananas¹⁰⁹ with a view to influence supply to certain regions within the Community. In an internal e-mail string of Pacific of 2 April 2004, Mr [...] stated that *"several ships believed to be going North have been diverted to the Med[iterranean] region... The reason is due to the price differential between the 2 markets..."*. The previous e-mail in that e-mail string from Mr [...] of Pacific to Mr [...] states that *"[t]he volume planned for the North is and will move south..."*¹¹⁰ Pacific submits that while small changes in the schedule are possible, it has diverted or redirected a vessel on rare occasions. This mostly occurs when the original port of

production of bananas in 2003 (96,6% being produced in Spain and France. For details see the 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, p. 3-4, 11.

¹⁰⁶ See e.g. ID 1900, p. 5 (Pacific's reply to the 6th request for information), where Pacific states that the country where it discharges bananas is not necessarily the country where it had imported the bananas and cleared the customs duties.

¹⁰⁷ See also recital (58). The traders use other arrangements without jeopardising their entitlements in the long run (they may sell/"lease" the right to use the license to a third party whereby the latter is allowed to sell bananas on behalf of the licence holder).

¹⁰⁸ See ID 1060, p. 78-79, ID 1919 (Pacific's reply to the 8th request for information), p. 4-5 and Pacific's reply to the SO, p. 11.

¹⁰⁹ ID 1919, p. 3 (Pacific's reply to the 8th request for information). [...]. In an internal e-mail of Pacific of 3 January 2001 from Mr [...] to, amongst others, Mr [...], it is stated that Pacific was trying hard to *"[turn] our ships around quickly and finishing charter vessels as soon as possible"*, ID 1893, p. 11 (Pacific document AJC 2).

¹¹⁰ ID 1766, p 2-3 (PFCI inspection document SDS9).

call is congested on the expected date of arrival.¹¹¹ Chiquita admitted that its vessels occasionally deviated from the port schedule and one of the reasons for such deviation might be the existence of a different market demand in the Mediterranean region¹¹². [...] and Pacific submit that it was possible to use both the service bound for Northern Europe and the Southern European service to supply Portugal with bananas.¹¹³

- (65) Also the replies to the Commission's requests for information addressed to ports and port authorities in Belgium, Germany, Greece, Italy, the Netherlands, Poland, Spain and Sweden show that vessels carrying bananas could be redirected and volumes shifted from one Union port to another. It was possible to leave out a port on a scheduled journey and to redirect a ship.¹¹⁴ Moreover, it is sufficient to inform the ports of calling about the arrival at short notice (that was sometimes only 24 hours in advance) or to decide upon the volumes to be unloaded at short notice.¹¹⁵ The Italian port agent [...] confirmed that diversions of ships happened several times and mentioned in this respect Chiquita and Pacific.¹¹⁶
- (66) While Chiquita states that its vessels usually follow a very tight port schedule of "core vessels" that, theoretically, does not leave any room for flexibility, it also states that it sometimes hired an "on-spot service", which adds to the flexibility in the volumes to be imported.¹¹⁷
- (67) There are also indications to suggest that vessels departing from the country of origin could be informed of the ports of destination only when they were well into their journey across the Atlantic, allowing the companies further flexibility in channelling their supplies to specific Member States.¹¹⁸ A certain degree of flexibility is also confirmed by the fact that bananas were transported to some neighbouring third countries through Italy or Greece.¹¹⁹ Pacific confirmed that the importers could sell their bananas inside the Union on the basis of T1 documentation to customers who could use their own licences to import bananas into the Union market. According to

¹¹¹ ID 1919, p. 3 (Pacific's reply to the 8th request for information), Pacific's reply to the Statement of Objections, p. 12.

¹¹² [...].

¹¹³ ID 1587, p. 6 ([...]'s reply to the 2nd request for information), Pacific's reply to the Statement of Objections, p. 16.

¹¹⁴ ID 705, p. 2 ([...] reply to a request for information), See also ID 2048 ([...]'s reply to a request for information).

¹¹⁵ ID 729, p. 2 ([...] reply to the request for information), ID 705, p. 2 ([...] reply to a request for information), ID 747, p. 2 ([...] reply to a request for information), ID 1919, p. 3-4 (Pacific's reply to the 8th request for information). Pacific also submits that it does not have a fixed time ahead of which it notifies the arrival of a vessel as circumstances such as the weather can influence the time of arrival until the very last moment. Pacific submits in its reply to the Statement of Objections (p. 12-13) that the time at which a captain is informed of his port of destination does not determine when the company needs to have its shipping and sales plan in place. The importer needs to organise a berth at the port, relevant storage facilities or pre-selling of volumes and consequently cannot simply change destination at will.

¹¹⁶ See ID 729, p. 2 ([...] reply to the request for information).

¹¹⁷ [...].

¹¹⁸ See the press articles ID 1204, p 57-63. See also [...].

¹¹⁹ See, for example, ID 1900, p 6 (Pacific's reply to the 6th request for information) and ID 1732, p. 55-68, p. 133-161 (Chiquita's marketing presentations concerning re-exports).

Pacific this solution does not allow the supplier to control where bananas are sold or even if they are ultimately imported into the Union¹²⁰.

- (68) Fourthly, the volumes loaded on vessels in South America might on occasions have been higher than what was unloaded at the ports of destination in Europe and the decisions on the volumes to be loaded on the vessels did not necessarily pre-determine the quantities that actually arrived at the ports of destination. There are indications that the importers, with a view to decrease volume of bananas unloaded in Europe, might have resorted to dumping boxes of bananas into the sea before the vessel reached the port of destination¹²¹. Pacific mentioned in this respect that dumping of bananas into the sea had only limited scope and related to the damaged bananas which could not be sold to the customers. According to Pacific it was in the interest of importers to avoid import of damaged bananas and incurring the tariff/VAT on those volumes as well as losing the use of those license volumes¹²². This is also confirmed by handwritten notes of Mr [...] of Pacific which had been found during the inspection of the Guardia di Finanza¹²³.
- (69) Fifthly, there were cases relating to licence frauds involving, amongst other Member States, Italy,¹²⁴ which amounted to a considerable scale and affected the total volume of bananas imported to the Union.¹²⁵ Pacific's reliance on downward trend of fraud in banana sector since at least 2003 cannot be attributed any significant weight. According to a 2004 Anti-fraud Report referred to by Pacific, one should be prudent to draw conclusions based on comparisons of data from different years, due to belated notification of data by the Member States' authorities and having regard to the fact that very often fraud and irregularities have already been committed some years earlier, before they are subject to regular ex-post controls or in some cases regulatory intervals expire leading to their occurrence¹²⁶.

¹²⁰ See ID 1919 (Pacific's reply to the 8th request for information), p. 4-5.

¹²¹ See ID 1982, p. 38 (document received from Guardia di Finanza).

¹²² See Pacific's reply to the Statement of Objections, p. 13-15.

¹²³ See ID 1982, p. 38 (document received from Guardia di Finanza).

¹²⁴ An OLAF investigation into licence frauds since the late 1990s took place, see

http://ec.europa.eu/anti_fraud/press_room/pr/2002/2002_07_en.html,
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/836&format=HTML&aged=1&language=EN&guiLanguage=en>,

as well as the annual Anti-Fraud Reports from which it emerges that irregularities and fraud continued in the banana sector in the period after 2000 but with a significant decrease in 2004:

http://ec.europa.eu/anti_fraud/reports/commission/2000/rep_comm_2000_en.pdf,

http://ec.europa.eu/anti_fraud/reports/commission/2001/rep_comm_2001_en.pdf,

http://ec.europa.eu/anti_fraud/reports/commission/2002/en.pdf,

http://ec.europa.eu/anti_fraud/reports/commission/2003/annex2_en.pdf,

http://ec.europa.eu/anti_fraud/reports/commission/2004/stat_en.pdf.

[...]. There are also references to licence frauds in inspection documents of Pacific: An e-mail to [...] of a Pacific internal meeting on 19 March 2001 reports on licence fraud cases (ID 1989, p 34). Mr [...]’s notes of a communication with Mr [...] of 18 January 2006 state: "Legal: [...] [i.e. [...]’s distributor [...]] (2) à false licence case => WON" (ID 1773, p 13).

¹²⁵ The Olaf press release quoted in footnote 124 mentions for an Italian case EUR 53 million of evaded duties and EUR 56 million of affected goods. The Anti-Fraud Report of 2000 mentions (p. 25) for the period 1998-middle of 2000 in relation to Belgian and Italian cases that at least 220 000 tonnes of bananas were imported with false licences and the evaded duties were estimated at EUR 164 million. The Anti-Fraud Report of 2001 mentions (p. 94) a volume of EUR 155 million. See also p. 44 of the Anti-Fraud Report of 2002. For references to all of these documents, see footnote 124.

¹²⁶ http://ec.europa.eu/anti_fraud/reports/commission/2004/stat_en.pdf, p. 27

- (70) Contrary to what Pacific alleges¹²⁷, the regulatory regime did not prevent importers from shifting important volumes of bananas from one Member State to another. Banana import data from Eurostat¹²⁸ shows that since the beginning of EU-25 statistics in May 2004 until the end of the licensing regime at the end of 2005 there were important trade flows of bananas by volume between the region comprising Italy, Greece and Portugal (i.e. the region concerned in this case) and the rest of the EU 25 countries. This is reinforced by indications on price differentials between different regions within the Union (see recital (64) above).
- (71) For these reasons and in spite of the licensing regime, the importers of bananas had a wide margin of manoeuvre to decide on volumes to be imported into various Member States, and in particular into Italy, Greece and Portugal, in any given week during the period of the infringement.

2.3.4. *The demand*

- (72) Bananas are seen in the trade as a 52-week product, which is traded on a week-to-week basis and 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.

2.3.5. *The geographic area covered*

- (73) The infringement which is the subject of this Decision relates to the supply of bananas to Greece, Italy and Portugal, which are key Member States for the trade of bananas along the Southern European shipping route and which are referred to together as the "Southern European region".

2.4. **Trade between Member States**

- (74) From the information received from the parties it is apparent that each of them was active throughout the Southern European region during the period in 2004 and in 2005. During that period the banana trade was characterised by important trade flows between Member States¹²⁹ (see section 2.3).
- (75) In particular, Portugal, Italy and Greece lie along the Southern European shipping route for bananas. Many banana vessels of the parties and the other big multinationals followed a pre-set schedule which meant that decisions to discharge certain volumes of bananas from a particular vessel in any Member State or a third country along that route influenced the temporary availability of bananas in another Member State. Chiquita reports that if, for example, the Italian market was slow in

¹²⁷ See Pacific's reply to the SO, p. 13.

¹²⁸ See Eurostat database (EU27 Trade Since 1995 by SITC), available on <http://eurostat.ec.europa.eu>. The data refers to Bananas, fresh and dried, including plantains. Volumes of dried bananas and plantains, however, do not appear to be of significant importance.

¹²⁹ Portuguese customers confirmed cross-border supplies from Spain, Italy and the Netherlands, ID 1639, p.2. Greek customers confirmed cross-border supplies from Italian, Dutch and Portuguese suppliers, ID 1636, p.2. Also Italian customers confirm confirmed cross-border supplies from suppliers from France, Germany, The Netherlands, Portugal, Slovenia and Spain, ID 1638, p. 2.

one week, it would push for Portugal to sell more bananas or try to sell bananas out of the Union via Greece.¹³⁰

- (76) Customs clearance of the imported fruit could happen in a Member State other than that in which the bananas were ultimately sold. For example, Pacific submits that it discharged all bananas to be sold in Portugal in Spain where they also cleared customs.¹³¹ [...] also confirms that it imported bananas into Italy and Portugal via France and into Portugal via Spain.¹³² [...] submits that it imported bananas overland into Greece via Italy where the bananas were discharged from the vessel and put into free circulation in the Union.¹³³ Evidence on the file also shows "re-exports" of bananas into the Balkans and that volumes not discharged in the Southern European region would be sold in the markets on the Balkans, the Black Sea and in Northern African countries.¹³⁴ An internal e-mail of Pacific of 25 April 2005 states that "Italy recovered in volume and price as result of less 'French' fruit being offered."¹³⁵
- (77) [...] confirmed that the ports of Lisbon, Barcelona and Port Vendres (Southern France near the Pyrenees) were sometimes skipped by a banana vessel and the bananas that should have been discharged at those ports were transported there overland from Vado.¹³⁶
- (78) Evidence on the file also shows that there were overland imports of bananas by most major importers from Northern Member States into the North of Italy.¹³⁷

3. PROCEDURE

- (79) On 8 April 2005, Chiquita applied for immunity from fines and, alternatively, a reduction of the fine under the Commission Notice on immunity from fines and reduction of fines in cartel cases,¹³⁸ (hereinafter "the Leniency Notice") in relation to the business of distribution and marketing of imported bananas as well as pineapples and other fresh fruit in Europe.¹³⁹ That application was registered as Case 39188 – Bananas. Chiquita was granted conditional immunity from fines on 3 May 2005 in respect of an alleged secret cartel – as described in Chiquita's submissions of [...] - affecting the sale of bananas and pineapples in the EEA.¹⁴⁰

¹³⁰ ID 1732, p 257 ([...]'s interview).

¹³¹ See recital (57). ID 1900, p. 5 (Pacific's reply to the 6th request for information).

¹³² ID 1587, p. 6 ([...]'s reply to the 2nd request for information).

¹³³ ID 1500 ([...]'s reply to the 4th request for information).

¹³⁴ ID 1732, p 253, 257 ([...]'s interview), p. 55-68, p. 133-161 (Chiquita's marketing presentations concerning re-exports). See also ID 1900, p. 6 (Pacific's reply to the 6th request for information) where Pacific confirms sales of Bananas unloaded in Greece also in third-countries.

¹³⁵ ID 1893, p 9 (Pacific documents).

¹³⁶ ID 705, p. 2 ([...] reply to a request for information).

¹³⁷ ID 1900, p 6 (Pacific's reply to the 6th request for information), where Pacific also reports about exports of Bananas from Italy to another Member State. See, for example, also ID 745, p. 109-112 ([...]'s volume reports), ID 1254, p. 92; ID 1255, p. 5, 7-14, 27, 29-30, 33-34, 37-41, 466-468, 470; ID 1256, p. 134, 143, 157, 168, 219, 232, 319, 348, 366, 437-438, 447-448, 457, 469, 478-479, 488-489, 498-499, 529; ID 1257, p. 16, 38, 67, 89, 117 (Chiquita's volume data). See also ID 1789, p. 2-11 (Pacific inspection document).

¹³⁸ OJ C 45, 19.2.2002, p.3.

¹³⁹ [...].

¹⁴⁰ [...] For further information, see section 8.5.

- (80) The investigation in Case 39188 – Bananas led to the adoption of the Commission's decision of 15 October 2008¹⁴¹ finding that Chiquita, the Dole group and Weichert, then under decisive influence of the Del Monte group, had infringed Article 81 of the EC Treaty (now Article 101 of the Treaty) by engaging in a concerted practice between themselves by which they coordinated quotation prices for bananas which they each set weekly for Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden between 2000 and 2002.¹⁴²
- (81) On 26 July 2007, the Commission received copies of inspection documents from the Italian authorities which originated from inspections in the home and office of an employee of Pacific Fruit Italy in the framework of national investigations. The documents were provided to the Commission by the Guardia di Finanza who in advance had obtained the permission of the Procuratore della Repubblica of Rome to use the data and notes for administrative purposes. Moreover, the Procuratore della Repubblica of Rome declared that the communication of those documents by the Commission to the parties was not prejudicial to the national investigation in Italy, which did not concern an infringement of competition law.¹⁴³
- (82) On 26 November 2007, Chiquita was informed orally by the Directorate-General for Competition (hereinafter "DG Competition") that on 28 November 2007, Commission officials would carry out an inspection at the premises of Chiquita Italia SpA in Rome and that DG Competition expected Mr [...] to be present for an interview that day. On this occasion, Chiquita was reminded that it had received conditional immunity from fines for the whole Community. Chiquita was also reminded of its duty to cooperate under the Leniency Notice and informed that an investigation into the South of Europe would be carried out under case number 39482 – Exotic fruit.
- (83) On 28 to 30 November 2007, surprise inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003 were carried out at subsidiaries of [...], [...] and Pacific Fruit Company Italy in Rome. Commission officials also inspected Chiquita Italia SpA pursuant to Article 20(2) of Regulation (EC) No 1/2003 and carried out an interview with Mr [...] of Chiquita.
- (84) In the course of the investigation, the Commission sent several requests for information to the parties and to customers as well as to other market participants, including ports and port authorities. Moreover, the parties were asked to re-submit certain information and evidence originating from them which were contained in the investigation file in case 39188 – Bananas.¹⁴⁴ Chiquita was asked to identify the parts

¹⁴¹ OJ C 189, 12.8.2009, p.12.

¹⁴² See, also for the exact duration of the infringement established, the Commission's press release IP/08/1509 of 15 October 2008 and OJ C 189, 12.8.2009, p. 7. The text of the full public version of the decision can be found on DG Competition's website.

¹⁴³ ID 1949-1985, 1987-1991, 2071, 2073, 2074. For details on the origin of the documents obtained from the Italian authorities see ID 2073.

¹⁴⁴ Pacific provided copies of most documents requested while objecting to DG Competition's request as a violation of Article 28 of Regulation (EC) No 1/2003. DG Competition has responded to Pacific's objections in its letter of 6 November 2008, ID 942.

of the transcripts of its Oral Statements in case 39188 – Bananas which it deemed to be related to this investigation.¹⁴⁵

- (85) On 9 February 2009, DG Competition issued a state-of-play letter to Chiquita [...].
- (86) When asked to state its confidentiality claims during the preparation of access to the Commission's file, Pacific put forward (i) that the Commission had unlawfully obtained the documents which it had received from the Guardia di Finanza and (ii) that it regarded certain information contained in the documents which the Commission had received from the Guardia di Finanza to be covered by Legal Professional Privilege (LPP).¹⁴⁶ Both claims have been rejected as unfounded.¹⁴⁷
- (87) On 10 December 2009 the Commission initiated proceedings and adopted a Statement of Objections. The Statement of Objections was sent on 11 December 2009 and was notified to the addressees between 14 December 2009 and 12 January 2010.
- (88) Following the access to the file, all addressees of this decision made known to the Commission in writing their views on the objections raised against them and took part in the Oral Hearing held on 18 June 2010. After the Hearing, both parties submitted further observations to the Commission.
- (89) On 9 September 2010, requests for information were sent to the addressees of this Decision asking them to provide information about their overall turnover and sales of bananas as well as details about any forthcoming significant change to their corporate structure.

4. DESCRIPTION OF THE EVENTS

4.1. Background and overview

- (90) In the banana business contacts between market participants occur almost exclusively orally¹⁴⁸ and therefore written traces of such communications are rare. In this case, the Commission's file contains, nevertheless, documentary evidence of competitor contacts in relation to the Southern European banana business – a number of which are of a collusive character.
- (91) [...] in a report drawn up by Mr [...] of Pacific entitled "Senior Call Report" relating to a meeting in Paris on 18 September 2000 between senior management of the Pacific group. In the report reference is made to [...] contacts in Italy between Chiquita, Pacific and another competitor whereby those companies would be in contact *"on a weekly basis to agree on the prices to be set for the following week"*.¹⁴⁹

¹⁴⁵ ID 1058, 1060, 2038.

¹⁴⁶ See ID 1930 (Pacific's letter about unlawful transmission) and ID 1941, 1998 (Pacific's LPP requests).

¹⁴⁷ ID 2117, 2116 and 2119 (DG Competition's replies to Pacific of 1 September 2009, 30 September 2009 and 16 October 2009).

¹⁴⁸ This was confirmed by Chiquita during the Oral Hearing, see, for example, part 4 of the recording of the Oral Hearing, from 00:12:35 to 00:12:45 and from 00:47:20 to 00:47:45. See also recitals (43)-(50).

¹⁴⁹ ID 1968 (document obtained from GdF), ID 1778, p 2-3 (Pacific Inspection document). Employees of Pacific confirmed that this meeting took place, ID 1754, p. 3, 6 (Mr Mattioni's and Mr Ferro's

- (92) Another [...] is found in the handwritten notes by Mr [...] of Pacific relating to an internal annual meeting of its European management and sales staff in Barcelona on 20-22 October 2003.¹⁵⁰ In Mr [...]’s notes of 22 October 2003 concerning a presentation given by Mr [...] and Mr [...] of Pacific (referred to in the notes as "[...]" and "[...]"), the following is written with regard to Greece : *"[v]olume & price coordination with Chiquita: secure market & fight when [...] or other comes in"*.¹⁵¹
- (93) [...], those documents indicate that the anti-competitive conduct between Pacific and Chiquita in the [...] infringement period from 28 July 2004 to marketing week 15 of 2005¹⁵² did not constitute an isolated event of price collusion in the Southern European banana business.
- (94) In the period from at least 28 July 2004 until marketing week 15 of 2005, Chiquita and Pacific coordinated their commercial strategy in Greece, Italy and Portugal by coordinating their price strategy regarding future prices, price levels, price movements and/or price trends, and exchanging information on future market conduct regarding prices.
- (95) The cartel arrangement was set up at a meeting between Chiquita and Pacific on 28 July 2004 and following that event the parties engaged immediately in further collusive contacts to coordinate their price strategy and to exchange information on future market conduct. The evidence indicates that in the period from February to early April 2005 Chiquita and Pacific engaged in such contacts on an almost weekly basis.

4.2. Evidence of the infringement

4.2.1. Introduction

- (96) The main evidence of the cartel arrangement consists of the following:

explanations). See also Pacific’s explanations, ID 1841, p. 3-5 (Pacific’s reply to the 1st request of information).

¹⁵⁰ ID 1910, p. 1-2 (Pacific’s reply to the 6th request for information): Pacific confirms the presence of Messrs [...]. Upon request, Pacific submitted the presentations of [...] (ID 1911, 1912 which are annexes to 6th request for information) and states that these were the only presentations for which slides were prepared and that Pacific has not been able to locate other documents relating to this meeting.

¹⁵¹ ID 1977, p. 13-14 (document obtained from GdF, allegato 9). According to Pacific, [...] presentation related to bananas, ID 1910, p. 2 (Pacific’s reply to the 6th request for information). See also ID 1757, p. 2, 5 and 7; ID 1759, p. 16 (Pacific inspection documents). According to Chiquita, [...] is an importer from [...] which sold only sporadically in Greece. Chiquita submitted an e-mail with an internal European price update report of 9 October 2003 for week 42 of 2003 which states *"Greece: Arrivals from competition at very low price 8.00 – 10.00 EURO. [...] discharging 60.000 bxs and Bonita 45.000 bxs."*, ID 1717, p 8 (Chiquita’s reply to the 3rd request for information), ID 1252, p. 151, resubmitted as ID 1236 (annex to the 3rd request for information). Pacific submits that [...] was an [...] banana brand which it believes was sold in Greece during the period of the infringement, see ID 1919, p. 7 (Pacific’s reply to the 8th request for information). See also ID 744, for example, p. 15-17 (Clerici’s monthly arrival reports for 2003) showing regular calls of [...] vessels on the Balkans, in particular at the Bulgarian port of Bourgas near the Northern Greek border.

¹⁵² Chiquita’s marketing week 15 for Italy started on Monday 11 April 2005. For Greece and Portugal it had already started during calendar week 14, but in any event before Friday 8 April 2005. For further information about the term marketing week see footnote 44.

- documents obtained during inspections by the Italian *Guardia di Finanza* in the framework of a national investigation which were subsequently submitted to the Commission with due authorisation from the *Procuratore della Repubblica* of Rome;
- documents obtained during the Commission's inspections of 28-30 November 2007 and statements made in the course of those inspections;
- corporate statements made by the immunity applicant Chiquita;
- replies to requests for information as well as subsequent submissions by Chiquita.

4.2.2. *Evidence with regard to the overall infringement: Chiquita's statements made during the inspections and in subsequent corporate statements*

- (97) Throughout the proceedings, Chiquita has made a number of statements relating to its Southern European banana business including several oral statements, a reply to the Commission's state-of-play letter and statements during the Oral Hearing. In addition, during an interview carried out by Commission officials under Article 19 of Regulation (EC) No 1/2003 during the Commission's inspections Mr [...] ([...], South Europe) gave a declaration on behalf of Chiquita as part of Chiquita's leniency cooperation.¹⁵³
- (98) Chiquita has submitted that in the period from 28 July 2004 until 8 April 2005 (the date of its application under the Leniency Notice) it engaged in an infringement comprising occasional illicit contacts with Pacific in relation to the exchange of price trend data for the following week.¹⁵⁴
- (99) Chiquita explains that in the context of a number of discussions between Mr [...] of Chiquita and Mr [...] of Pacific (then [...] for Pacific Fruit Company Italy SpA) which principally related to the sourcing of bananas in Ecuador, co-loading arrangements, complaints about port services in Salerno, the dissolution of the trade association Associazione Nazionale Importatori Prodotti Ortofrutticoli ("ANIPO") and the selling of bananas in Portugal, Italy, Greece and other countries, the representatives of Chiquita and Pacific would also discuss and exchange views on forthcoming market developments and price intentions, with the price intentions being expressed in price variations.¹⁵⁵
- (100) It is explained by Chiquita that on occasion, views of the general trends in the market were exchanged between the parties, with some of those discussions leading to more specific exchanges on price trends for the following week.¹⁵⁶ Chiquita argues that while Mr [...] of Chiquita would not give express or overt price indications to Mr [...] of Pacific, he would state his views on the general market tendencies in terms such as

¹⁵³ During the interview, Chiquita was informed orally (without being shown any documents) that the Commission was presuming contacts between Chiquita and Pacific at least around 28 July 2004 and around 11 April 2005.

¹⁵⁴ Chiquita statement during the Oral Hearing on 18 June 2010; [...]

¹⁵⁵ [...] ID 1732, p. 259 (Statement by Mr [...] on behalf of Chiquita, in an interview carried out by Commission officials under Article 19 of Regulation No. 1/2003 during the inspections).

¹⁵⁶ [...]

[...]. According to Chiquita's submission, such descriptions would, however, be easily understood by any person familiar with the banana industry as having a specific meaning with regard to prices.¹⁵⁷ According to Chiquita, as prices would normally vary by a range of EUR 0.50, an indication that [...] would mean that prices were expected to go down by EUR 0.50, an indication that [...] would mean that prices were expected to go up by EUR 0.50 and an indication that [...] would mean that Chiquita prices would remain unchanged.¹⁵⁸ Indeed, Chiquita's statements show that the price intentions were exchanged in such a way that both parties would understand whether the prices in the following week should go up by EUR 0.50, go down by EUR 0.50 or stay the same.

- (101) According to Chiquita, the persons directly involved in the price related contacts were Mr [...] of Chiquita and Mr [...] of Pacific. As will be shown in sections 4.2.3 and 4.2.4 those contacts also included Mr [...] of Chiquita ([...], South Europe). Chiquita explains that after Mr [...] of Chiquita had met Mr [...] of Pacific for the first time on 24 June 2004 at a meeting of the trade association ANIPO, a lunch meeting was organised on 28 July 2004 between Mr [...] of Pacific and Mr [...] and Mr [...] of Chiquita. After the meeting of 28 July 2004, Mr [...] of Chiquita and Mr [...] of Pacific started calling each other on an irregular basis, with a total of around 15-20 calls, starting from September 2004 until approximately June 2006.¹⁵⁹ ¹⁶⁰ Chiquita explains that while the frequency of the calls depended on the issues to be discussed, they were more frequent at the end of 2004 and the beginning of 2005 when the future of the trade association ANIPO was heavily discussed amongst its members and as Mr [...] was a newcomer on the market and was looking up to Mr [...] for his views and indications on market trends and market related issues. It further explains that in less than half of those 15-20 calls did a discussion on general or more specific price trends take place, with around five calls relating to future market trends of a more general nature and another five calls including Mr [...]’s [...] for the following week.¹⁶¹ Chiquita has further reported that such contacts took place before prices in Italy were regularly communicated to customers on Monday mornings by the Chiquita sales force.¹⁶² According to Chiquita, the calls in which price trend data was

¹⁵⁷ [...]

¹⁵⁸ [...]

¹⁵⁹ Indeed, the Commission has obtained outgoing mobile telephone records of Mr [...] of Pacific for the period from February to July 2004, October to December 2004 and January to November 2005 which indicate that Mr [...] had 15 contacts initiated by him with P. [...] of Chiquita, namely on 20/01/2005, 7/04/2005, 22/04/2005, 28/04/2005, 7/06/2005, 14/06/2005, 7/07/2005, 21/07/2005, 10/08/2005, 15/09/2005, 4/10/2005, 20/10/2005, 21/10/2005 and 28/10/2005. Moreover, the same telephone records indicate 2 contacts initiated by Mr [...] with Chiquita Italia on 19 and 23 May 2004. The Commission has asked for full records of Mr [...]’s telephone calls for the period from 2000 to 2005. Pacific has claimed that it is not in possession of any fixed line records and, for mobile calls, it could only provide records for the year 2005, so the records are fragmented and do not give a full picture. All records concern outgoing calls (from Mr [...] of Pacific to Mr [...] or Chiquita), see ID 1890.

¹⁶⁰ ID 1732, p. 259 (Statement by Mr [...] on behalf of Chiquita, in an interview carried out by Commission officials under Article 19 of Regulation No. 1/2003 during the inspections); [...]

¹⁶¹ ID 1732, p. 259 (Statement by Mr [...] on behalf of Chiquita, in an interview carried out by Commission officials under Article 19 of Regulation (EC) No 1/2003 during the inspections); [...]

¹⁶² Chiquita statement during the Oral Hearing on 18 June 2010

exchanged between Chiquita and Pacific ended at the latest when Chiquita applied for immunity on 8 April 2005.¹⁶³

4.2.3. Evidence with regard to the meeting of 28 July 2004

- (102) On 28 July 2004, a lunch meeting was organised at the restaurant *Shangri la Corsetti* in Rome between representatives of Chiquita and Pacific.¹⁶⁴ Pacific was represented by Mr [...] and Chiquita by Mr [...] and Mr [...].¹⁶⁵
- (103) The meeting served as the starting point of the collusive arrangement between Chiquita and Pacific aimed at coordinating their price strategy regarding future prices, price levels, price movements and/or price trends, and exchanging information on future market conduct regarding prices. As confirmed by Chiquita, following that meeting Mr [...] of Chiquita and Mr [...] of Pacific started calling each other on an irregular basis (see recital (101)).¹⁶⁶
- (104) Chiquita has explained that, according to Mr [...], the participants at that meeting discussed the possibility for Chiquita to source bananas from "Noboa" (Pacific) in Ecuador. Pacific has submitted that, in addition to the sourcing of bananas, issues related to joint shipping arrangements and the management of the trade association ANIPO were also discussed.¹⁶⁷ The contemporaneous documentary evidence related to the meeting, however, suggests otherwise and shows how Chiquita and Pacific used the meeting to set up the price coordination scheme which would subsequently operate along the lines of what Chiquita has claimed in its various submissions under the Leniency Notice (see recitals (99)-(101)), but would also go further. [...].¹⁶⁸
- (105) The hand-written notes, which were drafted by Mr [...] of Pacific at the time of the meeting, read as follows:¹⁶⁹

"Chiquita/Bonita July 28/04

(1) Portugal

[...] (under [...])

Structure to be changed end of year

less stable of 3 T2 markets

cooperation wkly basis to hold price

Spain: 1 truck/every 2 weeks MAX

[...]/Lidle.

- *Lowest price of all 3 markets -> 2 to 3 €*

¹⁶³ ID 1650, pp. 1-3, 8 (Chiquita's submission of 13 October 2009); Chiquita statement during the Oral Hearing on 18 June 2010

¹⁶⁴ ID 1982, p. 50 (document obtained from GdF, allegato 14).

¹⁶⁵ Chiquita's Oral Statement 1, ID 1545, p. 5; see also ID 1731, p. 74 (Mr [...] 's expense records), ID 1771, p. 1 (Pacific inspection document SDS 14 – Mr [...] 's agenda entry).

¹⁶⁶ ID 1732, p. 259 (Statement by Mr [...] on behalf of Chiquita, in an interview carried out by Commission officials under Article 19 of Regulation No. 1/2003 during the inspections); [...]

¹⁶⁷ [...]; Pacific's reply to the Statement of Objections, p. 43

¹⁶⁸ [...].

¹⁶⁹ ID 1983, pp. 5-6 (document obtained from GdF, allegato 15); During the inspections at Pacific in Rome, copies of Mr [...] 's notes of the meeting of 28 July 2004 (copied during an inspection of the Guardia di Finanza) were found (ID 1774, p 10-11, in reverse order). During the inspections at the premises of Pacific in Rome, Mr [...] confirmed that the handwriting was that of Mr [...], ID 1754, p. 4 (Mr [...] 's explanations).

No premium for Chiquita brand.

(2) Greece

- *Greece reports to [...].[...] in charge of all 3 markets.*
- *shipping cooperation: Salerno to Aegion weekly business for Bonita.*
- *Help push Chiquita/Bonita combo.*
- *also reduce Consul.*
- *Chiquita's idea: all Chiquita, only premium brand.*
- *Chiquita's price in Greece = to Italy*
- *They believe it should be = for Bonita Italy & Greece*

(3) Italy

- *Push Dole & Del Monte out*
- *Decrease Consul 15,000/wk.*
- *Focus on incr. tha volume in Chiquita*
- *Give the space to Bonita*
- *Bonita pushes prices*
- *Regulates supply (Ecuador)*
- *Local agreement (Italy/Portugal/Greece)*
- *too big (H.Office) Not possible*

Action Plan

- 1.- *talk next week for Portugal: price decision: stay, ~~up~~, Down. [...]*
- 2.- *Look at Italy first*
- 3.- *Greece for later."*

(106) As is clear from Mr [...]’s hand-written notes, Chiquita and Pacific¹⁷⁰ discussed their businesses in Portugal, Greece and Italy and set up a three step "action plan" for their continued cooperation. According to that action plan the two parties would, as a first step, get in contact the following week to concert on prices in Portugal, with Mr [...] of Chiquita and Mr [...] of Pacific concerting on their price decision on whether to "stay" the same, go "up", or go "down". This is consistent with Chiquita’s statement that, following the meeting of 28 July 2004, Mr [...] of Chiquita and Mr [...] of Pacific would occasionally exchange more specific price trends for the following week discussing in such terms that both parties would understand whether the prices should go up, go down or stay the same (see recital (100)).¹⁷¹ As a second step, the action plan saw the two parties giving certain priority to their joint strategy concerning Italy ("*Look at Italy first*") and finally, as a third step, the focus would be on their joint strategy for Greece ("*Greece for later*").

(107) In relation to pricing in Portugal, Mr [...]’s notes reveal that while Portugal was considered as "*less stable*" than Italy and Greece, Pacific and Chiquita should engage in cooperation on a weekly basis to "*hold price*". Pacific submits that the reference

¹⁷⁰ Pacific is referred to as "Bonita" in Mr [...]’s notes

¹⁷¹ It should be noted that when providing that statement, Chiquita had not seen those hand-written notes, as it received access to these notes only in access to file following the Commission Statement of Objections.

"*cooperation wkly basis to hold price*" in Mr [...]’s notes refers to Chiquita explaining that it was cooperating on a weekly basis with its agent in Portugal. Pacific further claims that, alternatively, Mr [...] could have asked himself whether Pacific would be better able to hold its price if it were to benefit from a weekly arrival through a co-shipping arrangement with Chiquita, or through Pacific bananas being sold in Portugal under the Chiquita brand.

- (108) The notes are clear with regard to the intent of Pacific and Chiquita to coordinate prices. As the action plan suggests ("*talk next week for Portugal: price decision: Stay, up, down. [...]*") the reference to "*cooperation wkly basis to hold price*" indicates that the two competitors agreed to cooperate on a weekly basis on prices.
- (109) Mr [...]’s notes reveal in relation to pricing in Greece that Chiquita had indicated its aim of bringing its price in Greece up to its price in Italy where the prices were higher ("*Chiquita’s price in Greece = to Italy*"), and had indicated that it thought that the same approach should also apply for Pacific’s "Bonita" branded bananas in Greece and Italy, namely that Pacific’s prices in Greece should be equal to Pacific’s prices in Italy ("*[Chiquita] believe it should be = for Bonita Italy & Greece*").
- (110) Pacific contests this interpretation and argues that the information in Mr [...]’s notes on the equalling of prices in Greece and Italy is trivial and does not correspond to Pacific’s actual price situation¹⁷². Contrary to Pacific’s argument, the discussion about how respective prices of Chiquita and Pacific in Greece and Italy should interrelate is, however, not trivial but constitutes a highly sensitive discussion on two competitors’ respective pricing strategies.
- (111) In relation to Italy, Mr [...]’s notes reveal that the parties had discussed the strategy by which Chiquita would focus on increasing the volume of its premium brand "Chiquita" banana in Italy, while decreasing the volume of its second brand "Consul" and discussed the possibility for the freed-up space to be given to Pacific’s "Bonita" brand instead. According to Mr [...]’s notes, Pacific would then push the market prices up ("*Decrease Consul 15,000/wk. [...] Focus on incr[easing] th[e] volume in Chiquita [...] Give the space to Bonita [...] Bonita pushes prices*").
- (112) Pacific argues, with regard to the alleged interpretation of notes on Italy in the Statement of Objections and in particular with regard to the statement in the document: "Push Dole & Del Monte out", that it is not credible that Pacific and Chiquita would have agreed to push Dole and Del Monte out of the Italian market by increasing the volume of Chiquita branded bananas while decreasing Consul and by Pacific pushing up prices.¹⁷³ Contrary to Pacific’s claim, however, the Statement of Objections did not link the quoted statement to the discussions about volumes and prices of the parties in the way argued by Pacific, but, in that respect, simply repeated the content of the notes.
- (113) Pacific refers furthermore to Mr [...]’s claim that the meeting of 28 July 2004 took place over lunch, thus making it unlikely that any anti-competitive behaviour would

¹⁷² Recital 206 of Pacific’s reply to the Statement of Objections.

¹⁷³ Recital 5 and section 5.2.4 of Pacific’s reply to the Statement of Objections referring to recital 95 of the Statement of Objections.

have taken place at the meeting.¹⁷⁴ In this respect it suffices to refer to contemporaneous notes drawn up by Mr [...] on the content of this meeting.

- (114) In view of Pacific's arguments¹⁷⁵ questioning the reliability of Mr [...] 's hand-written notes relating to the meeting of 28 July 2004, a number of factual elements can be highlighted to show that Mr [...] 's notes are well anchored in reality and, in fact, constitute a credible piece of evidence that reproduces accurately the market conditions and Chiquita's and Pacific's intentions and strategic thoughts at the time of the meeting. This holds irrespective of whether certain elements of notes may have been known in the market, as Pacific claims¹⁷⁶.
- (115) To this effect, a number of the factual statements regarding the parties' banana business that are contained in Mr [...] 's notes can be verified.
- (116) With regard to Mr [...] 's notes concerning Portugal, and apart from the accurate description of Chiquita's plans for its business structure¹⁷⁷, they correctly refer to Portugal as being "less stable" and having the "lowest prices" compared to Greece and Italy and Chiquita branded bananas not benefiting from a "premium" status. In fact, Chiquita confirms that it regarded Portugal as an opportunistic market with the lowest prices where Chiquita branded bananas were only perceived as "second tier" (see recitals (27)-(28)).¹⁷⁸ Chiquita also submits that at the time of the infringement the premium for Chiquita branded bananas and the actual prices were lower for Portugal than for Italy or Greece.¹⁷⁹ Pacific has also confirmed that in Portugal, it was [...] that achieved the highest prices on the market, whereas Chiquita was at the same (lower) price level as Bonita (Pacific) and [...].¹⁸⁰
- (117) With regard to Mr [...] 's notes concerning Greece, apart from the accurate description of Chiquita's business structure¹⁸¹, they refer to discussions on shipping cooperation between Chiquita and Pacific in relation to the ports of Salerno (Italy) and Aegion (Greece). Both Chiquita and Pacific confirm that discussions on shipping cooperation took place at the time and such discussions continued, according to Chiquita, until June 2006.¹⁸² As for Mr [...] 's reference to Chiquita reducing the supply of Consul branded bananas to Greece ("*also reduce Consul [...] Chiquita's idea: all Chiquita, only premium brand*"), it is confirmed that Chiquita reduced its sales of Consul

¹⁷⁴ Recital 179 of Pacific's reply to the Statement of Objections, see also recitals 228, 295-296 of Pacific's reply to the Statement of Objections and Pacific's letter of 7 September 2010.

¹⁷⁵ See, for example, recital 155 and sections 5.2 and 7.2.3 of Pacific's reply to the Statement of Objections.

¹⁷⁶ See part 4 of the recording of the Oral Hearing, from 02:17:40 to 02:19:55.

¹⁷⁷ The notes state as follows: "[...] (*under [...]*) *Structure to be changed end of year*"; Indeed, prior to March 2006 when Chiquita started its own operation in Portuguese business, Chiquita had an agent in Portugal headed by Mr [...], who in turn reported to Mr [...] (referred to as "[...]" in the notes) and Mr [...] of Chiquita; see ID 2043, p. 17-18 (Chiquita's reply to request of information of 7 April 2009); ID 1732, p. 14 (Chiquita's organizational chart for 2004); ID 1732, p. 254 (Interview with Mr [...] during inspections); ID 1717, p. 5 (Chiquita's reply to the 3rd request for information); ID 1732, p. 209-210 (Chiquita's strategic priorities for 2005).

¹⁷⁸ ID 2043, p. 5 (Chiquita's reply to the 1st request of information).

¹⁷⁹ ID 1705 (annex to Chiquita's reply to the 2nd request for information).

¹⁸⁰ ID 1919, p. 5-6 (Pacific's reply to the 8th request for information).

¹⁸¹ The country manager for Greece reported to Mr [...] of Chiquita; see recital (10).

¹⁸² The notes state as follows: "*shipping cooperation: Salerno to Aegion*"; see ID 1898, p 12-13 (Pacific's reply to the 5th request for information); [...]; ID 1731, p. 118 (annex to Chiquita's Oral Statement 1).

branded bananas at the time, not having sold any Consul branded bananas since June 2004.¹⁸³

- (118) With regard to the notes concerning Italy, it is confirmed that in line with what Mr [...] had written down with regard to strategic discussions between Pacific and Chiquita on the Italian market ("*Decrease Consul 15,000/wk. [...] Focus on incr[easing] th[e] volume in Chiquita [...] Give the space to Bonita [...] Bonita pushes prices*"), Chiquita had in fact started increasing the sales volumes of Chiquita branded bananas as from the second half of 2004¹⁸⁴ and, in the course of 2005, would reduce its sales of Consul branded bananas in Italy.¹⁸⁵ In addition, Mr [...]’s strategy related remarks are also confirmed by an internal Chiquita memorandum, containing an analysis of the Italian banana market in the post-licensing regime period (that is to say, the period after 1 January 2006), which Mr [...] drafted sometime in 2007 for the attention of Mr [...].¹⁸⁶ In line with Mr [...]’s notes, the Chiquita memorandum states in relation to the company’s strategy, sales actions and expectations as to Pacific’s (referred to as "Bonita") actions in the run-up to and beginning of the post-licensing regime period as follows: "*[a]t the dawn of the new system it would have been opportune to expect a 'constraint' market between Chiquita and Bonita. This is one of the reasons why Chiquita renounced from importing Consul. Unfortunately, while the actions of Chiquita from the top of the market have been constant, the steering of the market from the 'bottom' by Bonita has been totally inexistent.*"¹⁸⁷
- (119) In suggesting that the Commission thinks that Chiquita wanted Pacific to push up prices by steering the market from the bottom, Pacific misconstrues the context in which Mr [...]’s memorandum was referred to in the Statement of Objections.¹⁸⁸ The Statement of Objections did not go beyond the wording of the memorandum, which however clearly shows that Chiquita expected a "*steering of the market from the 'bottom' by Bonita*" and was disappointed by the results.

¹⁸³ ID 2034, p.12 and 14 (Chiquita’s sales in Greece, annex to reply to 1st request for information) and ID 2043, p. 14 (Chiquita’s reply to the 1st request for information, 1.49). With the exception of week 15 of 2005, Chiquita did not sell any Consul branded bananas in Greece between week 23 of 2004 and at least week 11 of 2006.

¹⁸⁴ ID 2033 (Chiquita’s Italian sales by brand). In relation to 2003, sales of Chiquita branded bananas in Italy were 4.9% higher in 2004, 9.3% higher in 2005 and 8.1% higher in 2006. On average, Italian sales were 5% higher during the period 2004-2006 than they had been during the period 2001-2003. According to the figures provided by Chiquita, sales of Chiquita’s competitors’ bananas in Italy were 3.8% higher in 2004, 8.8% lower in 2005 and 7.8% higher in 2006, see ID 1704 and ID 2033.

¹⁸⁵ As of week 18 of 2005 the sale of Consul branded bananas fell significantly and after week 23 of 2005 there were hardly any sales of Consul branded bananas. Indeed, a reduction of 15 000 boxes per week, as referred to by Mr [...] in the notes, would have corresponded to a reduction of volume of Consul branded bananas by approximately 75% in Italy; see ID 2033 (Chiquita’s Italian sales by brand)

¹⁸⁶ ID 2014, p. 5-6 (Chiquita inspection document AKe2). It appears from the document text that it was drafted sometime in 2007, see ID 1552, p 26-27 (Chiquita’s Oral Statement 9); ID 1650, p. 2 (Chiquita’s submission of 13 October 2009); Chiquita’s and Pacific’s replies to the Statement of Objections; As to the authorship, see the written declaration signed by Mr [...] (ID 1650, p 5 (annex to Chiquita’s submission of 13 October 2009)).

¹⁸⁷ Italian original: "*All’ alba del nuovo sistema sarebbe stato opportuno aspettarsi un mercato 'costretto' tra Chiquita e Bonita, questo è uno dei motivi per i quali la stessa Chiquita rinunziò ad importare il Consul. Purtroppo l’azione di Chiquita dall’alto sul mercato [è] stata costante ma il governo del mercato dal 'basso' da parte di Bonita è stato totalmente inesistente.*"

¹⁸⁸ Recitals 220 et seq of Pacific’s reply to the Statement of Objections referring to recital 109 of the Statement of Objections.

- (120) On the basis of the above factual verifications and the corroborating internal Chiquita memorandum, it is concluded that Mr [...]’s hand-written notes of 28 July 2004 constitute a credible piece of contemporaneous evidence reproducing accurately the market conditions and Chiquita’s and Pacific’s intentions and strategic thoughts at the time of the meeting. In addition, the content of those notes is in line with the other evidence of the infringement, namely the follow-up contacts in August 2004, the e-mail of 11 April 2005 and Chiquita’s submissions (see recitals (98) and (103)).

4.2.4. Evidence with regard to follow-up contacts in August 2004

- (121) While Chiquita has stated that following the meeting of 28 July 2004, and starting from September 2004, Mr [...] of Chiquita and Mr [...] of Pacific started calling each other on an irregular basis (see recital (101)), the contemporaneous and other evidence in the Commission file shows that the price related contacts were more frequent than submitted by Chiquita and started almost immediately following the meeting of 28 July 2004.¹⁸⁹ While the precise timing of the contacts is different from what Chiquita recalls, the substance of the illegal conduct is consistent with Chiquita’s statements (see recitals (100)-(101)).
- (122) Mr [...]’s handwritten notes reveal that on two separate instances in August 2004, roughly a week and two weeks after the 28 July 2004 meeting, Mr [...] of Pacific was first in contact with Mr [...] and then with Mr [...] of Chiquita to discuss future prices in Greece and the market developments in Portugal respectively. Those contemporaneous hand-written notes constitute evidence of the first follow-up contacts between Chiquita and Pacific after the meeting of 28 July 2004 and confirm that the meeting of 28 July 2004 was not simply an isolated incident but that, in line with the collusive scheme set up by Chiquita and Pacific on 28 July 2004, the parties took follow-up action to implement it.
- (123) It is apparent from Mr [...]’s hand-written notes that there was a contact between Mr [...] of Pacific and Mr [...] of Chiquita on Friday 6 August 2004 (week 32). Despite the fragmentary nature of those notes, it is clear that pricing information was exchanged. Such an exchange is in line with the collusive scheme that was set up at the 28 July 2004 meeting. The notes read as follows:

" [...]

Aug 6, 2004

à Chiquita à €11,50 – 75

€ 10,50 – 75 –

Greece

à *We are going there next week*

93.000 boxes for 2 weeks

à *20.000 boxes for TI*

à *problem w/ Olympics: transport every*

¹⁸⁹ See recitals (123), (125), (127) and (130). See also [...], ID 1732, p. 259 (Statement by Mr [...] on behalf of Chiquita, in an interview carried out by Commission officials under Article 19 of Regulation (EC) No 1/2003 during the inspections).

thing stopped.
à W33 – No Chiquita vessel

à Bonita: € 10,75 à 0,25 (transport)
Chiquita € 10,75 actual à not bellow [sic]
[...]: €
à 54347 – Bananas
+ pineapples + General Cargo to Spain
à 0,64/0,65/kg – Supermarkets = € 12,25
Greece à € 15,50-
€ 16,25- same levels

12,32 € Yellow –¹⁹⁰

- (124) Mr [...]’s notes show that Pacific and Chiquita also having discussed their respective schedule for vessel arrivals,¹⁹¹ and discussed and exchanged information on prices. It is not possible (due to the passage of time) to interpret and trace back all the details relating to these notes, but it is clear that the price data discussed and exchanged by Pacific and Chiquita related to prices in Greece and Italy, as confirmed by the fact that the prices mentioned by Mr [...] ("Bonita: €10.75 [...] Chiquita €10,75 actual à not bellow" [sic] [...] Greece à € 15,50- € 16,25 – same levels") correspond closely to the T2 prices that Chiquita and Pacific actually achieved with their main customers around the time of that contact.¹⁹² Such price discussions are in line with the collusive arrangement which was set up by Chiquita and Pacific at the meeting of 28 July 2004 whereby the parties would collude on prices (see recital (106)).
- (125) Mr [...]’s notes also reveal that another contact between Pacific and Chiquita took place shortly after 11 August 2004 during which Mr [...] of Pacific and Mr [...] of Chiquita at least discussed the [stable] market conditions on the Portuguese market. Mr [...]’s hand-written notes read as follows: "Chiquita à [...] [sic] [...] Portugal – stable".¹⁹³ Indeed, the stability of the Portuguese business is confirmed by Chiquita's actual prices achieved for green bananas in Portugal during the period 6-20 August 2004.¹⁹⁴

¹⁹⁰ ID 1983, p. 15 (document obtained from GdF, allegato 15).

¹⁹¹ The notes state as follows: "[Pacific] are going there next week [...] W33 – No Chiquita vessel"; Chiquita has confirmed that no Chiquita vessel arrived in Greece in week 33 of 2004 whereas Pacific has confirmed that its vessel discharged in Greece only on 17 August 2004, namely in week 34 of 2004; see ID 2043, p. 12 (Chiquita's reply to the 1st request for information); ID 1900, p 8 (Pacific's reply to the 6th request for information)

¹⁹² Chiquita has submitted that for its main Greek customers the actual green T2 price per box in week 33/2004 was EUR 15.00-15.50 and that for most of its main Italian customers the actual green T2 price per box in week 33/2004 was EUR 16.00-16.25; see ID 2024, p 20 and ID 2044, p 6 (annex to Chiquita's reply to the 1st request for information); Pacific has submitted that for its main Greek customers the actual T2 price per box in week 31/2004 (when a Pacific vessel arrived in Greece) was EUR 10.50-10.75 and for its main Greek customers the actual T2 price per box in week 34/2004 (when the following Pacific vessel arrived in Greece) was EUR 10.25; see ID 1866 (annex to Pacific's reply to the 3rd request for information). ID 1934, 1938 (Pacific's reply to the 9th request for information)

¹⁹³ ID 1983, p. 26 (document obtained from GdF, allegato 15).

¹⁹⁴ The actual price per box of green Chiquita bananas stayed stable at EUR 10.75 and, for one customer stable at EUR 11.00, during the period 6-20 August 2004; see ID 1342 (price list of Chiquita's agent in Portugal ([...]))

4.2.5. Evidence with regard to further contacts in February-April 2005

- (126) The continuation and implementation of the price coordination scheme that was set up by Pacific and Chiquita during the meeting of 28 July 2004 is further evidenced by an internal Pacific e-mail sent by Mr [...] to his superior Mr [...] [...] of PFCI and [...] of FSL Holdings NV and Firma Leon Van Parys NV) on Monday 11 April 2005 (week 15/2005) at 9:57 am and by an undated table entitled "Chiquita Prices – 2005" which contained Chiquita price information for weeks 6-13 of 2005.¹⁹⁵ Together, those documents show the almost weekly occurrence of price collusion between Mr [...] of Pacific and Mr [...] of Chiquita in the period between February and early April 2005 (weeks 6/2005 to 15/2005).
- (127) In his e-mail of 11 April 2005, Mr [...] reports to Mr [...] of Pacific about the content of his recent collusive price contacts with Mr [...] of Chiquita ("*Following is an update of the prices discuss with [...]*") including sensitive pricing information concerning Chiquita.¹⁹⁶ The relevant part of the e-mail message is shown below:

Following is an update of the prices discuss with [...] He was the one who told me about [...]

Chiquita Prices - 2005

Gross Prices in Euro (Duties, rebates, discounts are NOT deducted)

Week	Brand	9	10	11	12	13	14	15 (P)	Avg.
Italia	CHIQ	18.00	18.70	19.00	19.00	19.00	19.00	19.00	18.37
	CON		16.75	17.00	17.00	17.00	17.00	17.00	16.96
Greece	CHIQ	17.50	18.00	18.75	19.40	19.80	19.75	19.75	18.35
Portugal	CHIQ	15.50	16.70	17.00	17.00	17.50	17.50	17.50	16.42
Total:		17.00	17.54	17.94	18.10	18.33	18.31	18.31	17.49
		0.33	0.54	0.40	0.16	0.22	(0.01)	-	

BOLD ---> No new discharge = same price as previous week.

Notes:

Week 10 - He will increase P & S to our levels. our vessel in Wed, his in Sat.

Week 13 - Chiquita is feeling the pressure to reduce prices only in Italy (after easter). We both agreed that we should remain with prices unchanged.

Week 14 - Chiquita is feeling the pressure to reduce prices in Italy, specially the North. He call to ask that we share our strategy for next week and try to remain unchanged. The vessel arriving in Ravenna with 123,000 boxes is from [...] and is being sold as follows:

[...] 80,000 --> using his & a second importer from [...] licences
Croatia 43,000 --> T1

Week 15 - Afdl remains unchanged (Thursday of Week 14). I spoke to [...] and he will give instructions to keep all prices unchanged.

¹⁹⁵

¹⁹⁶

ID 1860, p. 2 (Pacific inspection document DWY 12); ID 1861 (Pacific inspection document DWY 13) Chiquita submits that Mr [...] denied having made such statements as contained in the e-mail; see [...]; Pacific submits that PFCI's [...], to whom the e-mail was addressed, assumes that "P&S" refers to "Portugal and Spain" and "[...]" to "[...]"; see ID 1859, p. 8 (Pacific's reply to the 3rd request for information); Also Chiquita recognises that "[...]" "potentially" refers to "[...]"; see ID 1650, p. 9 (Chiquita's submission of 13 October 2009)

- (128) The table which is contained in the e-mail shows Chiquita's banana prices ("*Chiquita Prices – 2005 [...] Gross Prices in Euro*") for weeks 9 to 15 of 2005 separately per brand (Chiquita and Consul) and Member State (Italy, Greece and Portugal). In respect of the week of Monday 11 April 2005, namely week 15, the prices are marked "(f)" for forecast, showing collusion on future prices. The forecasted Chiquita prices for Italy, Greece and Portugal correspond, furthermore, to the T2 prices that Chiquita actually achieved with its main customers in that week.¹⁹⁷
- (129) With reference to the Chiquita prices listed in the table for the various weeks, a set of explanatory notes at the bottom of the table show the content of Mr [...]’s almost weekly collusive contacts on future prices with Mr [...] of Chiquita. The notes read as follows: "*Week 10 - he will increase P&S [Portugal and Spain] to our levels*"; "*Week 13 - Chiquita is feeling the pressure to reduce prices only in Italy (after easter). We both agreed that we should remain with prices unchanged*"; "*Week 14 - Chiquita is feeling the pressure to reduce prices in Italy, specially the North. He call to ask that we share our strategy for next week and try to remain unchanged*"; "*Week 15 – [...] I spoke to [...] [...] and he will give instructions to keep alll [sic] prices unchanged*".
- (130) The almost weekly occurrence of such collusive contacts in the period February-April 2005 is further evidenced by the undated table entitled "*Chiquita Prices - 2005*" which was found in print-out format in the same binder in Mr [...]’s (Pacific) office as the e-mail of 11 April 2005, and consisted of an earlier version of the same table as was contained in the e-mail of 11 April 2005.¹⁹⁸ The table is shown below:

¹⁹⁷ See ID 2044, p. 8 (for Chiquita branded bananas in Italy), ID 1710, p. 3 (for Consul branded bananas in Italy), ID 2024, p. 28 (for Chiquita branded bananas in Greece, the price indicated is however at the lower level of the band of prices charged to customers) and ID 1344, 1345 (for Chiquita branded bananas in Portugal).

The Commission has asked Chiquita and Pacific to submit weekly initial prices which they use to start negotiations with their customers. Chiquita states that it only communicated such prices orally to customers and that it is therefore not able to submit initial prices to the Commission (ID 2043, p 9). Pacific submits that it does not have any such price at all (see, for example, ID 1849, p 8). The Commission considers that it is not credible that a major importer of bananas into Europe does not internally agree on a certain price level on the basis of which it would start its negotiations with its customers.

Therefore, the Commission has asked the addressees to submit weekly actual prices for their respective main customers. When determining price levels in this Decision for any given week the Commission used the following methodology: The Commission considers on the basis of the information on price setting available to it (see recital (40) et seq.) that Chiquita's initial price is equal or very near to the top price level of the band of prices actually agreed each week with the main customers excluding peak prices which, for single customers in single weeks, are clearly higher or clearly lower than the band of actual prices agreed with the large majority of main customers. The same assessment is also applied for the determination of the desired price level which Pacific must have had in mind when starting negotiations with its customers.

¹⁹⁸ ID 1861 (Pacific inspection document DWY 13); p. 7 (Pacific's reply to 4th request for information); ID 1986 (inspector's list), ID 1885: the copy of the e-mail of 11 April 2005 and the undated table were copied during inspections from a Pacific binder entitled "price forecasts".

Chiquita Prices - 2005

Gross Prices in Euro (Duties, rebates, discounts are NOT deducted)

Week		6	7	8	9	10	11	12	13	Avg.
Italy	CHIQ	17.00	17.50	17.50	18.00	18.70	19.00	19.00	19.00	18.21
	CON					18.75	17.00	17.00	17.00	18.94
Greece	CHIQ	16.50	17.00	17.00	17.50	18.00	18.75	19.40	19.30	17.99
Portugal	CHIQ	14.50	15.50	15.50	15.50	16.70	17.00	17.00	17.50	16.16
Total:		16.00	16.67	16.67	17.00	17.54	17.94	18.10	18.33	17.28
			0.67	-	0.33	0.54	0.40	0.16	0.22	

No new No new discharge = same price as previous week.

Notes:

Week 10 - He will increase P & S to our levels. our vessel in Wed, his in Sat.

Week 13 - Chiquita is feeling the pressure to reduce prices only in Italy (after easter).
We both agreed that we should remain with prices unchanged.

15 day 1p

- (131) Whereas the table in the e-mail of 11 April 2005 related to weeks 9-15 of 2005, the undated table entitled "*Chiquita Prices - 2005*" relates to weeks 6-13 of 2005 and contains the same explanatory notes for weeks 10 and 13 as the table in the e-mail of 11 April 2005 ("*Week 10 - he will increase P&S [Portugal and Spain] to our levels*"; "*Week 13 - Chiquita is feeling the pressure to reduce prices only in Italy (after easter). We both agreed that we should remain with prices unchanged*"). This fact confirms, as stated by Mr [...] in his e-mail of 11 April 2005 ("*Following is an update of the prices discuss with [...]*"), that the table and explanatory notes were updated on a regular, almost weekly, basis by Mr [...] of Pacific upon him colluding with Mr [...] of Chiquita on the weekly prices for green bananas in the three Member States concerned, namely Portugal, Greece and Italy.
- (132) Pacific argues in its reply to the Statement of Objections that there is nothing in the e-mail of 11 April 2005 to indicate that the company obtained pricing information from its competitors or that it had obtained confidential information prior to its disclosure in the market. Pacific argues that the e-mail contains non-sensitive market information and refers in this respect to what is stated in relation to week 13, namely: "*Chiquita is feeling the pressure to reduce prices only in Italy (after easter)*". Pacific claims that this is not confidential information, but information about an annually recurring development on the market. Moreover Pacific points to Chiquita's statement that the "*market information*" (the notes for weeks 10 to 14) could have originated from other sources, in particular customers, and that the note for week 15 might be an assumption of Mr [...] of Pacific based on statistical information.¹⁹⁹
- (133) Contrary to Pacific's argument, the e-mail of 11 April 2005 shows the exchange of competitively sensitive information between Pacific and Chiquita. The information in the e-mail of 11 April 2005 originates from Chiquita and shows how Chiquita disclosed its future price intentions to Pacific. In its attempts to show that the e-mail of 11 April 2005 does not constitute evidence of an infringement, Pacific makes selective use of quotes found therein. For example, in relation to the notes on week 13 (see recital (132)), Pacific fails to mention that the sentence "*Chiquita is feeling the pressure to reduce prices only in Italy (after easter)*" is followed by clear

¹⁹⁹

ID 1650, p. 8-9 (Chiquita's submission of 13 October 2009) and Chiquita's reply to the Statement of Objections, recital 123. See section 5.4.1 of Pacific's reply to the SO

evidence of an agreement on future pricing, namely "*We both agreed that we should remain with prices unchanged*". Pacific's observations as to the accuracy and origin of the Chiquita related information contained in the e-mail of 11 April 2005 are clearly contradicted by the wording used in the e-mail itself ("*Following is an update of the prices discuss[ed] with [...]*" and "*Week 15 - ... I spoke to [...] and he will give instructions to keep all prices unchanged*"). Such statements cannot be regarded as relating to general market conditions only. The wording of the e-mail of 11 April 2005 is, rather, self-explanatory and shows unequivocally that Pacific discussed future prices/price intentions with Chiquita. Pacific does not provide any evidence that would shed a different light on the content of the e-mail of 11 April 2005 and the contacts described therein.

- (134) While there is nothing in the e-mail of 11 April 2005 to support it, Pacific argues in its reply to the Statement of Objections that the table contained in the e-mail had likely been prepared by Mr [...] of Pacific on the basis of input from Pacific's sales team following their negotiations with customers. According to Pacific, by the time the e-mail of 11 April 2005 was actually sent (9:57am) it is likely that Chiquita had already communicated its prices to the market and that Mr [...] (Pacific's [...] for Italy) had talked to customers and been informed about Chiquita's pricing decision by the customers. According to Pacific, the e-mail did not, in any case, have any impact on Pacific's behaviour in the market.²⁰⁰
- (135) Pacific itself has indicated that its weekly negotiations with its Italian customers started on Monday mornings at around 10am and that they were not necessarily concluded at that time. Instead it admits that there are customers with which often more than one negotiation (and sale) takes place during the course of a week²⁰¹. In the light of Pacific's explanations as to the set up of its weekly negotiations, the company cannot successfully argue that the information contained in the e-mail of 11 April 2005 could not have had any impact on its commercial conduct.
- (136) Pacific further submits²⁰² that in respect of some weeks the prices in the table contained in the e-mail of 11 April 2005 are inaccurate and argues that if those prices had truly been the subject of a discussion between Mr [...] of Pacific and Mr [...] of Chiquita as alleged in the Statement of Objections, one would reasonably expect that Mr [...] would have inserted the correct prices for all of the weeks reported in the e-mail. In addition, Pacific puts forward²⁰³ that a further internal e-mail from Mr [...] to Mr [...] and others in Pacific undermines the credibility of the e-mail of 11 April 2005. That second e-mail, which was sent on 11 April 2005 at 11.24 am and entitled "MED Weekly Price Report – W 15",²⁰⁴ reports that the price in Italy was in fact going down by 45 cents contrary to what Mr [...] of Pacific had assessed in his earlier e-mail of 11 April 2005 at 9:57am. In the earlier e-mail of 11 April 2005, Mr [...] had assessed that Pacific would be able to maintain a price of EUR 17 in Italy (contrary to the general indication by Mr [...] (Pacific) that prices were going down). According to Pacific, that reversal of statements as to the price development in Italy

²⁰⁰ Recitals 259 et seq of Pacific's reply to the Statement of Objections.

²⁰¹ See Pacific's reply to the SO, recitals 76-78

²⁰² See recital 265 of Pacific's reply to the Statement of Objections.

²⁰³ See recitals 263-264 of Pacific's reply to the Statement of Objections.

²⁰⁴ Annex 13 to Pacific's reply to the Statement of Objections.

shows that it was Mr [...] of Pacific, not Mr [...] of Pacific, who was responsible for setting prices for Pacific.

- (137) Pacific's conclusions inferred from the statements in the second e-mail of 11 April 2005 are, however, inaccurate as the second e-mail reflects Pacific's internal pricing discussions. The first e-mail of 11 April 2005 reports that prices in the Italian business were reported to be generally going down, but that there were reasons to try to keep the price unchanged. The second e-mail of 11 April 2005 contains price information that was intended to be included in Pacific's weekly report.²⁰⁵ The purpose of the two e-mails is evidently different.
- (138) What the two e-mails of 11 April 2005 do show is that Pacific had a clear idea of what price levels should be achieved by its sales staff prior to discussions with customers (see recital (45)), which clearly contradicts Pacific's argument that it did not have any initial price in mind when it entered into discussions with customers.
- (139) In any event, the Italian and Portuguese prices for Chiquita bananas mentioned in the first e-mail of 11 April 2005 (9:57am) correspond to the upper level of the actual prices achieved by Chiquita in the weeks concerned.²⁰⁶

The timing of collusive contact in relation to week 15 of 2005

- (140) Considering that Mr [...]’s e-mail of 11 April 2005 contains information on Chiquita's prices for week 15 of 2005 and an unmistakable reference to a collusive contact between Pacific and Chiquita ("*Week 15 – [...] I spoke to [...] [...] and he will give instructions to keep alll [sic] prices unchanged*"), it is clear that a contact had taken place between Mr [...] of Pacific and Mr [...] of Chiquita shortly before Mr [...] sent his e-mail on Monday 11 April 2005. It is not possible to establish the exact timing of the contact from the e-mail, as the timing of the e-mail itself, namely 09:57am on 11 April 2005, merely indicates the time by which, at the very latest, the collusive contact between Pacific and Chiquita on future prices and pricing strategy for week 15 of 2005 could have taken place. Chiquita has denied that any of the price related collusive contacts [...] took place in the period from 9 to 11 April 2005 and argues that all contacts of an anti-competitive character had come to an end by the very latest on Friday 8 April 2005 when Chiquita applied for immunity.²⁰⁷

²⁰⁵ See recital 264 of Pacific's reply to the Statement of Objections.

²⁰⁶ See ID 2044, 1344, 1345. As Pacific points out for week 10, the Italian and Portuguese prices for Chiquita bananas are indicated 20 Cents higher in the table than they appear in Chiquita's actual price tables. As regards Greece, see footnote 197 where it is explained that for Chiquita branded bananas the price indicated is at the lower level of the band of prices charged to customers. It must also be pointed out that Pacific overlooks that the prices contained in the table do not contain "*duties, rebates and discounts*". Moreover, it is by no means necessary – as Pacific presumes – that the parties must actually have been able to realise to the full extent the prices or price changes they discussed when negotiating with their respective customers. There is also no indication that the prices contained in the table would be updated afterwards to correspond to the average prices that actually could be realised in any given week.

²⁰⁷ See for instance Chiquita's reply to the Statement of Objections, part IV.A; ID 1650, p. 1 (Chiquita's submission of 13 October 2009) or part 3 of the recording of the Oral Hearing, from 00:47:00 to 00:47:30.

- (141) As pointed out by Chiquita, there are several elements suggesting that the contact referred to in the 11 April 2005 e-mail between Mr [...] of Chiquita and Mr [...] of Pacific had already taken place in the week that preceded the e-mail of 11 April 2005 (week 14).²⁰⁸ Firstly, the e-mail of 11 April 2005 refers to *Aldi* prices for week 15 and the fact that they had been determined on Thursday 7 April 2005 ("*Week 15 – [...] Aldi remains unchanged (Thursday of Week 14)*"). Secondly, the e-mail refers to prices for marketing week 15 in relation to Greece and Portugal. In view of Chiquita's schedule for vessel arrivals²⁰⁹, the Greek and Portuguese prices for marketing week 15 had already been set and communicated by Chiquita to its customers in the period Tuesday-Friday of the preceding week (week 14). Thirdly, as argued by Chiquita, the fact that the information in the e-mail of 11 April 2005 is very detailed and stems from different sources indicates that it is unlikely to have been received by Mr [...] on the morning of Monday 11 April 2005 before he sent the e-mail.²¹⁰ Fourthly, there is a phone record indicating a contact between Mr [...] of Chiquita and Mr [...] of Pacific on 7 April 2005 (see footnote 159).²¹¹ In addition, Mr [...] of Chiquita was, from Sunday 10 April 2005 to Tuesday 12 April 2005, on a business trip in Cincinnati (USA).²¹² Due to Mr [...]’s travel schedule and in view of the time difference between Italy and the USA, it is unlikely that there would have been any contact between Mr [...] of Pacific and Mr [...] of Chiquita on the morning of Monday 11 April 2005.²¹³
- (142) For those reasons, the communication between Mr [...] of Chiquita and Mr [...] of Pacific must have already taken place before Monday 11 April 2005, that is to say during the week of Monday 4 April to Sunday 10 April 2005.²¹⁴

4.3. Assessment of other arguments of the parties

4.3.1. *Pacific’s general observations*

- (143) In its reply to the Statement of Objections Pacific looks at each piece of information in isolation, carving out and on numerous occasions selectively quoting single written or oral statements, and then submits that the relevant piece of information alone is neither sufficiently precise nor conclusive to find an infringement of the competition rules.²¹⁵
- (144) Contrary to Pacific’s submission, the Commission bases its findings of an infringement on a solid body of contemporaneous evidence concerning the whole period of the infringement, namely the documents described in recitals (105), (123),

²⁰⁸ ID 1650, p. 9 (Chiquita's submission of 13 October 2009); Chiquita statement during the Oral Hearing on 18 June 2010.

²⁰⁹ Chiquita’s volume tables for marketing weeks 9 to 16 of 2005 (ID 1125) set out that the vessel attributed to marketing week 15 called (i) in Italy at Genova on 11 April 2005 (Monday of calendar week 15) and at Salerno on 13 April 2005 (Wednesday of calendar week 15), (ii) in Greece at Aegion on 10 April 2005 (Sunday before) and (iii) in Portugal at Setubal on 8 April 2005 (Friday before).

²¹⁰ ID 1650, p. 9 (Chiquita's submission of 13 October 2009).

²¹¹ Chiquita statement during the Oral Hearing on 18 June 2010.

²¹² ID 1650, p. 8-9, 13, 17-18 (Chiquita's submission of 13 October 2009 and annexes thereto).

²¹³ 09:57am in Rome (Italy), that is to say, the time that Mr [...] sent his e-mail to Mr [...], corresponds to 03:57am in Cincinnati (USA).

²¹⁴ Mr [...]’s telephone records indicate a contact on Thursday, 7 April 2005, see footnote 159.

²¹⁵ Pacific’s reply to the Statement of Objections, recitals 172-175.

(125) and (126) and the corporate statements of Chiquita (see section 4.2.2). All those documents originate from Pacific or its managers. In addition, those documents are consistent with Chiquita's submissions as to the nature of the competitor contacts.

4.3.2. *Alleged legitimate contacts with competitors*

- (145) Pacific argues on numerous occasions in its reply to the Statement of Objections that the contacts between Pacific and Chiquita had a legitimate purpose and content, namely the co-shipping and co-sourcing of bananas, and that the notes should be read purely in that context.
- (146) Pacific argues²¹⁶ that, in spite of two on-site inspections by the Commission, a document search of [...] documents and more than [...] interviews [...], no contemporaneous documents showing the alleged infringement have been found at Chiquita, nor has the Commission found any “other” documents from Pacific than the ones described in sections 4.2.3-4.2.5. Pacific argues that if Chiquita and Pacific did enter into any such arrangement as the Commission alleges, it is not credible that no traces of such conduct was left in its written records. Instead, Pacific submits that Chiquita has found an abundance of records that support Mr [...]’s (Chiquita) statements as to the legitimate reasons for him to have contacts with Mr [...] of Pacific.²¹⁷
- (147) The claim that there were contacts between competitors which were allegedly legitimate does not in any way rule out the possibility that collusive contacts also took place. In view of the fact that, in this business, contacts (irrespective of whether they were collusive in nature or not) seem to have occurred exclusively orally (see recital (90)), it is not surprising that written traces of the collusion are limited.
- (148) Furthermore, despite the parties' internal searches, neither party has provided any contemporaneous documents of the meeting of 28 July 2004 to substantiate their claims that everything which was discussed during that meeting was of a purely legitimate nature. The only contemporaneous records of that meeting are the handwritten notes and calendar entry of Mr [...] of Pacific and Mr [...]’s (Chiquita) expense records (see section 4.2.3). In relation to the e-mail of 11 April 2005 and the contacts on pricing that took place between Pacific and Chiquita in the period preceding it, Pacific has not provided any contemporaneous documentary evidence to support its alternative explanation for the allegedly legitimate content of such contacts. The only contemporaneous documents describing the content of such pricing contacts are the e-mail of 11 April 2005 and the undated table entitled "*Chiquita Prices – 2005*" referred to in recital (126).
- (149) Pacific submits²¹⁸ with regard to the meeting of 28 July 2004 that it was intended as an opportunity for Mr [...] of Chiquita and Mr [...] of Pacific to get to know each other and to facilitate the work in the trade association ANIPO, as well as to explore the possibility for Chiquita to source bananas from Pacific or joint-shipping arrangements.

²¹⁶ Pacific’s reply to the Statement of Objections, recitals 313-320.

²¹⁷ Pacific refers in this context to [...].

²¹⁸ Recitals 181-183 of Pacific’s reply to the Statement of Objections.

- (150) According to Pacific²¹⁹ the explanation given by Chiquita that the possible sourcing of bananas from Ecuador was discussed at the 28 July 2004 meeting is fully consistent with the fact that Chiquita was, at the time, in short supply of licences and was actively seeking alternative supplies. In Pacific's view, contemporaneous documents submitted by Chiquita also provide support for that claim²²⁰. Pacific argues that Chiquita had approached Mr [...] of Pacific unsuccessfully at an earlier moment and in the summer of 2004 tried to contact Mr [...] of Pacific. Pacific claims that Mr [...], upon hearing of Mr [...]’s contacts with Mr [...] (Chiquita) on this subject, quickly stopped Mr [...] from pursuing this idea of sourcing bananas for commercial reasons.
- (151) While it appears that some of the topics suggested by Pacific in its Statement of Objections reply were also discussed between Chiquita and Pacific (see the reference in Mr [...]’s notes to "*Shipping cooperation: Salerno to Aegion weekly business for Bonita*"), these were not the sole topics discussed at the meeting.²²¹ The contemporaneous notes provide clear evidence of pricing discussions in relation to Portugal, Greece and Italy, while not providing any support for Pacific's alternative claim that the meeting discussions concerned the trade association ANIPO and the role of a representative of a competitor therein.
- (152) In any case, Pacific's reply to the Statement of Objections confirms the reliability of Mr [...]’s handwritten notes. Pacific admits that shipping cooperation was discussed between Pacific and Chiquita and the notes indeed contain a reference to that subject, among the discussions on pricing relating to Portugal, Greece and Italy. Apart from what has already been stated in recitals (147) and (151), it is also noted that Pacific's claims that Mr [...] stopped Mr [...] (Pacific) from pursuing co-loading/co-shipping discussions in the summer of 2004 are not credible in the light of Chiquita's internal e-mail of 23 February 2005²²² which clearly shows that, 6 months later, Mr [...] of Pacific and Mr [...] of Chiquita were still pursuing the same discussions, with the additional involvement of Chiquita's and Pacific's European headquarters.
- (153) Pacific argues that Mr [...]’s notes of the meeting dated 28 July 2004 should be understood in the context of the discussions on sourcing and co-shipping between Pacific and Chiquita. In this respect Pacific for example considers that the reference in Mr [...]’s notes to a "*local agreement*" which would be "*too big (H Office) not possible*" may refer to the fact that involving the head offices in the sourcing and co-shipping plans would be too complicated and it would be better to agree on such measures locally. Pacific also argues that the notes relating to Greece indicate that Mr [...] of Chiquita provided Mr [...] of Pacific with an overview of Chiquita's operations in Greece in order to convince Mr [...] of the benefits of entering into an

²¹⁹ Recitals 184-192 of Pacific's reply to the Statement of Objections. Pacific refers in this context to Chiquita's Oral Statement 9.

²²⁰ In this context Pacific refers to an e-mail of 5 July 2004, ID 1733, p. 139 (e-mail from Mr [...] to Mr [...] relating to a discussion with Noboa about co-loading arrangements), see also [...] and an e-mail of 23 February 2005 from Mr [...] to Mr [...] of Chiquita, ID 1731, p. 118 (e-mail reporting on the discussion on co-loading and co-shipping between Mr [...] and Mr [...]).

²²¹ An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives, see Case C-551/03 P *General Motors*, [2006] ECR p. I-3173, at paragraph 64.

²²² ID 1731, p. 118 (e-mail reporting on the discussion on co-loading and co-shipping between Mr [...] and Mr [...]).

agreement with Chiquita on sourcing and co-shipping. Pacific argues that Mr [...]’s statement according to which Greece was "*for later*", under the section entitled "*Action Plan*", served as an indication for Mr [...] to examine the co-shipping arrangement for Greece at a later stage as this would require a significant change to Pacific’s shipping plans.²²³ As a general remark, Pacific also emphasises that banana prices were widely known in the business.²²⁴

- (154) With regard to Pacific’s claims that Mr [...]’s notes should be understood in the context of the discussions on sourcing and co-shipping between Pacific and Chiquita, there is nothing in Mr [...]’s notes to support such an assumption or argument, nor has Pacific submitted any documents to support its claims to that effect. In view of the follow-up contacts between Pacific and Chiquita on pricing from August 2004 until April 2005, it is clear that the "*Action Plan*" referred to in Mr [...]’s notes reflects the content of the discussions at the meeting of 28 July 2004 between Mr [...] of Pacific and Mr [...] and Mr [...] of Chiquita and their intention to engage in price coordination.
- (155) Contrary to Pacific’s argument, competitor contacts do not become legitimate because banana prices were widely known in the business.²²⁵ There is a vital distinction to be made between competitors independently gleaning information or even discussing future pricing with customers and third parties, and discussing price setting factors or the evolution of prices with competitors before deciding upon their weekly prices. It has not been demonstrated that any of the available publications revealed competitors’ views disclosed in communications or competitors’ expectations or intended course of action in relation to prices. Moreover, even if information discussed or disclosed by the parties was known to customers or other trade players, this would not alter the conclusion that such discussions among competitors were anti-competitive. Since bananas are perishable goods and prices are widely known once pricing discussions with customers start, competitors have an incentive to concert on prices before they go to the market.²²⁶ Therefore, Pacific’s argument highlights the reason for colluding.
- (156) Regarding the e-mail of 11 April 2005, Pacific argues²²⁷ that it was prepared in the context of a "*benchmarking exercise*" by which Pacific’s "*performance vis-à-vis its competitors*" was assessed. Furthermore, Pacific argues that in view of Chiquita’s attempts to source bananas from Pacific, it is likely that Mr [...] of Chiquita and Mr [...] of Pacific would have had a couple of discussions during which general remarks may have been made by Mr [...] which were then interpreted and inflated by Mr [...] to show his importance within Pacific.²²⁸

²²³ Recitals 225 and 227, section 5.2.3 of Pacific’s reply to the Statement of Objections.

²²⁴ See Pacific’s letter of 7 September 2010.

²²⁵ The mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti-competitive intention, see Case T-53/03 *BPB v Commission* [2008] ECR II-1333, at paragraph 154. See also case T-54/03 *Lafargev Commission*, [2008] ECR p. II-120, at paragraphs 462-463.

²²⁶ See, for example, Case T-54/03 *Lafarge v Commission* [2008] ECR p. II-120, at paragraph 463.

²²⁷ Recitals 246-269 of Pacific’s reply to the Statement of Objections.

²²⁸ Recital 262 of Pacific’s reply to the Statement of Objections.

- (157) Pacific's arguments are clearly contradicted by the wording of the e-mail dated 11 April 2005 which is compelling evidence of price coordination between Chiquita and Pacific in weeks 6-15 of 2005. As the document clearly indicates, the price table and the notes under it originate from Chiquita and not from internal or public sources. Pacific's argument that the pricing discussions evidenced by that e-mail formed part of benchmarking exercises does not in any way excuse their anticompetitive content.

4.3.3. *Pacific's arguments based on Chiquita statements*

- (158) Pacific claims²²⁹ that Chiquita's statements²³⁰ contradict the Commission's objections. According to Pacific, and contrary to what was alleged in the Statement of Objections, Chiquita's early statements are consistent with those made at a later stage of the proceedings and confirm the existence of legitimate reasons for the two parties to have had contacts with each other (in this regard, see recitals (145)-(148)). Pacific argues that Chiquita has confirmed (i) that it was not aware of any evidence showing that an infringement consisting of the exchange of competitively sensitive information occurred, and (ii) that its employees have stated that there were no illegal communications between competitors.²³¹ Pacific also refers to Chiquita's explanations regarding the e-mail of 11 April 2005 and Mr [...]s (Chiquita) statements that (iii) he never discussed more than general market tendencies with Mr [...] of Pacific and that the specificity of the e-mail of 11 April 2005 was not consistent with the type of discussion that he engaged in²³² and that (iv) he did not recall having agreed on prices with Mr [...] of Pacific and the latter may have exaggerated the contents of their conversations.²³³
- (159) Contrary to Pacific's view, Chiquita's statements are overall consistent with the finding of an infringement in this decision and in line with the documentary evidence in particular that originating from Pacific referred to in section 4.2, even though they contain certain defensive passages. The prevailing principle in Union law is that of unfettered evaluation of evidence and the only relevant criterion for assessing evidence lies in the reliability thereof. Accordingly, whilst the lack of clarity of an item of evidence may reduce its value as evidence, that is no reason for rejecting it in its entirety.²³⁴ The interview with Mr [...] of Chiquita, which was conducted during the inspections in November 2007, was made at a time when Mr [...] had yet to prepare a defence line and the statements made in that context are, therefore, particularly credible. Whilst Mr [...] has, on occasion, been reluctant to disclose his full knowledge about the cartel behaviour, he nevertheless [...]. Furthermore, by e-mail of 17 April 2005²³⁵ (sent 10 days after its immunity application) Chiquita's [...]

²²⁹ Recitals 289-312 of Pacific's reply to the Statement of Objections.

²³⁰ In this respect Pacific refers to the minutes of Mr [...]s interview during the inspections in November 2007, [...] as well as the submission of 13 October 2009 (ID 1650, re-submitting the factual parts of the reply to the state of play letter for the purposes of granting access to the file).

²³¹ See recitals 303-306 of Pacific's reply to the Statement of Objections.

²³² Recital 251 of Pacific's reply to the Statement of Objections and [...].

²³³ Recital 254 of Pacific's reply to the Statement of Objections and Chiquita's submission of 13 October 2009, ID1650, p. 15.

²³⁴ See Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering a.o / Commission*, [2004] ECR p. II-2501, at paragraphs 263 and 273, and Case T-110/07 *Siemens / Commission*, not yet reported, at paragraph 54.

²³⁵ ID 1014, p. 2.

for Europe warned members of its staff - including Mr [...] - that the company would consider disciplinary action against those who failed to report, within 48 hours, their knowledge of any anti-competitive competitor contacts. According to Chiquita, Mr [...] was interviewed for the first time the day after the expiry of that deadline. The fact that Mr [...] failed to report the collusive contacts with Pacific within the 48 hour deadline had presumably affected negatively his willingness to report his knowledge of the collusion once the proceedings started in this case in 2007 for fear of disciplinary action (as he had not reported on the price contacts with Pacific within the deadline in 2005). In its reply to the Commission's state of play letter Chiquita explained the disciplinary measures that its employees would risk for any breach of Chiquita's compliance measures (be it non-termination of possible illegal conduct, inappropriate communications with competitors or provision of incomplete, misleading or false answers) up to and including termination of employment and that Mr [...] has consistently been informed of such consequences since 2005²³⁶. In the light of this, the defensive nature of some statements made by Chiquita several years after the facts at issue cannot cast doubt on the probative value of the precise and detailed information contained in the documentary evidence drawn up by Pacific at the time of the infringement which has also been corroborated by Chiquita's statements.

- (160) Pacific refers to the fact that Mr [...] of Chiquita has indicated that the calls with Mr [...] of Pacific were most frequent in the second half of 2004 due to the discussions related to ANIPO at the end of the quota regime. In view of the content of the calls, Pacific assumes that Mr [...] of Chiquita actually intended to refer to the end of 2005 (not the end of 2004), which would be consistent with the telephone records submitted by Pacific.²³⁷
- (161) Chiquita's statements are, however, consistent with the documentary evidence and support the conclusion that future prices were discussed between the two parties from the meeting on 28 July 2004 until early April 2005, as reported in the e-mail of 11 April 2005. There is no reason to assume that Mr [...] (Chiquita) recollection of the timing of the calls is erroneous. In that context, Pacific has only submitted partial telephone records and Chiquita has not provided any.
- (162) Regarding price discussions, Pacific claims²³⁸ that Mr [...] of Chiquita only refers to discussions on "*price variations*" but not on actual prices. The company also argues that Chiquita is wrong in referring to price movements of EUR 0.50. According to Pacific it is pure speculation that the price trend discussions would be conducted in a way that each party would know how the prices should move. Pacific submits that Chiquita's prices fluctuated by as much as EUR -2.00 to EUR +1.00 and that, on occasion, the prices changed only by EUR 0.25.²³⁹ Pacific argues that its own pricing data varied from changes of a few cents to more than EUR 2.00. Pacific argues that the price data submitted by the parties is not in line with the idea that prices would move by EUR 0.50 at a time. Therefore, Pacific concludes that Chiquita's statements are very general and non-price specific and that they are not supported by any facts.

²³⁶ ID 1050, p. 17-19.

²³⁷ Recital 293 of Pacific's reply to the Statement of Objections.

²³⁸ Recitals 294 and 308-311 of Pacific's reply to the Statement of Objections.

²³⁹ Chiquita's price data is referred to in footnote 197.

- (163) The distinction drawn by Pacific between price variations and actual prices is artificial. The banana business operates in weekly cycles and independently of whether prices were discussed in terms of the specific amounts or price variations the parties would, at the end of their discussion, understand how the competitor's prices would develop. It is settled case-law that in order to restrict competition it is not necessary to collude on actual prices.²⁴⁰ Moreover, the e-mail of 11 April 2005 shows that the prices discussed concerned actual price levels. In order to find that an infringement relates to actual price levels it is, however, not necessary – as Pacific seems to argue – that competitors exchange customer specific actual prices. In addition, the fact that prices could vary by more or less than EUR 0.50 does not contradict Chiquita's statements as they do not argue that prices would necessarily vary by EUR 0.50. With that argument Pacific is wandering from the core of Chiquita's statements which are also consistent with the documentary evidence: namely, the parties exchanged price intentions for the following week in such a way that both understood whether the prices should go up, go down or stay the same. Such discussions on price "trends" reduce each party's uncertainty as its competitor's prices compared to a situation in which each party decides on its behaviour autonomously. Finally, Pacific's statement about the range of its own price variations does not contradict the Commission's findings since Pacific's argument seems to be based on data on (not future) average prices.²⁴¹

4.3.4. *Arguments relating to Mr [...]’s role, experience and character*

- (164) According to Pacific,²⁴² only one of its employees, namely Mr [...], was involved in the collusive conduct. Pacific explains that Mr [...] worked as a financial controller but due to the small size of the Italian office in which he was stationed, Mr [...] was also required to take on administrative tasks as an office manager (formally referred to as [...] or [...]). Pacific argues that Mr [...] was the [...] in Pacific and was in charge of the company's sales team, and that Mr [...] carried out financial and benchmarking analyses for him. According to Pacific, Mr [...] did not have any decision making powers related to sales and he was not involved in price setting even though his role in finance required him to pull together input for Pacific's weekly management reports. Pacific claims that, in contacts with customers, Mr [...] would only deal with issues such as late payments, bank guarantees and invoicing. Pacific also states that when Mr [...] was present at meetings in which prices and volumes were decided, he would only take part in the discussions relating to purely financial and administrative issues. In Pacific's view Mr [...] was not an experienced player in the business who would understand the price implications of any "price trend" statements as described in recital (100).²⁴³

²⁴⁰ Case T-53/03 *BPB v Commission*, [2008] ECR p. II-1333, at paragraph 294.

²⁴¹ The only indication Pacific gives about what it means with „pricing data“ is footnote 199 of its reply to the Statement of Objections where it states that it has used for its analysis Chiquita's weekly predominant price agreed ex-ante with its main customers whilst using Pacific's average actual prices form its price reports. Such prices are, first, clearly not comparable and, second, it is evident that average prices determined ex-post taking into account rebates and other price corrections do not vary in steps of EUR 0.25 or 0.50 or multiples thereof.

²⁴² Section 4 of Pacific's reply to the Statement of Objections.

²⁴³ Pacific refers to recital 139 of the Statement of Objections. See recitals 308-309 of Pacific's reply to the Statement of Objections.

- (165) Contrary to Pacific's argument, it was not only Mr [...] who was involved in the infringement on Pacific's part, but also Mr [...] (manager in charge of the sales team). Irrespective of his main responsibilities within Pacific, Mr [...] was present at and participated in internal meetings in which prices were discussed and he reported to Mr [...] about his collusive contacts with Chiquita. Reference is made to the e-mail of 11 April 2005 and the undated table (see recital (126)) which show that Mr [...] reported directly to Mr [...] about his contacts with Mr [...] of Chiquita. Mr [...] also discussed prices with the Pacific sales team members, for example, Mr [...], as evidenced by the e-mail of 11 April 2005. Contrary to Pacific's assertion, Mr [...] was hence also involved in price setting discussions in addition to his benchmarking exercises and in accordance with his statutory powers as [...] or [...]. Mr [...]’s handwritten notes, in particular those which were drawn up during the period when he was [...] at Pacific's Rome office, show Mr [...]’s direct involvement in the management of the undertaking²⁴⁴.
- (166) Regarding Mr [...]’s notes, Pacific claims²⁴⁵ (i) that Mr [...]’s notebooks were personal notebooks in which professional and private issues were noted down, (ii) that Mr [...] wrote his notes after the relevant events and (iii) that those notebooks were not found at Pacific's premises but rather in Mr [...]’s private home and as a result, cannot be considered as official business records of Pacific. Contrary to such arguments, it is clear that the notebooks were mainly used for professional note-taking as evidenced by the fact that the overwhelming majority of the business related notes contained therein were business related. There is nothing in Mr [...]’s notes that would suggest that, if some notes were written after an event had taken place, the notes did not correspond to the content of the discussions at that event. Furthermore, the fact that the notebooks also contain personal notes does not undermine their probative value. The notebooks contain records of Mr [...]’s business activities at Pacific, no matter the location where the notebooks were physically kept or subsequently found. In addition, the notes follow a chronological order of events and dates, which indicates that the notes were written at the time of the respective event.
- (167) Pacific argues that Mr [...] was relatively isolated at work and had very little communication with the sales team in Pacific's Rome office due to personal conflicts with and his distrust of Messrs. [...] and [...], Mr [...]’s professional aspirations and alleged problems in his private life²⁴⁶. Isolation and lack of communication in the office cannot, however, constitute a credible explanation nor serve as a justification for Mr [...]’s collusive contacts with Mr [...] of Chiquita. Apart from the statement by Mr [...], Pacific's external legal counsel,²⁴⁷ which was prepared for the purpose of

²⁴⁴ For example see 1981, p. 4, 7, 31-32, 34, 39, 47, 51 (GdF documents). ID 1731, p. 118 (annex to Chiquita's Oral Statement 1) and the e-mail of 11 April 2005. A series of Pacific inspection documents also evidence Mr [...]’s involvement in the decision making on prices and volumes and reporting to and from PFCI's parent companies (for example, ID 1761, p. 16-18, 46, 68, 84, 106 and 143; ID 1765, p. 5; ID 1766, p.2; ID 1770, p. 11; ID 1773, p. 9-13 and ID 1774, p. 3). Moreover, as [...] Mr [...] had wide powers including the right to represent the company externally, conclude contracts and hire or fire employees, ID 1919, p. 7 (Pacific's reply to the 8th request for information), see also ID 1920, p. 8-10 (extract of the Italian Company Register).

²⁴⁵ Recitals 149-150, section 5.2.1 of Pacific's reply to the Statement of Objections.

²⁴⁶ Recitals 147-155 of Pacific's reply to the Statement of Objections.

²⁴⁷ See Annex 11 to Pacific's reply to the Statement of Objections, ID 2545.

Pacific's reply to the Statement of Objections, Pacific has provided no concrete evidence to show the lack of credibility of the notes drafted by Mr [...]. On the contrary, the file contains contemporaneous evidence showing that Mr [...] was diligent in taking notes. By way of example, reference is made to a meeting of 14 January 2004 for which the hand-written notes of both Mr [...] and Mr [...] are available.²⁴⁸ The comparison of those two sets of notes reveals that they match substantially both in terms of content and structure. In view of those elements, the arguments put forward by Pacific concerning Mr [...]’s personal characteristics and position within the company do not undermine the credibility and evidentiary value of Mr [...]’s notes.

- (168) Furthermore, Pacific points out²⁴⁹ that Mr [...] of Chiquita has also described Mr [...] of Pacific as new, young, disoriented and scared and that Mr [...] of Pacific was considered a much more consistent person. Those statements are, however, quoted out of their context and do not reveal any lack of experience on Mr [...]’s part. Mr [...] of Chiquita has actually explained²⁵⁰ that his first impression when he met Mr [...] of Pacific for the first time at a trade association (ANIPO) meeting was that Mr [...] was a young guy, rather disoriented who was a little bit scared. That statement relates only to their first encounter at a trade association meeting. Mr [...] (who was more than 15 years older than Mr [...]) explains that Mr [...] was new and young and that Mr [...] himself was among the youngest persons in the ANIPO association, characterising the other participants as a “*group of old foxes*”.²⁵¹ Mr [...]’s declaration concerning Mr [...]’s (Pacific) “consistency” actually reads as follows: “*in the beginning of 2006, I had a meeting, more PR-meeting than anything else in Berlin with his boss, Mr [...], which we were told was much more consistent person and to try to see if we could do something together*” (emphasis added).²⁵² Hence, this was neither Mr [...]’s assessment of Mr [...] nor an assessment by Mr [...] at that time or before that Mr [...] was not consistent or was less consistent than Mr [...].
- (169) Finally, Pacific questions the reliability of Mr [...]’s notes in view of his allegedly poor command of English.²⁵³ Neither Mr [...]’s handwritten notes nor any of Mr [...]’s reports to his superiors give any support to such claims. Overall Mr [...]’s notes are neither unclear nor contradictory. The fact that a document is not drawn up by a native speaker does not as such lead to the conclusion that the document is unreliable. In addition, as confirmed by Pacific, Mr [...] studied in English at [...].²⁵⁴

²⁴⁸ See ID 188, p. 11-12 (Mr [...]’s notes) and ID 905 (Mr [...]’s notes).

²⁴⁹ Pacific’s letter of 7 September 2010. In this respect Pacific quotes different statements during the Oral Hearing.

²⁵⁰ See part 4 of the recording of the Oral Hearing, from 02:14:00 to 02:14:26.

²⁵¹ See part 4 of the recording of the Oral Hearing, from 00:04:30 to 00:04:49.

²⁵² See part 4 of the recording of the Oral Hearing, from 02:17:13 to 02:17:34.

²⁵³ Recitals 4, 150, 387 of Pacific’s reply to the Statement of Objections.

²⁵⁴ See part 1 of the recording of the Oral Hearing, from 00:40:16 to 00:40:22.

5. APPLICATION OF ARTICLE 101(1) OF THE TREATY

5.1. Non-application of the EEA Agreement

- (170) This Decision exclusively concerns territories in which the Treaty applies. According to points (a) and (b) of Article 8(3) of the EEA Agreement, the provisions of the EEA Agreement only apply to products falling within Chapters 25 to 97 of the Harmonised 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 Agreement and this Decision does not cover any arrangements concerning territories in the EEA which are not Member States.

5.2. Jurisdiction

- (171) In this case the Commission is the competent authority to apply Article 101 of the Treaty, since the cartel had an appreciable effect on trade between Member States (see section 2.4).

5.3. Council Regulation No 26

- (172) Council Regulation No 26 applying certain rules of competition to production of and trade in agricultural products,²⁵⁵ provides that Article 101 of the Treaty applies to all agreements, decisions and practices which relate to production of or trade in the products listed in Annex I to the Treaty, which includes fruit.
- (173) By way of exception, Article 2 of Regulation No 26 provides that Article 101 of the Treaty does 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]”;
 - (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 Treaty] are jeopardised”.
- (174) The exceptions set out in points (a) and (c) in recital (173) cannot apply in this case. The organisation of the market for bananas is a common one, meaning that the exception in point (a) is excluded. The exception in point (c) is also excluded since

²⁵⁵ Regulation No 26 OJ 30, 20.4.1962, p. 993 (English special edition: Series I Chapter 1959-1962, p. 129), was replaced by Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, OJ L 214, 4.8.2006, p. 7, as of 24 August 2006.

the practices described in this Decision involve parties other than farmers. The exception in point (b) cannot apply either. The practices at issue do not in any way help to attain the objectives listed in Article 39 (1) of the Treaty. Consequently, they are not exempted from the application of Article 101 (1) Treaty.

5.4. Application of Article 101(1) of the Treaty

5.4.1. Article 101(1) of the Treaty

- (175) Article 101(1) of the Treaty prohibits as incompatible with the internal 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 internal market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

5.4.2. The nature of the infringement

5.4.2.1. Agreements and concerted practices

Principles

- (176) Article 101(1) Treaty prohibits *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.
- (177) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 101 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 101(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.
- (178) In its judgment in the PVC II case²⁵⁶, the Court of First Instance stated that “*it is well established in the case law that for there to be an agreement within the meaning of Article [101(1) of the Treaty] it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*”.
- (179) Although Article 101(1) of the Treaty draws a distinction between the concept of “*concerted practices*” and “*agreements between undertakings*”, the object is to bring within the prohibition of those Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called

²⁵⁶ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

has been concluded, they knowingly substitute practical co-operation between them for the risks of competition²⁵⁷.

- (180) 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 Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the internal 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 of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market²⁵⁸.
- (181) Thus, conduct may fall under Article 101(1) of the 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 behaviour²⁵⁹. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.
- (182) Although in terms of Article 101(1) of the 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, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a certain period. Such a concerted practice is caught by Article 101(1) of the Treaty even in the absence of anti-competitive effects on the market²⁶⁰.
- (183) In the T-Mobile judgment, the Court of Justice held that "*the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand ... the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve*" and that "*in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the*

²⁵⁷ Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

²⁵⁸ Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 174.

²⁵⁹ See also Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

²⁶⁰ See also Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion."²⁶¹

- (184) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 101 (1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article²⁶².
- (185) However, in the case of a *complex infringement* of a certain duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of those forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 101 of the Treaty lays down no specific category for a complex infringement of the present type²⁶³.
- (186) An agreement for the purposes of Article 101(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out it follows from the express terms of Article 101(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.²⁶⁴

Application in this case

- (187) Chapter 4 shows that the addressees of this Decision were involved in collusive activities concerning the banana business in the Southern European region, in particular coordinating their price strategy regarding future prices, price levels, price movements and/or price trends, and exchanging information on future market conduct regarding prices.

²⁶¹ The judgment of 4 June 2009 in Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, not yet reported, at paragraphs 60 et seq.

²⁶² See, in this sense, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission*, *Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, paragraph 72.

²⁶³ See again Case T-7/89 *Hercules v Commission*, paragraph 264.

²⁶⁴ See Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

- (188) The facts described in Chapter 4 and the behaviour of Chiquita and Pacific referred to in recital (187) clearly constitute an agreement within the meaning of Article 101(1) of the Treaty in the sense that the undertakings concerned explicitly agreed on certain conduct on the market. Those activities present a form of coordination and cooperation whereby the parties knowingly substituted practical cooperation between them for the risks of competition. Even if it is eventually not demonstrated that the parties explicitly subscribed to a common plan that constitutes an agreement, the conduct in question or parts of it would nevertheless form a concerted practice within the meaning of Article 101(1) of the Treaty.
- (189) The Commission has obtained documents from the Italian authorities, during the inspections in November 2007 and in response to requests for information, which show that the parties participated in those bilateral arrangements.
- (190) The documentary evidence together with the corporate statements of Chiquita in the Commission file (see Chapter 4.2) show, contrary to what Pacific has alleged,²⁶⁵ that the exchanges between Chiquita and Pacific went well beyond only sporadic, trivial or cryptic "market trend indications". What was set up at the meeting of 28 July 2004 was actually a structured and regular price fixing arrangement for Portugal, Greece and Italy.
- (191) Chapter 4 also shows that bilateral collusion took place over a period of time, systematically (or at least regularly) and in a repetitive way. The bilateral arrangements took place according to an established pattern, which was consistent throughout the relevant time period, even though intensity and specific contents of communications may have varied over time.
- (192) 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 cannot have failed to take into account, directly or indirectly, the information obtained in order to determine the policy which it intended to pursue on the market²⁶⁶. On the basis of the above considerations, there are no indications that the parties participating in concerting arrangements did not take account of the information exchanged with competitors when determining their conduct on the market.²⁶⁷ This is so despite variations in the frequency and specific contents of such communications, since such conduct could be expected to influence pricing behaviour even if the frequency and/or specific content of communications may have varied over time. It follows from the evidence that the parties, through their collusive contacts, engaged in action the obvious purpose of which was to influence their respective conduct on the market regarding prices and to disclose to each other the course of behaviour which each of the banana importers concerned itself contemplated adopting on the market.
- (193) To reach its conclusion, the Commission does not exclusively rely on this established case-law of the Courts. The facts described in Chapter 4 show that the parties at least

²⁶⁵ See recital 155 and section 5.8 of Pacific's reply to the Statement of Objections.

²⁶⁶ See Joined Cases T-202/98 etc. *Tate & Lyle v Commission* ECR [2001] II-2035, paragraph 58.

²⁶⁷ See Case C-49/92 P *Commission v Anic Participazioni SpA*, [1999] ECR I-4125, paragraph 121.

partially took account of the price information exchanged and acted accordingly (see in particular recitals (118), (124) and (129)-(130); see also, for example, the copy of the e-mail of 11 April 2005 and the undated table which were copied during inspections from a Pacific binder entitled “price forecasts”²⁶⁸).

- (194) Therefore, it is concluded that the bilateral arrangements between the parties influenced the conduct of the parties in setting banana prices for Italy, Greece and Portugal and that there was a causal connection between them. .
- (195) On the basis of these considerations, it is concluded that the infringement in this case presents all the characteristics of an agreement and/or a concerted practice in the sense of Article 101 of the Treaty.

Assessment of Pacific’s arguments

- (196) Pacific argues that none of the evidence relied on by the Commission makes it possible to draw the firm conviction that Chiquita and Pacific expressed a joint intention to fix prices in the market. According to Pacific the Commission failed to take into account the clear and demonstrable objective of contacts between Mr [...] and Mr [...] which concerned in its view legitimate business contacts related to ANIPO, sourcing of bananas and co-shipping arrangements.²⁶⁹
- (197) The evidence described in Chapter 4 shows that, at the meeting on 28 July 2004, the parties agreed on a price coordination scheme. Subsequent contacts between Chiquita and Pacific show the existence of such coordination (see sections 4.2.4 and 4.2.5). Those follow-up contacts also rule out Pacific’s alternative interpretations according to which the action plan recorded in the contemporaneous hand-written notes of Mr [...] merely reflects an arrangement to seek an agreement, an internal list of possible ideas or a discussion about the possible supply of bananas by Pacific to Chiquita. Furthermore, the mere fact that the cartel members also discussed other issues of a legitimate nature does not preclude the existence of the anticompetitive discussions about prices.
- (198) Pacific alleges that the contemporaneous notes of Mr [...] and the e-mail of 11 April 2005 were of a purely internal and/or personal nature and were not shared with or reviewed by anyone. Pacific further submits that the notes are unclear, inconsistent and fragmentary and were contradicted by Chiquita in its statements.²⁷⁰ Those allegations cannot be sustained in view of the high probative value of the evidence concerned. It must be taken into account that the handwritten notes of Mr [...] and e-mail of 11 April 2005 are of a contemporaneous nature and the source of the information had direct knowledge of the matters reported. Furthermore, those documents are corroborated by other facts and evidence, including Chiquita's statements, as described in Chapter 4.
- (199) Pacific states that there is no evidence that the "Action Plan" which is mentioned in the notes from the meeting of 28 July 2004 were agreed upon by Mr [...] of Chiquita and Mr [...] of Pacific. Pacific claims that it is just as likely that the "Action Plan"

²⁶⁸ ID 1986 (inspector's list).

²⁶⁹ Recitals 378 et seq of Pacific’s reply to the Statement of Objections.

²⁷⁰ Recitals 384 et seq and 178 et seq of Pacific’s reply to the Statement of Objections.

was Mr [...]’s internal notes of what he thought he could or should do.²⁷¹ Pacific further claims that there was no agreement and no implementation of an agreement relating to weekly contacts to hold price in Portugal. It also submits with regard to Portugal and the notes taken around 11 August 2004 (see recital (125)) that the Commission’s reference to "Chiquita -> [...], Portugal Stable" is undated and does not prove that Mr [...] of Pacific had a telephone conversation with Mr [...] of Chiquita and does not prove that an agreement had been reached on 28 July 2004. Pacific further argues that when, in the following week, on 2 August 2004, Mr [...] wrote in his notes that Pacific was forecasting a price decrease of 1 EUR to 8.75 EUR, this was in contradiction with any agreement to "hold" prices.²⁷² Regarding Greek and Italian prices, Pacific argues that the information in Mr [...]’s notes on equalling prices in those Member States is trivial and does not correspond to Pacific’s actual price situation (see recital (110)).

- (200) The Commission has not argued that the reference to "hold price" means that the parties would attempt to hold prices for each week in relation to Portugal (as suggested by Pacific in their response to the Statement of Objections) but that the parties would give follow-up to the agreement of 28 July 2004, as set out in the "Action Plan" regarding discussions on prices, and in particular on whether to stay put, to go up or to go down starting from the following week. Exactly this is shown by Mr [...]’s notes of 6 August 2004 and around 11 August 2004,²⁷³ as well as by the e-mail of 11 April 2005. Regarding these arguments of Pacific and its argument that the price difference between Greece and Italy continued, it suffices to observe that the Commission is not required to show that an agreement regarding future pricing behaviour was fully and successfully implemented.²⁷⁴
- (201) Irrespective of the plausibility of achieving exactly what they set out to do, the two parties followed up on the agreement of 28 July 2004 as evidenced by the notes from August 2004, the e-mail of 11 April 2005 and Chiquita’s statements. Mr [...]’s memorandum (see recital (118)) also confirms that Chiquita expected that its "actions [...] from the top of the market" would be carried out in parallel with "the steering of the market from the 'bottom' by Bonita", that is to say, in line with what was set out at the meeting of 28 July 2004.²⁷⁵ Accordingly, the body of evidence relied on in this

²⁷¹ Section 5.2.5 of Pacific’s reply to the Statement of Objections.

²⁷² Recitals 197-198, 240 of Pacific’s reply to the Statement of Objections.

²⁷³ The fact that such a note is undated is quite normal since it is a note taken during a conversation over the telephone and the anti-competitive object of the note was a reason for its author to leave the least trace possible, see Case T-11/89 *Shell / Commission* [1992] ECR II-757, at paragraph 86.

²⁷⁴ The responsibility of a given undertaking in respect of an infringement of Article 101(1) of the Treaty is properly established where it participated in the contacts, even if it did not subsequently implement any measure or measures agreed at the contacts (see to this effect, for example, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 509; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 145).

²⁷⁵ As indicated in recital (119), the memorandum shows that Chiquita expected a coordinated action by Chiquita and Pacific in the preceding period and was disappointed by results. This does not indicate, as suggested by Pacific, that no agreement existed. It rather shows that an agreement existed and, despite that agreement, Pacific had not completely fulfilled what it set out to do, with the consequence that Chiquita was disappointed with the fact that the envisaged results had not been fully achieved. The Commission has never asserted that the memorandum is direct evidence of an agreement between

Decision shows that Chiquita and Pacific reached an agreement which was then implemented.

- (202) The evidence in the file considered as a whole represents compelling proof that the parties reached an agreement on certain conduct on the market with a common objective to restrict competition. Chiquita and Pacific knowingly substituted practical cooperation between them for the risks of competition. Even if it should eventually not be demonstrated that the parties explicitly subscribed to a common plan that constitutes an agreement, the conduct in question or parts of it would nevertheless form a concerted practice within the meaning of Article 101(1) of the Treaty. By exchanging their price intentions, Chiquita and Pacific eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market.
- (203) Pacific submits²⁷⁶ that the Commission has failed to satisfy the level of proof required to support its objections against Pacific. According to the case-law, in order to establish that there has been an infringement of Article 101(1) Treaty, the Commission must produce precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement. Thus, even if, as Pacific asserts, none of the different elements of the infringement in question, considered separately, constituted an agreement or concerted practice prohibited by Article 101(1) Treaty, such a conclusion would not prevent those elements, considered together, from constituting such an agreement or practice.²⁷⁷ It is normal, in the context of anti-competitive practices and agreements, for the activities to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.²⁷⁸

5.4.2.2. Single and continuous infringement

Principles

- (204) A complex cartel may properly be viewed as a single and continuous infringement for the time frame in which it existed. 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.²⁷⁹ The agreement may well be

Chiquita and Pacific. The memorandum is used to clarify whether Mr [...]’s notes of 28 July 2004 are credible, a conclusion which it clearly supports.

²⁷⁶ See section 7.2 of Pacific’s reply to the Statement of Objections.

²⁷⁷ Case C-407/08 P *Knauf Gips/Commission*, not yet reported, at paragraphs 47-48.

²⁷⁸ Case T-53/03 *BPB/Commission*, [2008] ECR p. II-1333, at paragraphs 61-64, with further references. See also Joined Cases C-204/00 P etc *Aalborg Portland and others/Commission*, [2004] ECR p. I-123, at paragraphs 55-57. See also Case C-407/08 P *Knauf Gips/Commission*, not yet reported, at paragraph 49.

²⁷⁹ Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraph 3699.

varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of that 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 101 of the Treaty.

- (205) It would be artificial to split up such 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 both agreements and concerted practices.
- (206) 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 even cheating may even occur, but will not, however, prevent the arrangement from constituting an agreement or concerted practice for the purposes of Article 101 of the Treaty where there is a single common and continuing objective.
- (207) 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. 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 have reasonably foreseen or been aware of them and was prepared to take the risk²⁸⁰.
- (208) In fact, as the Court of Justice stated in its judgment in *Commission v Anic Partecipazioni*²⁸¹, the agreements and concerted practices referred to in Article 101(1) of the 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 recently reiterated by the Court in the Cement cases, that an infringement of Article 101 of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 101 of the Treaty. When the different actions form part of an ‘overall plan’, because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.²⁸²

²⁸⁰ See Case C-49/92 P *Commission v Anic Partecipazioni*, at paragraph 83.

²⁸¹ Case C-49/92 *Commission v Anic Partecipazioni*, at paragraph 79.

²⁸² See Joint cases C-204/00 P and others, *Aalborg Portland et al.*, [2004] ECR, p. I-123, paragraph 258. See also Case C-49/92 P, *Commission v Anic Partecipazioni*, paragraphs 78-81, 83-85 and 203.

Application in this case

- (209) In this case, the conduct in question constitutes a single and continuous infringement of Article 101 of the Treaty.
- (210) While there are indications (see recitals (91) and (92)) that collusive arrangements occurred among undertakings active in the banana business - including the parties – from the year 2000, there is a consistent body of evidence to establish the collusive arrangements as of 28 July 2004.
- (211) The evidence referred to in Chapter 4 shows the existence of a single and continuous infringement between Pacific and Chiquita in relation to the banana business in the Southern European region. The parties expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct in the banana business. The agreement to enter into that plan with a view to restricting competition can be dated back to at least 28 July 2004. The collusion was in pursuit of a single anti-competitive economic aim, namely to prevent competition on price by coordinating their price strategy regarding future prices, price levels, price movements and/or price trends and exchanging information thereon.
- (212) The agreements and/or concerted practices found to exist form part of an overall scheme which laid down the lines of their action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that parameter. It would be artificial to split up such 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 both agreements and concerted practices.²⁸³
- (213) The plan, which was subscribed to by Chiquita and Pacific, was developed and implemented through a complex of collusive arrangements, specific agreements and/or concerted practices. Given the common design and common objective of eliminating competition in the banana business, the collusive arrangements described in Chapter 4 have as their object the restriction of competition within the meaning of Article 101(1) of the Treaty. That description is supported by clear evidence, systematically referred to throughout this Decision. Taking into account these considerations, it is concluded that the arrangements formed a single and continuous infringement.

²⁸³

Pacific argues in very generic terms that the Statement of Objections did not properly characterise how the conduct under investigation would be considered as relating to a single and continuous infringement (Section 7.5 of Pacific's reply to the Statement of Objections.) Contrary to this view, the Statement of Objections did contain the essential elements used against Pacific on which the Commission imposes a penalty for an infringement of the competition rules, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that Pacific was in a position to submit its arguments effectively in the administrative procedure brought against it (see Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG and others v Commission*, ECR [2009] p. I-7191, at paragraph 36 with further references).

- (214) Pacific alleges²⁸⁴ that the Commission does not describe any specific conduct which spans across the period of the alleged infringement and has failed to demonstrate that the conduct described in Chapter 4 formed a single and continuous infringement. Pacific argues that the Commission has failed to describe any links between the documentary evidence of July/August 2004 and the documentary evidence of April 2005 and, while the Commission describes the conduct as a single and continuous infringement, it remains silent on the absence of evidence for the period between July/August 2004 and April 2005 (namely for a period of seven months). Pacific argues that that gap is especially long in view of the fact that, in the banana business, prices are negotiated on a weekly basis (that is to say, there is no evidence for more than 30 negotiation cycles).
- (215) Those arguments by Pacific are unsustainable and cannot be accepted. The finding that Pacific and Chiquita engaged in the coordination of prices and exchanges of information on future market conduct regarding prices is based on contemporaneous documents and Chiquita's corporate statements (see section 4).
- (216) The starting point of the infringement is the meeting between Pacific and Chiquita on 28 July 2004, the collusive character of which is evidenced by the hand-written notes drawn up by Mr [...] of Pacific (see section 4.2.3). The nature of the collusive scheme that was set up during that meeting (namely a structured and regular price fixing scheme covering Greece, Italy and Portugal) and which emerges from Mr [...] 's hand-written notes, is also consistent with the conduct described by Chiquita in its corporate statements (see recital (100)).
- (217) The contemporaneous evidence in the file shows that, following the meeting of 28 July 2004, Chiquita and Pacific continued their collusive contacts, with a first contact taking place on 6 August 2004 and another contact shortly after 11 August 2004 (see section 4.2.4). During those contacts between Mr [...] of Pacific and Mr [...] and Mr [...] of Chiquita, the parties discussed prices in Greece and market development in Portugal respectively²⁸⁵. The nature and substance of these contacts are consistent with Chiquita's corporate statements (see recitals (100)-(101)), namely that in the period following the meeting of 28 July 2004 Mr [...] of Chiquita and Mr [...] of Pacific started calling each other and discussed, inter alia, general market trends and specific price trends and intentions for the following week. According to Chiquita, calls between Mr [...] of Chiquita and Mr [...] of Pacific became more frequent towards the end of 2004 and the beginning of 2005. Chiquita reiterated during the Oral Hearing that such communications between Mr [...] of Pacific and Mr [...] of Chiquita took place during the period from 28 July 2004 until 8 April 2005. Those communications concerned forthcoming market developments or likely price developments.²⁸⁶

²⁸⁴ Sections 5.4 and 7.3. of Pacific's reply to the Statement of Objections.

²⁸⁵ ID 1983, p. 15 (document obtained from GdF, allegato 15).

²⁸⁶ See part 4 of the recording of the Oral Hearing, from 00:01:30 to 00:02:15, on part 4 of the recording of the Oral Hearing, from 00:45:30 to 00:46:00 Mr [...] of Chiquita reiterates that occasionally he and Mr [...] of Pacific touched base on market trends at the end of phone calls. Regarding further statements by Chiquita during the Hearing, see sections (...).

- (218) The continuation of the regular bilateral contacts in which Pacific and Chiquita coordinated prices is further confirmed by the internal Pacific e-mail of 11 April 2005²⁸⁷ and the undated table entitled "*Chiquita Prices – 2005*" (see section 4.2.5) which together show the almost weekly occurrence of such contacts between Mr [...] of Pacific and Mr [...] of Chiquita in the period between February and April 2005 (weeks 6/2005 to 15/2005). In particular, the undated excel table entitled "*Chiquita Prices – 2005*", indicates that Mr [...] of Pacific updated a table containing Chiquita's prices on a weekly basis and wrote down notes of the content of his discussions with Mr [...] of Chiquita upon them agreeing on the weekly prices for green bananas in Greece, Portugal and Italy.
- (219) Contrary to Pacific's arguments, the body of evidence relied upon does not allow for the conclusion that there is a gap of 7 months in the evidence, but instead, when considering the body of evidence as a whole, it is established that the collusive conduct which is evidenced by the e-mail of 11 April 2005 and the undated table entitled "*Chiquita Prices – 2005*" constitutes a continuation of the price coordination scheme as set up at the meeting of 28 July 2004. This is also confirmed by Chiquita, which submits that in the period from 28 July 2004 until 8 April 2005 (the date of its application under the Leniency Notice) it engaged in an infringement comprising of occasional illicit contacts with Pacific in relation to the exchange of each party's individual "*price trend data*" for the following week.²⁸⁸
- (220) In its attempt to show the absence of any contacts showing coordination between Pacific and Chiquita in the period from August 2004 to April 2005, Pacific refers to the following documents:²⁸⁹
- (a) A set of four internal Pacific e-mails dated 19 August 2004, 8 December 2004, 14 June 2005 and 5 October 2006²⁹⁰ which in Pacific's view illustrate that it used figures from a the periodical Sopisco and average selling prices in Europe for the internal estimation of its competitors' prices and that Pacific did not have any direct sources of price information of competitors. However, Pacific draws excessively far-reaching conclusions from those documents. The fact that Mr [...] and Mr [...] of Pacific exchanged e-mails containing pricing information originating from legitimate sources such as Sopisco News or public press releases made by Chiquita does not in any way rule out the possibility of the existence of collusive contacts during the same period of time, which are evidenced in documents originating from Pacific and confirmed by Chiquita's statements. Also, the statement in the e-mail of 8 December 2004, according to which Pacific has no other independent verification of their price setting than Sopisco, cannot lead to the conclusion that Pacific did not have any direct sources of price information of competitors.
 - (b) A set of three internal Pacific e-mails dated 11 and 18 October 2004 and 29 November 2004 which, according to Pacific, refer to competition from Chiquita in the Greek market during the second half of 2004.²⁹¹ The e-mails of

²⁸⁷ Pacific inspection document DWY 12, ID 1860, p. 2.

²⁸⁸ Chiquita statement during the Oral Hearing on 18 June 2010; [...]

²⁸⁹ Section 5.4 of Pacific's reply to the SO.

²⁹⁰ Annexes of its reply of 17 September 2008 to a request for information, ID 1862 and ID 1863.

²⁹¹ Annexes 2-4 and recital 244 of Pacific's reply to the Statement of Objections.

11 and 18 October 2004 do not, however, contain any reference to price competition in Greece, whereas the e-mail of 29 November 2004 simply mentions that Chiquita was holding down prices in that market in order to use additional licences in the 4th quarter of that year, but that the policy had changed. None of the e-mails support Pacific's arguments that there was tough price competition between Chiquita and Pacific in Greece at that time.

- (221) It follows that the bilateral collusion between Chiquita and Pacific occurred regularly and in a repetitive way over a period of time. The bilateral arrangements took place according to an established pattern which was consistent over the relevant time period, even though the intensity and specific contents of communications may have varied over time. Various bilateral contacts between the parties which occurred at and after the meeting of 28 July 2004 served to coordinate the parties' conduct on the market and to exchange commercially sensitive information. All those actions formed part of an overall plan as they were carried out in pursuit of a single and common anti-competitive objective, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that parameter.

5.4.3. *Restriction of competition*

- (222) The anti-competitive behaviour in this case had the object of restricting competition in the Union, namely in Italy, Greece and Portugal which are a substantial part of the internal market.
- (223) Article 101(1) of the Treaty expressly includes as restrictive of competition agreements and concerted practices which²⁹²:
- (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.
- (224) It is settled case-law that, for the purpose of application of Article 101(1) of the Treaty, there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market²⁹³. The mere fact of making an agreement whose object is to restrict competition in breach of Article 101(1) of the Treaty in itself constitutes a failure to comply with those provisions, irrespective of whether that agreement was actually implemented²⁹⁴. Concerted practices are also prohibited under Article 101(1) of the Treaty, regardless of their effect, when they have an anti-competitive object²⁹⁵. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is established.

²⁹² The list is not exhaustive.

²⁹³ Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178.

²⁹⁴ Case T-241/01 *SAS v Commission* [2005] ECR II-2917, paragraph 186.

²⁹⁵ Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 157-168.

- (225) It is established case law that the implementation of agreements on target prices and other commercial terms does not necessarily require that those exact prices and conditions be applied. In line with the General Court's judgement in ADM²⁹⁶, when there is an agreement relating to price objectives rather than to fixed prices, *"it is clear that implementation of that agreement simply meant that the parties would endeavour to achieve those objectives."*
- (226) The conduct of the parties in this case fulfils the general characteristics of horizontal arrangements in the meaning of Article 101(1) of the Treaty. Price being the main instrument of competition, the collusive arrangements and mechanisms adopted by the parties were all ultimately aimed at inflating prices to their benefit. The parties explicitly coordinated price movements. Price fixing by its very nature restricts competition within the meaning of Article 101(1) of the Treaty.²⁹⁷
- (227) Contrary to what Pacific alleges, the conduct in question cannot be qualified as free-standing information exchange.²⁹⁸ Whilst it is true that Chiquita and Pacific exchanged sensitive market information, such exchanges formed an integral part of the overall horizontal arrangement which has as its object the restriction of competition. In addition, the exchange of information regarding prices allowed each of the parties to take due account of the contemplated behaviour of the other party vis-à-vis specific markets. The mere fact of obtaining information that an independent operator keeps strictly secret as confidential business information is sufficient to demonstrate that the parties had an anti-competitive intention²⁹⁹.
- (228) Having regard to the degree of flexibility which prevailed on the market despite the existence of the licensing regime as described in section 2.3.3, the comparisons of price information reduced uncertainty about the parties' market strategies and enabled the parties to adjust their own behaviour and influence each others' conduct. In so far as the characterisation of certain behaviour as a concerted practice requires subsequent conduct on the market following the exchanges of information, it can be presumed that the undertakings which take part in such concerting and which remain active on the market take account of the information exchanged with competitors in determining their own conduct on the market.
- (229) According to Pacific the statements by Chiquita indicating that, on occasion, views on general trends in the market were discussed between the parties and that Mr [...] of Chiquita might, in that context, have described the market with expressions such

²⁹⁶ Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597, paragraph 160.

²⁹⁷ Pacific argues in very generic terms that the Statement of Objections did not properly characterise the alleged conduct (Section 7.5 of Pacific's reply to the Statement of Objections.) Contrary to this view, the Statement of Objections did contain the essential elements used against Pacific on which the Commission imposes a penalty for an infringement of the competition rules, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that Pacific was in a position to submit its arguments effectively in the administrative procedure brought against it (see Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG and others v Commission*, ECR [2009] p. I-7191, at paragraph 36 with further references).

²⁹⁸ Sections 7.2.4 and 7.2.5 of Pacific's reply to the SO.

²⁹⁹ See to that effect Case T-3/89 *Atochem v Commission* [1991] ECR II-1180, paragraph 54, and Case T-12/89 *Solvay v Commission* [1992] ECR II-907, paragraph 100.

as “soft” and “no reason for me to change” do not amount to an illegal agreement covering price fixing.³⁰⁰

- (230) The cartel, however, has to be considered as a whole and in the light of the overall circumstances. The principal aspects of the complex of agreements and/or concerted practices which can be characterised as restrictions of competition are the fixing of prices by coordination of the parties' price strategy regarding future prices, price levels, price movements and/or price trends (see section 4.2, for example recitals (99)-(101), (105)-(109), (111) and (124)-(131)).
- (231) Those agreements and/or concerted practices have as **their object** the restriction of competition within the meaning of Article 101(1) of the Treaty. They are described in detail in the Chapter 4.
- (232) Regarding the anti-competitive object of the exchanges of confidential information and the other contacts with an anticompetitive purpose identified, for example, in recitals (99)-(101), (105)-(109), (111), (123)-(125) and (127)-(130), the arrangement has to be seen in its context and in the light of all the circumstances. Those contacts **served to attain a single and common anti-competitive objective**, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that parameter, and further enabled the undertakings to adapt their commercial strategy by taking into account the information received from a competitor.
- (233) Chiquita and Pacific reached an agreement on 28 July 2004 which they subsequently implemented. Further evidence on the file (see section 4.2) clearly shows that the infringement had an impact in the Southern European region. This is evidenced by the following examples:
- The implementation of the cartel arrangements was ensured through contacts between the representatives of the parties. Such contacts are evidenced by Mr [...]’s notes of August 2004, the e-mail of 11 April 2005 and the undated table found together with the print-out of that e-mail.
 - The copy of the e-mail of 11 April 2005 and the undated table (see section 4.2.5) were copied during inspections at the premises of Pacific from a binder entitled “price forecasts” in Mr [...]’s office (see recital (193)) which shows that the information reported in those documents was used in Pacific’s internal decision making on prices. The documents also evidence regular internal reporting to Pacific's European Headquarters.
 - The e-mail of 11 April 2005 shows that the parties’ discussions were in line with the collusive arrangement which was set up by Chiquita and Pacific at the meeting of 28 July 2004 whereby the parties would collude on prices.
 - Mr [...]’s notes regarding the meeting of 28 July 2004 refer to, amongst other things, measures to help Pacific to “push prices” (see recital (111)). The memorandum of Mr [...] of Chiquita (see recital (118)) confirmed such "actions of Chiquita from the top of the market".

³⁰⁰ Recital 300 of Pacific’s reply to the Statement of Objections.

- Mr [...]’s notes on a contact with Chiquita in August 2004 (see recitals (122)-(124)) show price discussions which are in line with the collusive arrangement which was set up by Chiquita and Pacific at the meeting of 28 July 2004 whereby the parties would collude on prices (see recitals (106) and (109)).

(234) The fact that an agreement having an anti-competitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market.³⁰¹ Accordingly, whilst the competition-restricting object of the arrangements is sufficient to support the conclusion that Article 101(1) of the Treaty applies and it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved³⁰², the competition-restricting effects of those arrangements have nonetheless also been established and lead to the same conclusion.

5.4.4. *Effect upon trade between Member States*

- (235) The continuing agreement between the producers had an appreciable effect upon trade between Member States.
- (236) Article 101(1) of the 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 internal market.
- (237) The Court of Justice and the General Court 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*".³⁰³ In any event, whilst Article 101 of the 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"³⁰⁴.
- (238) As demonstrated in the "Description of the Industry" and "Trade Between Member States" section in Chapter 2, the market for bananas in the Southern European region is characterised by a substantial volume of trade between Member States.
- (239) The application of Article 101 of the Treaty to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one Member 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 States³⁰⁵.

³⁰¹ Case T-38/02, *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 148.

³⁰² Case T-62/98 *Volkswagen AG vs Commission* [2000] ECR II-2707, paragraph 178.

³⁰³ 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 and others, *Cimenteries CBR* [2002] ECR II-491, at paragraph 1986.

³⁰⁴ 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 103.

³⁰⁵ See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

- (240) Pacific denies that there has been any requisite effect on trade between Member States either.³⁰⁶
- (241) Contrary to Pacific's argument, the cartel arrangements described in Chapter 4 and involving Pacific and Chiquita covered Italy, Greece and Portugal, which form a significant part of the Union. The existence of those collusive arrangements must have resulted, or was likely to result, in the diversion of trade patterns from the course they would otherwise have followed³⁰⁷.
- (242) Insofar as the activities of the cartel related to sales in third countries, they lie outside the scope of this Decision.

5.5. Procedural arguments of the parties

- (243) Throughout the administrative proceedings, the parties put forward numerous procedural arguments which have been dealt with by the Commission. Nevertheless, the parties have maintained certain of their claims in their replies to the Statement of Objections and/or thereafter.

5.5.1. Claims relating to the Commission's investigation

- (244) Both parties question³⁰⁸ the legitimacy of the Guardia di Finanza's transmission to the Commission of copies of the national inspection documents which were seized in a tax investigation.³⁰⁹ Chiquita argues that the transmission appears illegal under Italian law. Pacific claims (i) that the Commission would only have been entitled to receive those documents under Article 12 of Regulation (EC) No 1/2003 from a national competition authority, in Italy the Autorità Garante della Concorrenza e del Mercato ('AGCM'), (ii) that the information could not be used in evidence as it was not collected in the context of a procedure to establish an infringement of Union competition law and (iii) that the authorisation of the Procuratore della Repubblica³¹⁰ does not guarantee the adherence to procedural safeguards established at European Union level.
- (245) Article 12 of Regulation (EC) No 1/2003 does not restrict the Commission's ability to legally receive documents from different sources. That provision deals with the exchange of information within the European Competition Network for case allocation purposes and is simply one of the avenues for the Commission to obtain information.³¹¹
- (246) As regards the admissibility of the national inspection documents as evidence, the lawfulness of the transmission to the Commission by a national prosecutor or the

³⁰⁶ Pacific's reply to the SO, p. 103

³⁰⁷ See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

³⁰⁸ Recitals 29-32 and 238-240 of Chiquita's reply to the Statement of Objections and annex B to the reply; section 8.2. of Pacific's reply to the Statement of Objections.

³⁰⁹ See recital (81).

³¹⁰ See recital (81).

³¹¹ Contrary to Pacific's claim, the fact that the Guardia di Finanza may also have shown or transmitted the national inspection documents to the AGCM does not bring the Guardia di Finanza's transmission of the documents to the Commission within the ambit of Article 12.

authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law. In order to consider a document to be inadmissible evidence, the transmission of that document must be declared unlawful by a national court.³¹² No convincing elements have been brought to the Commission's attention that would indicate the unlawfulness of the transmission of the inspection documents received from the Guardia di Finanza.³¹³ On the contrary, the Procuratore della Repubblica of Rome has authorised the use of the national inspection documents for administrative purposes and declared that the communication of those documents by the Commission to the parties was not prejudicial to the national investigation in Italy.³¹⁴ The parties were given access to those authorisations. Therefore, there is no basis for the claim that the national inspection documents or information obtained on their basis should not be used in evidence.

- (247) Pacific³¹⁵ also argues that the Commission sought to steer the immunity applicant (i) by putting undue pressure on Chiquita to provide it with information supporting the Commission's case at the time of the inspections and (ii) by providing Chiquita with a copy of the e-mail of 11 April 2005 already during the inspections in November 2007, when the e-mail did not yet form part of the file, and, again, after the state of play letter to Chiquita.
- (248) Contrary to Pacific's allegation, no pressure has been exerted on Chiquita. Chiquita was merely asked to comply with its duty to cooperate under the Leniency Notice. The fact that Chiquita was informed orally on 26 November 2007 that Commission officials would carry out an inspection at the premises of Chiquita in Rome and that Mr [...]’s presence was requested (see recital (82)) cannot be regarded as steering the applicant. Regarding the access to the e-mail of 11 April 2005, it is noted that during the inspections in November 2007, the interviewing Commission officials simply referred to the fact that Chiquita could find a document which indicated collusive contacts around 11 April 2005 in the file in Case 39188-Bananas.³¹⁶ At that point in

³¹² See Case C-407/04 P *Dalmine / Commission* [2007] ECR p. I-829, at paragraphs 62-63. The judgment in Case 85/87 *Dow Benelux / Commission* [1989] ECR p. 3137, at paragraph 17, to which Pacific refers in its reply to the Statement of Objections, does not lead to a different conclusion as it concerns a case in which the Commission relied on information obtained during earlier investigations having a different subject-matter in order to open a new inquiry concerning infringements of the competition rules, not information obtained from a third party.

³¹³ In annex B to its reply to the Statement of Objections, Chiquita puts forward legal explanations according to which a transmission of the national inspection documents would not be permissible under Italian law. These explanations are, however, not convincing and it remains that neither the Italian public prosecutor nor the Guardia di Finanza saw any objection to such a transmission. The Commission has explicitly informed Chiquita that a request regarding the lawfulness of the transmission of the national inspection documents to the Commission should be addressed to the competent Italian court.

³¹⁴ See recital (81).

³¹⁵ Section 8.1. of Pacific's reply to the Statement of Objections.

³¹⁶ At that point in time, that document had already been accessible to the addressees of the Statement of Objections in Case 39188. According to the case-law, the Commission may obtain leads from other investigations. It follows from the judgment in Case 85/87 *Dow Benelux / Commission* ([1989] ECR p. 3137) that in cases where the Commission has discovered materials in one investigation about a different infringement it cannot use the information in evidence in that second case, but it cannot be prevented from using the information to commence a new and separate investigation. Article 28(1) of Regulation (EC) No 1/2003 should not be construed as meaning that the Commission is barred from

time, no copy of the e-mail of 11 April 2005 was handed over to Chiquita.³¹⁷ Chiquita was, however, provided with a copy of that e-mail after the state of play letter was sent in order to give it the opportunity to express its views on the state of play letter, mainly in the context of a possible continuation of the infringement after its leniency application. This cannot be qualified as steering the immunity applicant.

- (249) After the Oral Hearing, Pacific requested that Mr [...] should be formally interviewed again to further explore his views on the facts in the Statement of Objections.³¹⁸ As reasons for its request it argues that the minutes of Mr [...]’s interview during the inspections may not be sufficiently clear and precise and may not reflect what Mr [...] said after he had allegedly been instructed to be more forthcoming. As additional reasons, Pacific submits that Chiquita had explained during the Oral Hearing that it had offered such interviews following the Statement of Objections, but that offer was not taken up by the Commission even though, during the Oral Hearing, Chiquita did not take any stance on the case regarding the period before the date of its leniency application.
- (250) There are no elements to support the claim that a further interview with Mr [...] is necessary. Mr [...] was interviewed during the inspections in November 2007 by the Commission under Chiquita’s leniency cooperation. His declarations are particularly credible since he only became aware that the Commission was carrying out an investigation in the Southern European banana business at that time. Chiquita has reviewed and approved the interview record.³¹⁹ The account given in that interview is consistent with subsequent submissions of Chiquita (see recitals (97)-(101)) which were based to a great extent on its own interviews with Mr [...]. Chiquita has also provided its account of the events covered by this Decision several times. The Commission’s investigations are directed against undertakings and not against its employees.³²⁰ Therefore, it is the respective undertaking’s duty to present its views about the conduct under investigation. Chiquita has confirmed during the Oral

initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of the conduct contrary to the competition rules. Such a bar would go beyond what is necessary to protect professional secrecy and the rights of defence and would thus constitute unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules and enforcement of Article 101 of the Treaty. See also Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250-252/99 P *Limburgse Vinyl Maatschappij and others / Commission*, [2002] ECR p. I-8735, at paragraphs 297-308.

³¹⁷ This has also been confirmed by Chiquita during the Oral Hearing, see part 2 of the recording of the Oral Hearing, from 00:36:15 to 00:37:00.

³¹⁸ Pacific’s letter of 7 September 2010.

³¹⁹ Regarding Pacific’s comments about the length and the content of the minutes of the interview with Mr [...] during the inspections, it is noted that, as interviews under Article 19 of Regulation (EC) No 1/2003 are given on a voluntary basis, it can be necessary to invoke, if an undertaking has applied for leniency, its best efforts under its duty of cooperation under the Leniency Notice to ensure that its employees divulge their knowledge about a cartel. In the case of Mr [...]’s interview during the inspections, Chiquita was asked after first clearly inaccurate statements by the interviewee to ensure that subsequent statements could be open and transparent and informed that it was not acceptable to limit statements to confirming the elements that the Commission would put forward. The account of the interview was edited by Chiquita and signed by Mr [...].

³²⁰ See Case T-9/99 *HFB Holding and others / Commission* [1999] ECR p. II-2429, at paragraphs 382 et seq.

Hearing³²¹ that there are no new elements to the Commission's case that Mr [...] could report as he has reported all he can in terms of the infringement. Under those circumstances, an additional interview with Mr [...] is not required. The rights of the defence do not require the Commission to hear witnesses put forward by the parties concerned, where it considers that the investigation of the case has been sufficient.³²²

- (251) While an additional interview with Mr [...] is not necessary, there are elements which may have affected the willingness of Chiquita's managers, including Mr [...], to be more forthcoming in providing evidence, during the course of the proceedings, of their collusive competitor contacts. By e-mail of 17 April 2005, Chiquita warned its staff members (including Mr [...]) that it would consider taking disciplinary action against any staff member that failed to report, within 48 hours, all anti-competitive contacts with competitors that they may have been involved in. The short deadline given and the threat of disciplinary action is likely to have discouraged Mr [...] from pro-actively providing evidence of his contacts with Pacific in the period from July 2004 to April 2005. Pacific has been given access to the e-mail of 17 April 2005³²³ as well as Chiquita's explanations to that effect in its reply to the state of play letter, without however, providing any observations on the matter. Pacific did also not ask any questions to Mr [...] or Chiquita on the matter during the Oral Hearing, despite the opportunity to do so.

5.5.2. *Access to file claims*

- (252) In reply to the Statement of Objections, the parties argue that the scope of the access given to the file was limited.³²⁴ The parties received access to non-confidential versions of the documents on the file with the exception of business secrets, other confidential information and internal documents. Following the parties' claims for further access to the file, the Hearing Officer approved a Non Disclosure Agreement (NDA)³²⁵ between Chiquita and Pacific regarding documents and submissions on the file originating from the parties. Following the execution of the NDA, the parties withdrew their remaining requests for further access to those documents pending before the Commission. All remaining requests for further access to other documents on the file have been dealt with by the Commission during the administrative proceedings.

³²¹ See part 4 of the recording of the Oral Hearing, from 02:00:00 to 02:03:00

³²² See Case T-9/99 *HFB Holding and others / Commission* [1999] ECR p. II-2429, at paragraphs 382 et seq.

³²³ Chiquita agreed only after the Oral Hearing that access to the e-mail of 17 April 2005 could be given to Pacific, whilst prior to the Statement of Objections and the access to file exercise it had categorically claimed confidentiality for all documents relating to its internal investigation such as the e-mail of 17 April 2005 and large parts of the reply to the state of play letter.

³²⁴ Recital 455 of Pacific's reply to the Statement of Objections, recital 241 of Chiquita's reply to the Statement of Objections.

³²⁵ Under that agreement, the parties' external counsels had access to confidential versions of the respective other party's submissions to the Commission and identified what additional information they would wish to use in their defence in reply to the Statement of Objections. The parties then sent to each other and to DG Competition up-dated non-confidential versions of the identified documents or passages, which were introduced into the Commission's file.

- (253) Regarding documents of third parties, Pacific argues³²⁶ that it should have been given access to more than summaries³²⁷ of replies by customers of different banana importers to the Commission's requests for information since it would not have the ability to retaliate against its customers, nor is there any reason to think that it would do so. When access to the file was given, the parties received access to summaries of customer replies containing sensitive business data, such as sources of supplies not only by geographic origin but also by the major suppliers. Those summaries provide a detailed account of what information was submitted to the Commission by the customers. The banana business in Southern Europe is highly concentrated and a few big international importers control a large part of the business and are considerably larger than many of their customers. It is legitimate to refuse to reveal to undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures.³²⁸ The customer replies stem not only from customers of Pacific and Chiquita, but also from those of other importers. Therefore, disclosure of individual confidential replies of customers, as requested by Pacific, would cause serious harm not only to the interests of the individual customers, but also to the interests of other banana suppliers in the business³²⁹ which justifies that access to those documents was given in the form of summaries.³³⁰

5.5.3. *Legal professional privilege claims*

- (254) Pacific submits³³¹ that the Commission has breached its rights of defence by not giving it the opportunity to claim legal professional privilege (LPP) as soon as the Commission became aware of the possibility that some information in the national inspection documents transmitted by the Guardia di Finanza could potentially be protected by LPP. In particular, Pacific maintains that one of the national inspection

³²⁶ See recital 456 of Pacific's reply to the Statement of Objections.

³²⁷ ID 1636, 1638 and 1639.

³²⁸ Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389, at paragraph 33 and Case C-310/93P, *BPB Industries and British Gypsum* [1995] ECR I-865, at paragraphs 26 et seq; see also case T-221/95 *Endemol v Commission* [1999] ECR II-1299, paragraph 69, and Case T-5/02 *Tetra Laval* [2002] ECR II-4381, paragraph 98 et seq.

³²⁹ The Commission is entitled in situations comparable to the present one to accord the parties disclosure in the form of a summary. Limited disclosure of that type is a balanced response which allows, so far as is possible, the opposing interests of the parties, on the one hand, and the customers, on the other, to be reconciled. See to that effect case T-210/01 *General Electric / Commission*, [2005] ECR, p. II-5575, at paragraphs 653 ff. Although that judgment concerns a merger proceeding, it refers, at paragraph 653, to the court ruling in the Cement cartel. It is also noted that the parties finally received further explanations and were given access to non-confidential versions of two customer replies where a non-confidential version had been provided to the Commission by the customer concerned.

³³⁰ See point VII of the Commission's letter of 2 February 2010 (D/633, ID 2296) to Pacific. By letter dated 5 February 2010 (ID 2318) Pacific referred this issue amongst others to the Hearing Officer who rejected Pacific's claims by decision of 22 April 2010 (ID 2481). By decision of 4 May 2010 (ID 2570), which was taken upon a further request by Pacific, the Hearing Officer confirmed his decision of 22 April 2010, but stated that non-confidential versions of customer replies could be disclosed if such a non-confidential version had been provided by the customer concerned. A non-confidential version of two customer replies was subsequently provided to both parties on 6 May 2010 (ID 2575, 2578).

³³¹ Section 8.3 of Pacific's reply to the SO.

documents entitled “Transfer Pricing Analysis”³³² is covered by LPP and was used by the Commission to assess Pacific’s corporate structure. Pacific argues in this context that the Commission’s interpretation of the concept of LPP is too narrow as the document in question contains advice on an issue which has a relationship to the subject-matter of the proceedings and that the document was drawn up by independent lawyers.

- (255) Legal professional privilege is an essential corollary to the effective exercise of the rights of the defence. With regard to investigations conducted by authorities of the Member States, the rights of defence in relation to investigative measures are in principle determined by the law of the authority carrying out such a measure and must be addressed with that authority. The lawfulness of the transmission to the Commission by national authorities of information obtained in application of national law is a question governed by national law and the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority.³³³ Therefore, the Italian courts and/or authorities were competent to ensure that the rights of defence (including LPP issues) in relation to the seizure of those documents under national law were observed. There is also no indication that Pacific’s rights of defence were not respected in the Italian proceedings. In addition, if the Commission were obliged to disclose documents it has obtained from national authorities to an undertaking under investigation prior to the Statement of Objections, this would seriously undermine its ability to carry out a cartel investigation.
- (256) When the Commission carried out an initial screening of the national inspection documents after receiving copies of them from the Italian authorities, it did not identify any document or part of document which would, in view of the information available, have led it to consider them as falling being covered by LPP.³³⁴
- (257) In any event, based on the information available to the Commission, even under Union rules, the document entitled “Transfer Pricing Analysis” would not be covered by LPP. The document was drawn up before the initiation of the investigation, and does not contain any reference to the subject-matter of this investigation, nor does it have any link to advice being given or sought in relation to competition law. There is nothing in the document that would indicate that it has been drawn up in exercise of the rights of the defence. A mere marking such as “privileged and confidential – attorney/client privilege” alone does not suffice to show that a document is covered by LPP.

³³² For this document see recital (286). In addition, Pacific claimed in its reply to the Statement of Objections that “several” of the national inspection documents were covered by LPP, but did not specify which exact documents it meant. In this respect it refers to correspondence between the Commission and Pacific, ID 1941, 2116, 1647, 2119, 1998, 2115 of the file. Pacific’s claims put forward in that correspondence have been rejected by the Commission as the information in question was not covered by LPP.

³³³ See Case C-407/04, *Dalmine/Commission*, [2007] ECR p. I-829, at paragraph 62.

³³⁴ In relation to the notion of LPP under Union competition rules see Joined Cases T-125 and 253/03, *Akzo Nobel Chemicals and Akcros Chemicals/Commission*, [2007] ECR, p. II-3523, with further references to cases *AM&S* and *Hilti*.

5.6. Application of Article 101(3) of the Treaty

- (258) On the basis of the facts before the Commission, there are no indications to suggest that the conditions of Article 101(3) of the Treaty could be fulfilled in this case. The addressees of this decision have not advanced such an argument during the administrative procedure.

6. ADDRESSEES

6.1. General principles

- (259) 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 Union competition rules is the “undertaking”, a concept 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 meetings. The term “undertaking” is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the General Court held that “*in prohibiting undertakings inter alia from entering into agreements 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 101(1) of the Treaty on the Functioning of the European Union] 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*”.³³⁵
- (260) The Union-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.³³⁶ For each undertaking that is to be held accountable for infringing Article 101 of the Treaty in this case, one or more legal entities have been identified which should bear legal liability for the infringement. 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 [now Articles 101 and 102 of the Treaty on the Functioning of the European Union] if the companies concerned do not determine independently their own conduct on the market*”.³³⁷ If a subsidiary does not

³³⁵ See Case T-11/89, [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.

³³⁶ Although an ‘undertaking’ within the meaning of Article 101(1) is not necessarily the same as a company having legal personality, it is necessary for the purposes of enforcing decisions to identify the natural or legal person to whom the decision will be addressed. See Case T-305/94 *PVC*, [1999] ECR, II-0931, paragraph 978.

³³⁷ Case 48/69 *Imperial Chemical Industries v. Commission*, [1972] ECR 619, paragraphs 132-133; Case 170/83 *Hydrotherm*, [1984] ECR 2999, paragraph 11 and 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.

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.

- (261) According to the settled case-law of the Courts, the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power.³³⁸ However, the parent company and/or subsidiary can reverse that presumption by producing 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’*”.³³⁹ Moreover, it is clear from the case-law that a presumption, even difficult to rebut, remains within acceptable limits if it is proportionate to the legitimate aim pursued, if it is possible to bring proof to the contrary and if the rights of defence is assured³⁴⁰.
- (262) Where an infringement of Article 101 of the Treaty is found to have been committed, it is necessary to identify a natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.
- (263) When an undertaking that has committed an infringement of Article 101 of the Treaty subsequently disposes of the assets which contributed to the infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist.³⁴¹ If the undertaking which has acquired the assets carries on the violation of Article 101 of the 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 those 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.³⁴² The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade

³³⁸ Joined Cases T-71/03 *Tokai Carbon and Others v Commission*, [2005] ECR II-10, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, [1998] ECR II-2111, paragraph 80, upheld in Case C-286/98P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27-29; and Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50.

³³⁹ Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 61.

³⁴⁰ C-521/09 P, *Elf Aquitaine v Commission*, paragraphs 60-62.

³⁴¹ 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.

³⁴² 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*”.

liability.³⁴³ Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

- (264) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic links, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence.³⁴⁴

6.2. Liability in this case

- (265) It is established by the facts as described in this Decision that the following entities were involved in, or bear liability for, the infringement within their respective undertakings.

6.2.1. Chiquita

- (266) The evidence described in this Decision shows that Chiquita Italia SpA participated directly in the infringement concerning bananas in Greece, Italy and Portugal.
- (267) During the period of the infringement, Chiquita Italia SpA was directly wholly owned and controlled by Chiquita Banana Company BV. Chiquita Banana Company BV was wholly owned and controlled by Chiquita Brands LLC, which was wholly owned and controlled by Chiquita Brands International, Inc.³⁴⁵
- (268) In 2008, Chiquita restructured the top level of its European operations. Since then, Chiquita Banana Company BV has [...] indirectly been wholly owned and controlled by Chiquita Brands LLC. Chiquita Brands LLC has remained a wholly owned subsidiary of Chiquita Brands International, Inc.³⁴⁶
- (269) Therefore there is a presumption that Chiquita Brands International, Inc. exercises decisive influence over the conduct of those subsidiaries on the market.³⁴⁷
- (270) In addition, there are further elements which confirm and thus corroborate the presumption that Chiquita Brands International, Inc. exercised decisive influence over its subsidiaries. In particular, this is shown by the reporting lines and the multiple functions held within the Chiquita Group of the officials directly involved in the collusive contacts or of the persons to whom they reported. 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.
- (271) According to Chiquita, the ultimate responsibility for the banana business in the Southern European region³⁴⁸ lies with [...], who was the [...] of Southern Europe at

³⁴³ See Case T-305/94 *PVC II*, [1999] ECR II-931, paragraph 953.

³⁴⁴ See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I-267, paragraphs 354-360, as confirmed in case T-43/02 *Jungbunzlauer AG v Commission*, quoted above, par. 132-133.

³⁴⁵ ID 1716, p. 4-8, 10, ID 1714 (addendum to Chiquita's reply to the 2nd request for information).

³⁴⁶ ID 1716, p. 4-8, 14, ID, 1714 (addendum to Chiquita's reply to the 2nd request for information).

³⁴⁷ See also section 2.2.1.1.

the time of the infringement and still is today.³⁴⁹ He reports to [...], [...] of Chiquita Fresh Europe.³⁵⁰ The reporting took place on a continuous basis via weekly telephone calls and daily e-mail exchanges.³⁵¹ He also reported to the management of Chiquita Brands International, Inc.³⁵² Mr [...] has also admitted informal contacts with the ultimate parent company in the United States.³⁵³

(272) Mr [...] also participated in Chiquita's European Leadership Team meeting and the Thursday morning business conference calls with Chiquita's European management.³⁵⁴

(273) These key employees held multiple functions throughout the Chiquita group:

NAME	COMPANY	POSITION	PERIOD
[...] ³⁵⁵		[...]	[...]
	Alpha Fruit Hellas SA	[...]	[...]
	Chiquita Banana Company BV	[...]	[...]
	Chiquita Brands International, Inc.	[...]	[...]
	Chiquita Hellas SA	[...]	[...]
	Chiquita Italia SpA	[...]	[...]

³⁴⁸ For Chiquita, the Southern European region contains the Mediterranean Member States of the European Union (Italy, Portugal, Spain, Greece, Slovenia, Malta and Cyprus), see [...]

³⁴⁹ [...], ID 1732, p. 253, 254 ([...]'s interview), see also [...]. [...] started working for Chiquita from December 1989, holding different positions that can be found in the table below.

³⁵⁰ Chiquita submits that "[...] reported to [...] [who was the predecessor of [...]] from 2000 until 2004, and to [...] since 2005", see [...].

³⁵¹ ID 419, p. 4 (non-confidential version at ID 1732, p. 254) ([...]'s interview), [...]. See also ID 2013, p. 5, 13 (Chiquita inspection documents).

³⁵² Chiquita submits that *"the business plan is presented by [...] to Mr. [...] in September, who then forwards it to Headquarters in Cincinnati around October/November for approval. ... Work is then carried out on the basis of the annual business plan"*, see ID 419, p. 5 (non-confidential version at ID 1732, p. 255) ([...]'s interview). Moreover, Chiquita Italia's management reports to Chiquita Banana Company BV, where [...] was [...] from [...] until [...]. They, in turn, report to Chiquita Brands LLC, where [...] was [...] from [...] until [...] and [...] from [...] until [...]. Chiquita Brands LLC's management finally reports to Chiquita Brands International, Inc., where again [...] was [...] and [...] for Chiquita Fresh Group, from [...] until [...], see ID 1719, p. 4, 6, 8 (Annex 1 to Chiquita's updated reply to 2nd request for information) and ID 1716, p. 2-3. ID 1944 (confidential version at ID 1029) (Mr [...] 's e-mail back-ups) contains numerous examples of Mr [...] 's reporting to and the involvement of his European and American superiors, in particular Mr [...] and Mr [...], in discussions about the day-to-day business as well as about the extraordinary business, for example, p. 17, 19, 22, 33, 35, 54, 154, 268, 270, See also [...].

³⁵³ ID 1732, p. 254 ([...]'s interview).

³⁵⁴ ID 419, p. 4 (non-confidential version at ID 1732, p. 254) ([...]'s interview), see also, for example, ID 1060, p. 56-58 (Transferred Transcript 13) regarding Thursday calls and price setting. As examples of the information sent from Chiquita's European headquarters in Antwerp to Mr [...] (and the other way round) see ID 1947, p. 205-216, 306-312 and 328-331 (annexes to the Transferred Transcripts). See also ID 2021, p. 12-13, 16-27 (conf ID 296, p. 15-26), 108 (Chiquita inspection documents).

³⁵⁵ ID 1732, p. 254 ([...]'s interview), [...], ID 1716, p. 3-13 (Chiquita's reply to the 2nd request for information), ID 1719, p. 4-13 (annex to Chiquita's reply to 4th RFI).

	Chiquita Portugal Venda E Comercialização De Fruta, Unipessoal Lda	[...]	[...]
[...] ³⁵⁶	Chiquita Brands L.L.C.	[...]	[...]
	Chiquita Brands L.L.C.	[...]	[...]
	Chiquita Brands International, Inc.	[...]	[...]
	Chiquita Fresh North America L.L.C.	[...]	[...]
	Chiquita Fresh North America L.L.C.	[...]	[...]
	Chiquita International Limited	[...]	[...]
	Chiquita International Trading Company	[...]	[...]
	Chiquita Banana Company BV	[...]	[...]
[...] ³⁵⁷	Chiquita Hellas SA	[...]	[...]
	Chiquita Italia SpA	[...]	[...]
	Alpha Fruit Hellas SA	[...]	[...]
	Chiquita Portugal Venda E Comercialização De Fruta, Unipessoal Lda	[...]	[...]
[...] ³⁵⁸	Chiquita Italia SpA	[...]	[...]
	Chiquita Banana Company BV	[...]	[...]
[...] ³⁵⁹		[...]	[...]
	Chiquita Italia SpA	[...]	[...]
	Chiquita Portugal	[...]	[...]
	Alpha Fruit Hellas SA	[...]	[...]
	Chiquita Hellas SA	[...]	[...]
	Chiquita Portugal Venda E Comercialização De	[...]	[...]

³⁵⁶ ID 1716, p. 5-12 (Chiquita's reply to the 2nd request for information), ID 1719, p. 4-12 (annex to Chiquita's reply to 4th request for information).

³⁵⁷ ID 1716 (Chiquita's reply to the 2nd request for information), ID 1719 (annex to Chiquita's reply to 4th request for information).

³⁵⁸ ID 1716 (Chiquita's reply to the 2nd request for information), ID 1719 (annex to Chiquita's reply to 4th request for information).

³⁵⁹ [...], ID 1732, p. 253-254 ([...]'s interview), ID 1716, p. 4, 9, 10, 13 (Chiquita's reply to the 2nd request for information), ID 1719, p. 4, 9, 10, 13 (annex to Chiquita's reply to 4th request for information).

	Fruta, Unipessoal Lda		
--	-----------------------	--	--

- (274) Chiquita submits that neither Mr [...] (Mr [...]’s predecessor) nor Mr [...] used to give instructions to Mr [...] with respect to sales, volumes and prices in the markets of Italy, Portugal and Greece.³⁶⁰ Evidence on the file, however, shows regular reporting from Mr [...] to those individuals on all business matters relating to bananas, as the following examples demonstrate.
- (275) Chiquita itself lists Mr [...] as one of its "employees operating or responsible" for the Southern European banana business.³⁶¹ Also, Mr [...]’s e-mail to, amongst others, Mr [...] and Mr [...] of 10 April 2005 instructing them not to have contacts with competitors "*other than in the context of fruits or licensing transactions*"³⁶² clearly shows that he had the authority to instruct Chiquita’s European employees, including Mr [...] and Mr [...], regarding their business conduct in relation to the pricing and volumes of bananas.
- (276) According to an e-mail of 23 February 2005 from Mr [...] to Mr [...] and Mr [...], Mr [...] had talked to Mr [...]. He reports that Mr [...] would investigate with Mr [...] whether there is any interest to supply additional volumes to Chiquita Antwerp. "*I told him, that most probably this potential volume will not compete in the market place, because it is already prebooked. He should come back with a preliminary answer soon*".³⁶³ The text of the e-mail clearly indicates that Mr [...]’s superiors at least implicitly approved his line of conduct which he had previously proposed to them.
- (277) Another illustration is an e-mail of 13 November 2001 to, amongst others, Mr [...] (Mr [...]’s predecessor) and [...] ³⁶⁴ with the title "[...] deal 2002" in which Mr [...] summarises a verbal purchase agreement with [...] to his hierarchy and colleagues as follows (40 000 boxes every 2 weeks arrival Salerno; "a fair commission that [...] will get on the basis of its selling official weekly price... On the top they will decide to withdraw from core markets" (emphasis added); reports on goods sold to Chiquita on cleared basis (T2 licences) using [...] total volume licences) and gives instructions for next steps to finalise the deal.³⁶⁵ While that document refers to a time period prior to the infringement to which this Decision relates, there is no indication that that evidence on the reporting and decision making structure does not also apply for the period of the infringement.

³⁶⁰ [...].

³⁶¹ [...].

³⁶² ID 943, p. 39 (non-confidential version at 1739, p. 37) (annexes to Oral Statement 4), see also ID 950 (non-confidential version at ID 2007), p 6 (Chiquita’s Oral Statement 4) where the date of the e-mail is mistakenly indicated as 10 April 2004.

³⁶³ ID 1731, p. 118 (annex to Chiquita’s Oral Statement 1).

³⁶⁴ Mr [...] reported to the [...] within Chiquita Brands International, Inc., [...]. On Mr [...]’s involvement in Chiquita’s European business see also ID 2021, p. 4-11, and ID 298, p. 2-3 (non-confidential version at ID 2018, p. 3-4) (Chiquita inspection documents).

³⁶⁵ [...], ID 1029 (non-confidential version at ID 1944), p 22 (Mr [...]’s e-mail back-up data). See also *ibid.*, p. 23.

- (278) Moreover, Chiquita submits that Mr [...] and Mr [...] were ultimately responsible for decisions with respect to licence transactions.³⁶⁶ Decisions on licence issues and decisions on volumes were inevitably interrelated (see section 2.3.2).
- (279) Chiquita also submits that Mr [...] proposed the yearly business plan for shipments for approval by Antwerp (Mr [...]) and Cincinnati (Mr [...]).³⁶⁷
- (280) Chiquita's organisation charts³⁶⁸ for its Southern European business show that Mr [...], [...] was reporting to Mr [...] until the end of 2005. The Greek country manager was reporting to Mr [...].³⁶⁹ Chiquita submits that Mr [...] was working for Chiquita Brands LLC until the end of 2005 and confirms that he "*held the title [...]*".³⁷⁰
- (281) Chiquita Brands International, Inc., Chiquita Banana Company BV and Chiquita Italia SpA should therefore be held jointly and severally liable for the entire duration of the infringement in respect of Chiquita Italia SpA's direct involvement in the infringement (see Section 7 below for the duration).

6.2.2. *Pacific*

- (282) The evidence described in this Decision shows that Pacific Fruit Company Italy SpA (PFCI) and Firma Leon Van Parys NV (LVP)³⁷¹ participated directly in the infringement concerning bananas in Greece, Italy and Portugal.
- (283) During the period of the infringement PFCI was directly wholly owned and controlled by LVP which held 99.75 % of the shares in PFCI (0.25 % of PFCI's shares were held by FSL Holdings NV). LVP is owned by FSL Holdings NV (Belgium) (100 % minus one share) and by FSL Finance BV (Netherlands; 1 share). Those two companies are owned by TW Trading BV (Netherlands) [...], which is in turn owned by Transworld Trading NV (Netherlands Antilles).³⁷² FSL Holdings NV and LVP are presumed to exercise decisive influence over their respective subsidiaries' conduct on the market.
- (284) LVP and PFCI maintain that they do not have information available on the corporate structure above Transworld Trading NV, but state that it is their belief that the main shareholders of the ultimate parent company of PFCI and LVP are controlled by members of the [...] Family.³⁷³
- (285) Given the fact that the group of companies to which PFCI and LVP belong is not a publicly listed group of companies, information publicly available on the corporate

³⁶⁶ [...]

³⁶⁷ [...].

³⁶⁸ ID 1724, 1725 (annex to Chiquita's reply to the 4th request for information), ID 1732, p. 14 (Chiquita's organigrammes).

³⁶⁹ [...]. See also examples of this reporting in ID 1944, for example, p. 59-78 (Mr [...]’s e-mail back-ups).

³⁷⁰ ID 1726, p. 3-4 (Chiquita's reply to the 4th request for information).

³⁷¹ The group of entities which PFCI and LVP are part of is collectively referred to as "Pacific" or "Pacific Fruit", see recital (15).

³⁷² ID 1070 (non-confidential version at ID 1900), p. 3-5, ID 1071, 1073 (Pacific's reply to the 6th request for information).

³⁷³ ID 1070 (non-confidential version at ID 1900), p. 4 (Pacific's reply to the 6th request for information), ID 1369 (non-confidential version at ID 1934), p. 1 (Pacific's reply to the 9th request for information).

structure of the group is limited. LVP and PFCI have also maintained their ignorance as to the corporate structure of the group of companies to which they belong (see recital (284)). Despite those limitations, the documentary evidence in the Commission file does reveal further information on the corporate structure of the group above Transworld Trading NV.

- (286) Most importantly, in a document of November 2001 entitled "Transfer Pricing Analysis" which the Guardia di Finanza copied from Mr [...]’s computer during its inspection it is stated that "LVP is a member of the 'Fruit Shippers Group'... The ultimate parent company of the Fruit Shippers Group is Fruit Shippers Limited, a Bahamas company ('FSL')." In addition to that statement, the document reveals that [...], LVP’s [...],³⁷⁴ had added the following comment in relation to the ultimate parent company of LVP: "Do we need to mention all this? Why over-expose ourselves? Better to be a bit 'vague'. Let's discuss."³⁷⁵
- (287) Further indications on the corporate structure above Transworld Trading NV is found in a judgment of 21 November 2002 of the United Kingdom High Court of Justice, Queens Bench Division, Commercial Court, (concerning litigation between Alvaro Noboa and other members of the Noboa family) which describes the Noboa family's business as "*export of bananas. ... The principal Ecuadorian company engaged in the banana business was Exportad[o]ra Bananera Noboa S.A. (EBN). The ultimate holding company and the company owning most of the overseas business was FSL [Fruit Shippers Limited], a company incorporated in the Bahamas. FSL was undoubtedly the most valuable asset in the empire.*"³⁷⁶ According to that judgment "*it was simple indisputable fact that Alvaro [Noboa] obtained control over 50.1% of FSL shares*".³⁷⁷ The judgment also states that Carlos Aguirre was at the time "*director and chief financial officer of FSL; former President of FSL; director of various companies within the FSL group. Member of executive committee appointed by Alvaro Noboa to run FSL during presidential campaign [of Alvaro Noboa]*".³⁷⁸
- (288) During the Oral Hearing Mr [...] declared, on behalf of Chiquita, that Chiquita has always been told that PFCI is the sales branch of the Noboa Group for the Southern European region reporting to their headquarter in North Europe and that they were

³⁷⁴ ID 1369 (non-confidential version at ID 1934), p. 2 (Pacific's reply to the 9th request for information).
³⁷⁵ ID 1001, p 657-672 (non-confidential version at ID 1989, p. 304 et seq.)(document obtained from GdF, allegato 17), see also ID 1239 (confidential) (screenshot of the beginning of the document with comments); the file name of this document is "TransfPriceMemo_Nov2001.doc" and it was last modified on 15 November 2001, 10.53 h.

³⁷⁶ ID 1204, p. 34 (Molestina v Noboa Ponton, [2002] EWHC 2413 (Comm)). The case concerns a dispute between Mr Alvaro Noboa and his siblings about entitlement of shares to the business of their father, the late Louis Noboa. The judgment dismisses claims by Mr Alvaro Noboa's sisters against him regarding agreements and damage claims concerning transfers of share ownership at FSL. ID 1204, p. 33-34.

³⁷⁷ According to Pacific, Mr [...] is a representative of the ultimate shareholders of PFCI (see, for example, ID 212 (non-confidential version at ID 1841), p. 4, Pacific's reply to the 1st request for information). The judgment referred to in recital (287) spells out that Mr [...] had control of FSL. See ID 1204, p. 29 and 52.

³⁷⁸ ID 1204, p. 52 (Molestina v Noboa Ponton, [2002] EWHC 2413 (Comm)), see also the reference to FSL in ID 1001, p 291 (non-confidential version at ID 1988, p. 291) (document obtained from GdF, allegato 17).

fully owned by the Noboa Group.³⁷⁹ Pacific did not comment on that statement during the Oral Hearing.

- (289) The file contains elements which confirm and thus corroborate the presumption that FSL Holdings NV and LVP exercised decisive influence over PFCI. In FSL Holdings NV, LVP and PFCI the same persons have management responsibilities ([...], [...], [...]). FSL Holdings NV and LVP also have the same address (Zeevaartstraat 3, Antwerp, Belgium).³⁸⁰ Pacific submits that PFCI's sales team (that is to say, Mr [...], Mr [...] and Mr [...]) reported to Mr [...] on a weekly basis on future pricing in Southern Europe.³⁸¹ During the period of the infringement, Mr [...] was PFCI's [...] for Italy and Mr [...] PFCI's [...] for, amongst others,, Portugal and (until May 2005) for Greece. As of June 2005, Mr [...] took over the responsibility for Greece from Mr [...] whose [...] he had been prior to that date.³⁸²
- (290) Pacific submits that while Mr [...] was working for PFCI, he had no responsibility for sales, volume or price setting or shipping of bananas and that his duties in reality simply extended to carrying out financial analysis and benchmarking analysis of Pacific's performance for Mr [...].³⁸³ Pacific, however, itself admits that as [...] Mr [...] had wide powers including the right to represent the company externally, to conclude contracts and to "hire or fire" employees.³⁸⁴ Moreover, the documentary evidence on the file clearly shows Mr [...] 's involvement in business discussions, reporting and decision making, including the setting of prices and volumes of bananas for the Southern European region, thus contradicting Pacific's statement that Mr [...] was only involved in financial analysis and benchmarking.³⁸⁵ Therefore, it is

³⁷⁹ See part 4 of the recording of the Oral Hearing, from 00:02:05 to 00:03:00.

³⁸⁰ ID 1073 (annex to Pacific's reply to the 6th request for information).

³⁸¹ ID 884 (non-confidential version at ID 1849), p. 2 and 8 (Pacific's replies to the 2nd request for information). During the inspections at PFCI in Rome, the employees responsible for sales in the Southern European region also explained that they were reporting on a weekly basis (for Greece every second week) to LVP regarding estimated prices and volumes for the following week, ID 89 (non-confidential version at ID 1754), p. 2, 4, 6 (explanations by Mr [...], Mr [...] and Mr [...]). See, for example, also the e-mail string ID 161 (non-confidential version at ID 1824) (Pacific inspection document) where Mr [...] signed as "[...] Pacific Fruit-Europe".

³⁸² ID 908 (non-confidential version at ID 1859), p. 2 (Pacific's reply to the 3rd request for information). Pacific submits that the sales representatives were responsible for the setting of prices and volumes and sales in their respective territories.

³⁸³ ID 908 (non-confidential version at ID 1859), p. 1, 6 (Pacific's reply to the 3rd request for information), ID 1263 (non-confidential version at ID 1919), p. 8 (Pacific's reply to the 8th request for information).

³⁸⁴ ID 1263 (non-confidential version at ID 1919), p. 7 (Pacific's reply to the 8th request for information), see also ID 1920, p. 8-10 (extract of the Italian Company Register).

³⁸⁵ See footnote 76. See also e.g. ID 95 (non-confidential version at ID 1759), p. 14 and ID 97 (non-confidential version at ID 1761) (Pacific inspection documents). ID 97 (non-confidential version at ID 1761) contains numerous management reports with handwritten annotations of [...]. See also in particular pp. 16 to 19 containing detailed instructions on weekly reporting to Antwerp (with Mr [...] 's handwritten annotations). See also the documents from Guardia di Finanza, for example, ID 188 (non-confidential version at ID 1978), pp. 11, 12, 23, 24, 28, 31, 37, ID 191 (non-confidential version at ID 1981), pp. 3, 12, 13, 14, 32, 33, 61, ID 193 (non-confidential version at ID 1983), pp. 5, 6, 15, 22, 23, 29, 32, 35, 38, 40, ID 194 (non-confidential version at ID 1984), pp. 19, 20, 29, and also ID 180 (non-confidential version at ID 1970), pp. 34, 53, ID 182 (non-confidential version at ID 1972), pp. 4, 15, 20, 22, 33, 34, 44, 47, ID 183 (non-confidential version at ID 1973), p. 5, ID 185 (non-confidential version at ID 1975), pp. 8, 17, 21, 44, ID 186 (non-confidential version at ID 1976), pp. 15, 26, 29, 43, 44, ID 187 (non-confidential version at ID 1977), p. 10, ID 190 (non-confidential version at ID 1980), p. 18, ID 192 (non-confidential version at ID 1982), pp. 22, 25, 41, 42.

concluded that Mr [...] was involved in business discussions, reporting and decision making, including the setting of prices and volumes of bananas for the Southern European region.

- (291) In the internal Chiquita e-mail referred to at recital (271) it is also reported that Mr [...] had told Mr [...] that he would report Chiquita's proposal to Mr [...].
- (292) Based on the following elements it is concluded that PFCI, LVP and FSL Holdings form part of the Noboa Group/Corporacion Noboa. The Commission file contains documents which confirm that LVP belongs to the Noboa Group and that it had direct contacts with Noboa Group companies. An organisation chart of the Noboa Group shows that LVP belongs to Export Division of the Noboa Group outside Ecuador.³⁸⁶
- (293) Furthermore, there are documents in the file which demonstrate that PFCI and LVP had direct contacts with representatives of ultimate shareholders of the group regarding pricing of the bananas that Pacific sells in the Union.³⁸⁷
- (294) Firstly, Pacific's internal senior call report of September 2000 shows detailed discussions on pricing and other commercial matters between the management of PFCI, the management of LVP and Mr [...], who, according to Pacific, is a representative of the ultimate shareholders of LVP.³⁸⁸
- (295) Secondly, an e-mail dated 27 February 2001 from [...] (see recital (287)) and an e-mail reply dated 1 March 2001 from [...] ([...] of LVP and [...] of PFCI), with the

³⁸⁶

³⁸⁷

ID 997 (non-confidential version at ID 1893), p 19-21 (Pacific documents).

For example, there are numerous examples of communications and reporting between the managers of European entities of the Noboa group, such as LVP, and representatives of the ultimate shareholders of the Noboa group as well as with persons holding high management posts within the Noboa group (for example, ID 1001, p. 77, 91, 288-291, 293, 295, 300-301, 387-390, 393-394, 504, 546, 561-563 703, confidential version; for non-confidential versions see the respective pages in ID 1988 and 1989). See also as examples from Pacific's inspection documents, in particular ID 95 (non-confidential version at ID 1759), pp. 2-3, ID 97 (non-confidential version at ID 1761), p. 5, ID 104 (non-confidential version at ID 1768), p. 13, ID 105 (non-confidential version at ID 1769), p. 7 and ID 106 (non-confidential version at ID 1770), p. 3. Further examples can be found in ID 97 (non-confidential version at ID 1761), pp. 99, 101, 103, 107, 109, 111, 113, 115, 126-134, 144-145, ID 103 (non-confidential version at ID 1767), pp. 8, 10, ID 105 (non-confidential version at ID 1769), pp. 11-12, ID 135 (non-confidential version at ID 1798), pp.1-2, ID 137 (non-confidential version at ID 1800), p.2, ID 138 (non-confidential version at ID 1801), p. 2, ID 140 (non-confidential version at ID 1803), pp. 1-2, ID 143 (non-confidential version at ID 1806), pp. 1-2, ID 144 (non-confidential version at ID 1807), pp. 1-2 and ID 152 (non-confidential version at ID 1815), pp. 1-2. Those documents provide evidence that employees of PFCI and LVP had direct business contacts with employees of the Noboa group located in Ecuador and the US. GYE in several e-mail addresses in those documents is an abbreviation for Guayaquil, a city in Ecuador, see ID 1176 (non-confidential version at ID 1910), p. 5 (PFCI's reply to 7th request for information). Mr [...] was involved in the supply of fruits and freight from Ecuador to LVP and its subsidiaries in Europe, see ID 1176 (non-confidential version at ID 1910), p. 5 (PFCI's reply to 7th request for information). There are numerous examples in Pacific's inspection documents showing direct reporting on prices and volumes to Mr [...] and instructions from Mr [...] on prices (see ID 97-106 (non-confidential version at ID 1761-1770), for example, ID 98 (non-confidential version at ID 1762), p. 4-5; ID 100 (non-confidential version at ID 1764), p. 2). See also ID 96 (non-confidential version at ID 1760) (Pacific inspection document-extract from Pacific's internal directory).

³⁸⁸

ID 178 (non-confidential version at ID 1968) (document obtained from GdF, allegato 1B), see also recital (91).

subject line "*Precios de Venta*", shows detailed discussions involving both [...] and [...] on final sales prices of Pacific in the Union (including Southern Europe).³⁸⁹

- (296) Thirdly, in another e-mail dated 26 May 2000 from [...] to [...], [...] and [...], Mr [...] communicates his decision regarding pricing for final customers in the Union and speaks about those prices using the terms "we" and "us", thus indicating that LVP's sales prices in the EEA are prices of the Noboa Group in the EEA.³⁹⁰ Moreover, documents found at Pacific during the Commission's inspection contain two memorandums with attachments on letter paper with "Bonita" logo addressed, among others, to [...] with a view to communicating detailed information on Noboa's/Exportadora Bananera Noboa S.A.'s (EBNSA) weekly export quantities giving reports both on realised exports and forecasted quantities and comparing those with competitors' export quantities.³⁹¹
- (297) Fourthly, Mr [...]’s handwritten notes of a "Market Meeting" of 17 January 2006 which were found during the inspections at PFCI read: “[...]: ... *I want to keep [...]’s confidence? I want him to trust us, he needs to know & understand that we know what the competition are doing ... We need competition information so I can correctly inform Ecuador ... we need to keep Ecuador informed.*”³⁹² Apart from Mr [...], Mr [...], Mr [...], Mr [...] and Mr [...] of Pacific were also present at this "Market Meeting". According to Pacific, the notes (presumably "[...]" and "Ecuador") refer to the representatives of the ultimate shareholders of LVP³⁹³, with "[...]" thus clearly referring to Mr [...].
- (298) Fifthly, a Chiquita internal e-mail of July 2001 reports on discussions between Chiquita and Pacific in relation to co-loading and co-sourcing and states that Mr [...] could not "*get [...] to budge*" on certain conditions of the negotiations. According to Chiquita, "[...]" most likely refers to Mr [...].³⁹⁴ This shows that a competitor of Pacific was also well aware that the agreement of Mr [...] - who Pacific has, during the proceedings in this case, confirmed to be a representative of the ultimate shareholders of LVP - was needed in order for Pacific to be able to conclude any arrangements such as co-loading or co-sourcing.
- (299) Since the exact corporate structure of the Noboa Group/Corporation Noboa could not be identified, it is concluded also from the above evidence taken together that FSL Holdings NV, Firma Leon Van Parys NV and Pacific Fruit Company Italy SpA form part of one undertaking. Moreover, during the administrative procedure, including in their reply to the Statement of Objections, none of these companies argued the opposite.

³⁸⁹ ID 997 (non-confidential version at ID 1893), p. 10-11 (Pacific inspection document AJC 2). As another example of extensive reporting to [...], see ID 121 (non-confidential version at 1784), p. 10 (Pacific inspection document).

³⁹⁰ ID 1370 (non-confidential version at ID 1935), p. 2 (document AJC3).

³⁹¹ ID 1370 (non-confidential version at ID 1936, 1937) (annex to Pacific's reply to the 9th request for information). The information given in the attachments to the memos contains for example details on Noboa vessels, volumes on vessels, voyage timing and route.

³⁹² ID 110 (non-confidential version at ID 1773), p 10-11 (inspection document SDS 16).

³⁹³ ID 1176 (non-confidential version at ID 1910), p. 4 (Pacific's reply to the 6th request for information).

³⁹⁴ ID 1733, p 135 and [...].

- (300) FSL Holdings NV, Firma Leon Van Parys NV and Pacific Fruit Company Italy SpA should therefore be held jointly and severally liable for the entire duration of Pacific Fruit Company Italy SpA's and Firma Leon Van Parys NV's respective direct involvement in the infringement (see Section 7 for the duration). In this context, the liability of Firma Leon Van Parys NV is based on its direct involvement as well as on its exercise of decisive influence over the commercial policy of Pacific Fruit Company Italy SpA. The Commission points out that either of the two elements suffices to hold Firma Leon Van Parys NV liable for the infringement.

6.2.3. *Conclusion*

- (301) Based on the foregoing, it has been established that the following companies directly participated in the infringement of Article 101 of the Treaty, or should bear liability for it, for the entire duration of their respective participation (see Chapter 7):
- Chiquita Brands International, Inc.
 - Chiquita Banana Company BV
 - Chiquita Italia SpA
 - FSL Holdings NV
 - Firma Leon Van Parys NV
 - Pacific Fruit Company Italy SpA.

7. DURATION OF THE INFRINGEMENT

- (302) [...] (see section 4.1), the exact date on which the infringement started can no longer be established with certainty. Hence, the Commission will for the purpose of this Decision limit its assessment to the period from 28 July 2004, which is the date of the meeting between Mr [...] and Mr [...] of Chiquita and Mr [...] of Pacific where they set a joint strategy for Italy, Portugal and Greece.
- (303) With regard to the ending of the infringement, it is not possible to ascertain the exact date when the participants had their last collusive contacts. Chiquita has submitted that the collusive conduct stopped at the time of its immunity application, which it submitted on 8 April 2005. Chiquita has pointed out several elements that suggest that the collusive contacts referred to in an e-mail of 11 April 2005 took place during the preceding week (see recital (141)). For the reasons set out in recitals (140) to (142), it is considered that the communications evidenced by the said mail must have taken place before Monday 11 April 2005, that is to say, during the week of Monday 4 April to Sunday 10 April 2005. It cannot be demonstrated that collusive contacts between the parties took place after Chiquita's immunity application.

- (304) There are, however, several elements showing that the cartel produced effects for marketing week 15 of 2005.³⁹⁵ The internal Pacific e-mail of 11 April 2005 (see recital (126)) states for marketing week 15 that Mr [...] “will give instructions to keep all [sic] prices unchanged”. Chiquita explained that its vessels for marketing week 15 were calling in Genova, Italy, on Monday 11 April 2005, in Portugal on Friday 8 April 2005 and in Greece on Sunday 10 April 2005.³⁹⁶ As in Greece and Portugal price discussions with customers started already prior to the arrival of the vessel (see recital (46)-(48)) and the arrangements were at least already partially implemented by Chiquita, thus producing effects at and potentially after the time of Chiquita’s immunity application. In this respect, it must be recalled that, according to Chiquita, in most weeks its prices, once set, remained the same throughout the marketing week (see recitals (43) and (46) et seq.) and it is therefore likely that even after the date of Chiquita’s immunity application, Pacific could still have relied to a certain extent on the information obtained during the last collusive contacts with Chiquita. As regards implementation by Pacific, the internal Pacific e-mail of 11 April 2005 provided input to Pacific’s price setting for its marketing week 15 of 2005. It is, however, not possible to ascertain the exact date when the arrangement ceased to produce effects.
- (305) For those reasons, 8 April 2005, should, for the purpose of this Decision and in favour of all addressees, be taken as the end date of the infringement.
- (306) It follows that the duration of the infringement for each of the parties was as follows:
- Chiquita Brands International, Inc., Chiquita Banana Company BV and Chiquita Italia SpA: from 28 July 2004 until 8 April 2005, that is to say, 8 months and 12 days.
 - FSL Holdings NV, Firma Leon Van Parys NV and Pacific Fruit Company Italy SpA: from 28 July 2004 until 8 April 2005, that is to say, 8 months and 12 days.

8. REMEDIES

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

- (307) Where the Commission finds that there is an infringement of Article 101 of the Treaty it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.
- (308) Given the secrecy in which the cartel arrangements were carried out, it is not possible to determine 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

³⁹⁵ For the term marketing week see footnote 44. Calendar week 15 of 2005 was 11 to 17 April 2005. Chiquita’s marketing week usually started on Monday for Italy, on Thursday before the arrival of the vessel for Greece and a few days prior to the arrival of the vessel in Portugal, see recitals (43) et seq.

³⁹⁶ See ID 1125 (Chiquita’s reply to the 1st request for information), Chiquita’s presentation during the Oral Hearing and annex D and recital 114 of Chiquita’s reply to the Statement of Objections.

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

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

- (309) 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 101 Treaty. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.
- (310) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission sets the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement is assessed on an individual basis. In particular, the Commission reflects in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.
- (311) In setting the amount of the fines to be imposed, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003³⁹⁷ (hereafter, “*the Guidelines on fines*”). Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice.
- (312) In this case, it is concluded, on the basis of the facts described in Section 4 and the assessment in Section 5, that the infringement was committed intentionally or at least negligently. The infringement consisted of collusive activities concerning the banana business in the Southern European region, in particular coordination of price strategy regarding future prices, price levels, price movements and/or price trends, and the exchange of information on future market conduct regarding prices.

8.3. Calculation of the fines

8.3.1. Methodology for setting the amount of the fine

- (313) According to the Guidelines on fines, the basic amount of the fine for each party results from the addition of an variable amount and an additional amount. The additional amount is calculated as a proportion of the value of sales of goods or services to which the infringement relates in a given year (normally, the last year of the infringement). The variable amount results from a proportion of the value of sales multiplied by the number of years of the company's participation in the infringement. The resulting basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are present. The fine may not exceed 10% of the worldwide turnover of an undertaking concerned pursuant to Article 23 of Regulation (EC) No 1/2003. The fine may be reduced in application of the Leniency Notice, where applicable.

³⁹⁷ OJ C 210, 1.9.2006, p. 2.

8.3.2. *The value of sales*

- (314) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales³⁹⁸, that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA. While the Commission will normally take the sales made by the undertakings during the last full business year of their participation in the infringement³⁹⁹, in this case, in view of the short duration of the infringement and the fact that it covered parts of two calendar years, it is appropriate to deviate from that principle. A proxy for annual value of sales (based on the actual value of sales made by the undertakings during the eight months of their participation in the infringement from August 2004 to March 2005) will be used as the basis for the calculation of the basic amount of the fines to be imposed.
- (315) The goods to which the infringement relates in this case are bananas (fresh fruit) both un-ripened (green) and ripened (yellow) bananas.
- (316) The relevant geographic area covers the three Southern European Member States of Greece, Italy and Portugal. This case relates to an infringement that is clearly distinct from the infringement found in Case 39188-Bananas.⁴⁰⁰
- (317) Chiquita submits in its reply to the Statement of Objections that only the sales of un-ripened (green) bananas ought to be included in the relevant value of sales to be taken as a basis by the Commission for the calculation of the basic amount of the fine. Chiquita's argument rests on the fact that it sold almost exclusively un-ripened (green) bananas in the Southern European region and hence the infringement related only to un-ripened (green) bananas. Chiquita's argument cannot be accepted as the agreement to coordinate prices related to bananas in general (both un-ripened and ripened bananas), as is apparent from sections 2.1 and 4. Furthermore, while the fact may be that only limited sales of ripened (yellow) bananas were sold by Chiquita, that fact is in any case reflected in the value of sales of bananas which serves as a basis for the calculation of the basic amount of the fine to be imposed.
- (318) The resulting calculation of the proxy for annual value of sales is as follows:

	Total relevant turnover from August 2004 to March 2005 (EUR)	Proxy for annual value of sales (EUR)
Chiquita	127 794 529	191 691 793
Pacific	29 732 872	44 599 308

³⁹⁸ Point 12 of the Guidelines on fines.

³⁹⁹ Point 13 of the Guidelines on fines.

⁴⁰⁰ This case concerns a separate (single and continuous) infringement in particular since the geographical scope of the arrangements, the personnel involved, the period of the alleged infringement, the functioning of the business and the nature of the conduct under investigation in this case are plainly different from those in Case 39188-Bananas. See also recital (80).

8.3.3. *Determination of the basic amount of the fine*

- (319) The basic amount consists of an amount of up to 30% of a company's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the company's participation in the infringement, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.⁴⁰¹

8.3.3.1. Gravity

- (320) The gravity of the infringement determines the level of the value of sales taken into account in setting the fine. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to determine the specific percentage of the basic amount of the fine, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.⁴⁰² Those elements are :

Nature

- (321) The addressees of this Decision participated in a single and continuous infringement of Article 101 of the Treaty, with the single and common anti-competitive objective, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that parameter.
- (322) Pacific argues, in its reply to the Statement of Objections, that as the Commission has failed to provide any concise and reliable evidence in support of its objections, it should not impose any fine on Pacific. Pacific further argues that the conduct described does not amount to a secret, institutionalised and systematic price fixing cartel which was conceived, directed and encouraged at the highest levels in the undertakings concerned. In fact, Pacific claims that neither Mr [...] nor any other Pacific employee ever engaged in any secret contacts with Chiquita but, instead, met openly with Mr [...] of Chiquita to discuss legitimate business issues linked to the operation of the CMO. Pacific states that Mr [...], who did hold a position at the highest levels of PFCI, did not conceive, direct or encourage any of the alleged conduct and that Mr [...], who did engage in contacts with Mr [...] of Chiquita, was both inexperienced in the banana market and held a principally administrative position and had by no means reached the most senior level of the company hierarchy. Pacific also argues that the Commission has been unable to provide prima facie evidence of the alleged conduct impacting negatively on the market in terms of prices and volumes and therefore the conduct described does not amount to a hard-core cartel infringement.
- (323) Finally, both Pacific and Chiquita state that the Commission must take account of the regulatory regime set out in Council Regulation (EEC) No 404/93 which affected the banana industry at the time of the alleged infringement by removing a vital aspect of competition and creating a high level of transparency, thereby materially affecting conditions on the market.

⁴⁰¹ Points 19-26 of the Guidelines on fines.

⁴⁰² Points 21-22 of the Guidelines on fines.

- (324) Contrary to Pacific's arguments, the contemporaneous evidence in the Commission file shows, as presented in section 4.2 of this Decision, that Pacific and Chiquita did in fact engage in an institutionalised and systemic price fixing cartel which was conceived at the meeting on 28 July 2004 between the high ranking representatives of the two undertakings, namely Mr [...], then [...] of PFCI and Mr [...], [...] for South Europe, and Mr [...], [...] for South Europe at Chiquita. The immediate implementation of the cartel arrangement is shown by the contemporaneous notes by Mr [...] dated in the first half of August 2004. The implementation of the cartel arrangement, its systematic and institutionalised nature and the involvement of the highest levels in each undertaking is further shown by the internal e-mail of Pacific of 11 April 2005 and an undated table containing Chiquita's prices and covering weeks 6 of 2005 to 13 of 2005, both of which contain weekly notes reporting on agreements between Chiquita and Pacific regarding future price behaviour. Those documents together reveal the almost weekly occurrence of price coordination between Pacific and Chiquita in the period between February 2005 and April 2005 (week 6/2005 to week 15/2005). The e-mail also shows that Mr [...] reported directly to Mr [...], [...] of PFCI and [...] of FSL Holdings NV and Firma Leon Van Parys NV, about the outcome of his illegal contacts with Chiquita. The fact that both the internal e-mail of 11 April 2005 and the undated table covering Chiquita's price information for weeks 6/2005 to 13/2005 were found in Mr [...] 's office, in print-out format and stored in a binder is also of relevance to the question of Mr [...] 's knowledge and involvement in the cartel arrangement. As for Pacific's argument about the legitimate content of the contacts between Pacific and Chiquita and the absence of any secrecy in them, it is recalled that the anti-competitive nature of the contacts has already been shown in section 5.4.2 and that there is nothing to suggest that knowledge of such anti-competitive contacts (for example the contents of the meeting of 28 July 2004 and e-mail of 11 April 2005) would have been kept anything but secret. With regard to Pacific's argument on the lack of evidence that the described conduct had any negative impact on prices and volumes, reference is made to section 5.4.3, in which the impact and effect of the conduct is described.
- (325) It is to be stressed that the infringement, as described in section 4.2, involved the coordination of price strategy, including future prices, price levels, price movements and/or price trends and the exchange of information on future market conduct regarding prices. Such an infringement is by its very nature among the most harmful restrictions of competition and, in accordance with point 23 of the Guidelines on fines, the proportion of the value of sales taken into account will generally be set at the higher end of the scale. The very specific regulatory regime in place at the time of the infringement should, however, be taken into account in adjusting the basic amount of the fine for all addressees (see section 8.4.2).

Combined market share

- (326) In 2004, the estimated overall combined market share for Chiquita and Pacific was 50% in Italy, 30% in Portugal and 65-70% in Greece. In 2005, the estimated overall market share for Chiquita and Pacific was 50% in Italy, 40% in Portugal and 60% in Greece.

Geographic scope

- (327) As regards the geographic scope, the cartel covered three Member States, namely Greece, Italy and Portugal.

Implementation

- (328) As described in recital (233), the arrangements were implemented.

Conclusion on gravity

- (329) Given the specific circumstances of this case and taking into account the criteria discussed in recitals (321)-(325) relating to the nature of the infringement, the proportion of the value of sales to be taken into account should be 15% for all undertakings concerned.

8.3.3.2. Duration

- (330) The infringement started on 28 July 2004 and lasted until 8 April 2005 (see recital (306)).
- (331) Rather than rounding up periods as suggested in point 24 of the Guidelines on Fines, the Commission will take into account the actual duration of participation in the infringement of the undertakings involved in this case on a rounded down monthly and pro rata basis to take fully into account the duration of the participation for each undertaking. Hence, as the duration in this case is eight months and 12 days for both Chiquita and Pacific, the calculation will take into account eight months only. This leads to a multiplier for duration of 0.66 (2/3 of a full year) for all undertakings concerned.

8.3.4. *The percentage to be applied for the additional amount*

- (332) In addition, irrespective of the duration of the undertakings' participation in the infringement, the Commission includes 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 and market-sharing agreements.⁴⁰³
- (333) Given the specific circumstances of this case and taking into account the criteria discussed section 8.3.3.1, it is concluded that an additional amount of 15% of the proxy for annual value of sales should be taken into account for all undertakings concerned.

8.3.5. *Calculation and conclusion on basic amounts*

- (334) Based on these criteria, the basic amounts of the fines to be imposed on each undertaking should therefore be as follows:

Addressees	Basic amount (EUR)
------------	--------------------

⁴⁰³ Point 25 of the Guidelines on fines.

Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA	47 922 000
FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA	11 149 000

8.4. Adjustments to the basic amounts of the fine

8.4.1. Aggravating circumstances

(335) No aggravating circumstances have been found.

8.4.2. Mitigating circumstances

(336) In the light of the very particular circumstances in the Commission decision of 15 October 2008 in Case 39188 – Bananas a reduction was applied to the basic amount of the fines for all parties on the basis that the banana sector was subject to a **very specific regulatory regime** and that the type of coordination established in that decision related to quotation prices.⁴⁰⁴ The combination of those elements led to the application of a reduction of 60% to the basic amount of the fines for all parties.

(337) Both Pacific and Chiquita argue in their replies to the Statement of Objections that the regulatory regime in place during the relevant period in this case was identical, with no substantive factual or legal differences, to the **regulatory regime** identified in the Commission decision of 15 October 2008 in case 39188 – Bananas. Pacific further argues that the fact that the alleged conduct in this case is not described as collusion on "*quotation price[s]*", as in Case 39188 – Bananas, is immaterial as, according to Pacific, the alleged conduct "*only*" involved the discussion of "*incorrect prices*" or price trends at most. For those reasons, Pacific and Chiquita request that "*at least the same*" or "*an equivalent*" reduction of the fines as in the Commission decision of 15 October 2008 in case 39188 – Bananas be granted in this case.⁴⁰⁵

(338) As a result of the specific business environment in the bananas sector, there are common elements in this case and in Case 39188 – Bananas. The regulatory regime which applied at the time of the infringement in the Commission decision in Case 39188 – Bananas and the one in this case operated according to rules which were to a large extent identical.

(339) The type of quotation prices which were established in Case 39188 – Bananas did not exist in the Southern European region and the price fixing identified in this case does not limit itself to such quotation prices. Hence, that part of the bundle of mutually reinforcing elements justifying a mitigating factor of 60 % in the Bananas decision **is not present in this case**. Contrary to what Pacific claims, the infringement in this case did not amount to "*much less potentially harmful behaviour than even the*

⁴⁰⁴ See recitals 104-115 and 467 of the Commission decision of 15 October 2008 in Case 39188-Bananas.

⁴⁰⁵ Section 9.3 of Pacific's reply to the Statement of Objections and annex E of Chiquita's reply to the Statement of Objections.

discussion of quotation prices or inaccurate prices”.⁴⁰⁶ On the contrary, there is even evidence that the collusion in this case included the coordination of prices which were at levels of actual prices (see for instance recitals (163) and (139)).

- (340) In view of the very particular circumstances of this case, and in the light of the position taken by the Commission in Case 39188 – Bananas, a reduction of 20% should be applied to the basic amount of the fines to be imposed on all the undertakings concerned.

8.4.3. Conclusion on adjustments of the basic amounts

- (341) Based on this mitigating circumstance, the adjusted basic amounts of the fines to be imposed on each undertaking should therefore be as follows:

Addressees	Adjusted basic amount (EUR)
Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA	38 337 600
FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA	8 919 200

8.4.4. Deterrence

- (342) In determining the amount of the fines, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, the Commission may increase the fines to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.⁴⁰⁷
- (343) In this case, it is not necessary to increase the amount of the fine to be imposed for the purposes of deterrence..

8.4.5. Application of the 10% turnover limit

- (344) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking must not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision. The adjusted basic amounts set out in section 8.4.3 do not exceed 10% of the total turnover for any of the undertakings concerned.

8.5. Application of the Leniency Notice

- (345) Chiquita’s leniency application of 8 April 2005 under the Leniency Notice concerned the business of distribution and marketing of imported bananas as well as pineapples

⁴⁰⁶ Recital 523 of Pacific’s reply to the Statement of Objections.

⁴⁰⁷ Point 30 of the Guidelines on fines.

and other fresh fruit in Europe⁴⁰⁸ and was registered as Case 39188 – Bananas. 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. On 3 May 2005, Chiquita was granted conditional immunity from fines under point 8(a) of the Leniency Notice for an alleged secret cartel – as described in Chiquita's submissions of [...] ⁴⁰⁹ - affecting the sale of bananas and pineapples in the EEA. ⁴¹⁰ As the conduct under investigation in this case was distinct ⁴¹¹ from that in Case 39188 – Bananas, the original investigation was divided into two cases, namely Case 39482 – Exotic Fruit and Case 39188 – Bananas. In this type of situation an immunity applicant has the duty to cooperate in both separate investigations which may originate from the same immunity application, and continue doing so even after obtaining final immunity with regard to the infringement(s) covered by one of the investigations.

- (346) Conditional immunity under the Leniency Notice means that, at the end of the administrative procedure, the Commission will grant an undertaking immunity from fines with regard to any infringement that the Commission may find as a result of its investigation in connection with the evidence that the undertaking submitted in relation to the alleged cartel provided that the undertaking abides by the provisions of the Leniency Notice throughout the administrative procedure.
- (347) In order to qualify for immunity from a fine at the end of the administrative procedure, the Leniency Notice requires immunity applicants to meet the cumulative conditions set out in point 11 of the Notice, in addition to the conditions which have to be met 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. Accordingly, the benefit of granting leniency can be justified only where the information provided and, more generally, the conduct of the undertaking concerned demonstrates genuine cooperation on its part. It follows that immunity applicants have an obligation to cooperate fully, on a continuous basis and expeditiously. This includes providing accurate, non-misleading and complete information. ⁴¹² Points 11(b) and (c) of the Leniency Notice 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 of the Leniency Notice and not to have taken steps to coerce other undertakings to participate in the infringement.
- (348) In view of certain declarations made by Chiquita during the proceedings, ⁴¹³ the Commission expressed its preliminary view, in the Statement of Objections issued to

⁴⁰⁸ [...].

⁴⁰⁹ [...].

⁴¹⁰ [...]

⁴¹¹ This case concerns a separate (single and continuous) infringement in particular since the geographical scope of the arrangements, the personnel involved, the period of the alleged infringement, the functioning of the business and the nature of the conduct under investigation in this case are plainly different from those in Case 39188-Bananas.

⁴¹² 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* [2005] ECR I-5425 paragraphs 394-396 and Case C-301/04 P *Commission v SGL Carbon AG a.o.*, [2006] ECR, p. I-5915, at paragraphs 68-70.

⁴¹³ [...]

Chiquita, that the infringement to which this Decision relates was not covered by Chiquita's leniency application of 8 April 2005 and, alternatively, that Chiquita had not fulfilled its obligations under point 11(a) (obligation to cooperate) and point 11(b) (termination of the infringement at the time of the application) of the Leniency Notice. Prior to the Statement of Objections, the Commission had sent a state-of-play letter to Chiquita [...].

- (349) Based on all the arguments put forward by Chiquita, especially after the Statement of Objections, it is concluded that the infringement established in this Decision is covered by Chiquita's immunity application. However, it is recalled that immunity applicants must endeavour to spell out clearly on what information they base their allegations when applying for immunity.
- (350) Regarding the duty to end involvement in the infringement no later than at the time of the immunity application, and taking into account the evidence as well as the explanations given by Chiquita following the issuing of the Statement of Objections (see recitals (141)-(142)), it cannot be demonstrated with certainty that the date on which the last collusive contact involving Chiquita personnel occurred was after the date of its immunity application of 8 April 2005. Thus, there is no basis to withdraw immunity for any breach of point 11(b) of the Leniency Notice.
- (351) Regarding the duty to continuously cooperate, contrary to what Chiquita argues in its reply to the Statement of Objections,⁴¹⁴ it is not sufficient that the immunity applicant enables the Commission to launch the investigation and thereafter provides only the information that the Commission explicitly requests. It is the responsibility of the applicant to come forward with its account of the facts buttressed by evidence and to demonstrate that it cooperates genuinely, fully, on a continuous basis and expeditiously. The Commission needs to remain neutral and abstain from leading the applicant and can hence only present factual questions to the applicant. Chiquita has nevertheless provided the Commission with several submissions explaining its involvement in the Southern European banana business, including the collusive contacts with Pacific. It was also Chiquita's contribution that originally triggered the Commission's investigation of the business. It is therefore concluded that Chiquita has met its obligation to continuously cooperate.
- (352) Given the special circumstances of this case as described above, it would not be justified to withdraw immunity from Chiquita. Since Chiquita has fulfilled the conditions set out in the Leniency Notice, it should be granted immunity from any fines that would otherwise have been imposed on it.

8.6. Conclusion: final amount of individual fines

- (353) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:
- (a) Chiquita Brands International, Inc., Chiquita Banana Company BV and Chiquita Italia SpA jointly and severally:

EUR 0

⁴¹⁴ See recital 167 of Chiquita's reply to the Statement of Objections.

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

EUR 8 919 000

HAS ADOPTED THIS DECISION:

Article 1

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

- (a) Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA,
- (b) FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA.

Article 2

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

- (a) Chiquita Brands International, Inc., Chiquita Banana Company BV, Chiquita Italia SpA, jointly and severally: EUR 0
- (b) FSL Holdings NV, Firma Leon Van Parys NV, Pacific Fruit Company Italy SpA, jointly and severally: EUR 8 919 000

The fines shall be paid in euro, within three months of the date of notification of this Decision, to the following account held in the name of the European Commission:

Banque et Caisse d'Epargne de l'Etat

1–2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI / COMP/39482

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.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 85a(1) of Commission Regulation (EC, Euratom) No 2342/2002.⁴¹⁵

⁴¹⁵ OJ L 357, 31.12.2002, p. 1.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in Article 1 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 Banana Company BV
Schelluinsestraat 46B
4203 NM Gorinchem
The Netherlands

Chiquita Italia SpA
Via Tempio del Cielo, 3
00144 Rome
Italy

FSL Holdings NV
Zeevaartstraat 3
2000 Antwerp
Belgium

Firma Leon Van Parys NV
Zeevaartstraat 3
2000 Antwerp
Belgium

Pacific Fruit Company Italy SpA
Via Benedetto Croce 40
00142 Rome
Italy

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 12.10.2011

For the Commission

Joaquín ALMUNIA
Vice-President