

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 1975

relating to a proceeding under Article 86 of the EEC Treaty
(IV/26699 — Chiquita)

(Only the English text is authentic)

(76/353/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the
European Economic Community, and in particular
Article 86 thereof,

Having regard to Council Regulation No 17 of
6 February 1962 ⁽¹⁾, and in particular Articles 3, 15
and 16 thereof,

Having regard to the application by Th. Olesen A/S,
Valby, Denmark, submitted to the Commission on
20 February 1974 and withdrawn on 13 March 1975,

Having regard to the applications submitted to the
Commission on 27 May 1974 by the Tropical Fruit
Co. and Jack Dolan Ltd, both of Dublin, and
Banana Importers of Ireland Ltd, Dundalk, Ireland,

Having regard to the Commission's decision of
19 March 1975 to initiate a proceeding against United
Brands Company, New York, USA,

Having heard the undertakings concerned in
accordance with Article 19 of Regulation No 17 and
with Regulation No 99/63/EEC of 25 July 1963 ⁽²⁾,

Having regard to the opinion of the Advisory
Committee on Restrictive Practices and Dominant
Positions, delivered pursuant to Article 10 of
Regulation No 17 on 13 November 1975,

Whereas:

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

I. THE FACTS

The facts of the case can be summarized as follows:

1. STRUCTURE OF THE MARKET

(a) World banana market

Bananas (heading No ex 08.01 in the Brussels
Nomenclature) are a highly perishable product
grown in the tropics all the year round and imported
into the temperate zones. The main growing areas
are as follows:

- countries in Central America and the northern
part of Southern America, known as 'the dollar
area countries', accounting for 66 % of world
exports;
- Jamaica and the Windward Islands, the United
Kingdom's traditional suppliers, and Guadeloupe
and Martinique, the French overseas
departments, altogether with 16 %;
- certain of the African States associated with the
EEC, such as the Ivory Coast, Somalia,
Cameroon and Madagascar;
- certain other countries, including China, the
Canary Islands, Israel and the Philippines.

The Member States of the EEC import roughly a
third of the total of world banana exports. In 1974
imports amounted to 1 978 000 metric tons, of which

30 % went to Germany, 25 % to France, 16 % to Italy, 15 % to the United Kingdom, 6 % to the Netherlands, 4.5 % to the Belgo-Luxembourg Economic Union (BLEU), 2 % to Denmark and 1.5 % to Ireland.

Traditionally, the banana cultivated for export was the Gros Michel, primarily because of its good handling and storage qualities. However, in view of its extreme susceptibility to Panama disease and to wind damage, it was replaced by the Cavendish variety, produced by crossing Gros Michel with a Canaries variety. Cavendish gives a greater yield per hectare than other varieties and the Cavendish sub-variety Valery even more so, but as they are more sensitive than Gros Michel to damage in handling and transport, they have to be prepacked in the producer country. In 1969 the Cavendish/Valery variety accounted for 85 % of world banana exports, as against only 30 % in the early 1960's. In addition to the changeover to the Cavendish/Valery variety, there has also been a change in the packing arrangements. Instead of being shipped in stems, that is with the hands left on the branch and not wrapped separately, the bananas are shipped in cardboard boxes, each hand being prepacked.

All varieties are, however, exported while still green and have to be artificially ripened when they arrive in the country where they are to be consumed. Most ripening is carried out by the importer/distributors, although there are a number of independent ripeners. The changeover from stem to box exports has, however, created technical problems for ripeners, because it is much more difficult to ripen prepacked bananas than to ripen unpacked stems. Ripeners have had to completely modernize their plant, and ventilation and cooling systems, with airtight facilities, have become indispensable. In many cases they have had to construct entirely new ripening facilities.

At the same time there has been a trend towards the sale of bananas under brand names, accompanied by intensive sales campaigns. With this new sales technique, which depends on advertising, each hand of bananas, and in some cases each banana, has to be marked before packing in boxes in the producer country. This policy of large-scale advertising campaigns was introduced by United Fruit Company for the sale of its Cavendish/Valery bananas in 1967 under the brand 'Chiquita'. Other brands followed later.

(b) The position of United Brands Company

The main operators on the world banana market are a few large American corporations, particularly United Brands Company (UBC) of New York, Castle and Cook Company (Castle and Cook) of San Francisco, and Del Monte Company of California (Del Monte). UBC was formed in 1970 by the merger of United Fruit Company and AMK Corporation (American Seal-Kap), a major meat producer in the United States. In addition, UBC has interests in flower growing, palm oil, soya beans, rice, peanuts and vegetables of various kinds, and in a wide range of preserved foods using these products. UBC also operates in other areas such as chemicals, plastics, packaging, sea and rail transport and telecommunications. UBC sells its products throughout the world. Following the restrictions imposed on UBC by the American antitrust authorities, production, transport, distribution and marketing of bananas worldwide in 1973 represented only 18.5 % of UBC's overall turnover of some US \$ 2 000 million.

UBC today employs altogether more than 60 000 staff, owns more than 30 000 hectares of banana plantations, and in 1974 sold more than 100 million boxes of bananas, representing some two million metric tons, or about 35 % of world exports. UBC is therefore the largest banana group in the world. It also owns one of the world's largest banana-boat fleets and in addition makes use of the services of one of the most powerful refrigerator shipping operators, the Salén Shipping Company of Stockholm (Sweden). With a 9 % holding, Salén has one of the largest shareholdings in UBC.

UBC owns a large number of subsidiary companies throughout the world, whose operations are controlled by a Central Board at UBC New York. One of its members is a director of United Brands Continentaal BV (Rotterdam), which is responsible for coordinating UBC's banana operations in an area covering all the Member States of the EEC, except Italy and the United Kingdom, and which has been authorized to represent UBC in the present proceedings.

1. The countries in which UBC is a major banana producer are Colombia, Costa Rica, Honduras and Panama. UBC also buys fruit grown in other

areas by independent producers, including virtually the entire production of Surinam, Cameroon and Guyana and a large proportion of the bananas grown in Jamaica, Guadeloupe, the Philippines, Ecuador and the Dominican Republic, to name only the major producing countries.

2. UBC is also very strongly placed in banana shipping. Green bananas have to be shipped in specially fitted high-speed refrigerator vessels. The commonest type is the traditional banana boat, which carries a full cargo of bananas. The average capacity of a banana boat is 3 000 metric tons, although the capacity of the latest vessels can be as much as 6 000 metric tons. The voyage time from Central and South America to Europe is between 10 and 14 days, excluding loading and unloading.

UBC owns or charters more than 40 refrigerator ships and its own vessels alone represent a capacity of nearly 10 million cubic feet. It is the only firm operating refrigerator container ships for the transport of bananas and owns two such ships. UBC also ships its bananas under contract with other carriers. UBC ships also carry bananas of other brands, such as Del Monte and Onkel Tuca. UBC's latest ships have a relative efficiency 50 % higher than the other ships of its fleet.

The main ports for delivery within the Community are Bremerhaven, Rotterdam, Antwerp and Hamburg, together with a few ports in France, Italy and the United Kingdom, which unload exclusively such quantities as are to be consumed in those countries. UBC's main port of delivery in the EEC is Bremerhaven and a considerable proportion of the bananas for sale in Germany, Denmark, Switzerland and Austria pass through this port. Its second main port is Rotterdam, where bananas are landed for sale not only in the Netherlands but also in the BLEU, Germany, Ireland, and sometimes Denmark. Occasionally, UBC bananas for consumption in the EEC are unloaded at Göteborg, in Sweden.

3. UBC also operates as a banana importer in the Community, where it has an elaborate distribution system. Its European and Middle East operations are coordinated by three wholly-owned subsidiaries:

- (a) United Brands Continentaal BV of Rotterdam (UBC-Rotterdam), which coordinates sales in the BLEU, Denmark, France, Germany, Ireland and the Netherlands, as well as Austria, Switzerland, other Scandinavian countries and the COMECON countries;

- (b) Fyffes Group Ltd, London (Fyffes), which coordinates United Kingdom sales and also handles a comprehensive range of other products;

- (c) Compagnia Italiana della Frutta SpA, Milan (CIF), which coordinates sales in Italy and the Mediterranean countries as well as the Middle East.

4. UBC has its own ripening facilities in certain Member States. In Belgium, Italy and the United Kingdom it owns about a third of total ripening capacity. For Germany, however, UBC sells its bananas mainly to the Scipio Group, which owns more than a third of the country's ripening capacities. In most of the Member States where it does not have its own ripening facilities, UBC has pursued just as strict a technical control over the ripening of its bananas as it would if it owned its own facilities. UBC took up this policy when it gave up selling its bananas in stems in favour of sales in boxes. Ripening facilities then had to be rebuilt or modernized.

In about 1967, UBC made enquiries in each Member State into the situation there and then selected a number of firms, which it invited to distribute and ripen Chiquita bananas; it required these distributors to have ripening premises meeting its own rather strict technical specifications. In a number of cases UBC put up loans to these distributor/ripeners to enable them to build or modernize their ripening facilities. At the same time it set up an elaborate technical assistance and control department to advise ripeners, prepare plans, determine the ripening methods to be used, train personnel and make periodic checks.

Bananas are graded by degrees of ripeness on a scale running from 1, completely green to 7, over-ripe bananas which must be consumed

immediately. Ripening itself lasts from five to eight days depending on the colour aimed at. Bananas are removed from cold storage depots or from refrigerator ships or vans for transfer to ripening rooms only when it is clear that, after ripening, they can be sold for consumption within a few days. Once they are yellow, bananas are highly perishable and will not keep for more than a few days. Hence bananas must always be imported, exported and shipped while still green; all transport and storage facilities are refrigerated. All unnecessary handling must be avoided once the bananas have left the refrigerator ship, since their quality will otherwise rapidly deteriorate.

5. In marketing its bananas UBC determines the sales policy to be adopted for all bananas, whether sold by its own subsidiaries or by other distributor/ripeners, including the bananas sold to the Scipio Group fob Central or South American ports. UBC's marketing policy is governed completely by its committal to selling its bananas under the Chiquita brand name, and consumer attachment to this brand is regularly tested and strengthened by various means. It is for this reason that UBC conducts its own sales promotion and advertising for its bananas. UBC accordingly employs its own representatives in the various Member States to go into shops and supermarkets and to promote sales there by means of demonstrations and by providing promotional material and gifts. Retailers and supermarkets attach great importance to these sales promotion activities, which UBC representatives personally supervise and control in the various Member States, though in collaboration with the distributor/ripeners since a sales promotion venture requires the ripening of more bananas than usual. In addition UBC representatives provide retailers with money while the promotion lasts. UBC considers its marketing activities directly at the level of the retailer to be a most effective marketing tool which is unique in the banana industry.

In all the Member States where UBC sells bananas under the Chiquita brand, it organizes and pays for advertising and sales promotion itself; this includes the advertising for Chiquita bananas sold to the Scipio Group. In its Chiquita advertising, UBC has stressed the value of a carefully selected high-quality fruit branded in the producer country. It has assured retailers of receiving regular supplies of bananas of uniform quality, excellent appearance and good shelf life. UBC was the first undertaking to launch

large-scale advertising campaigns for the sale of branded bananas. It started at the beginning of 1967, when the new Chiquita brand name, already in use in the United States, was introduced in Europe. Before then it had sold its bananas in Europe under the Fyffes brand, as it still does in the United Kingdom.

UBC sets great store by the proper use of the Chiquita brand name, and operates permanent and strict quality controls. It is rigorously selective as to the bananas which it sells under its Chiquita brand. In order to keep up the image of this product with the public, the Chiquita name is applied mainly to bananas of certain varieties, (Cavendish/Valery). These must in addition be of a minimum size of not less than eight inches and have a very smooth skin. No defects are allowed. Any bananas not satisfying these strict criteria may not bear the Chiquita label and are sold without a brand name. This is the case, for example, with bananas from the upper hands of a stem, which, although not of poor quality, are generally smaller and more curved than others from the same stem.

Moreover, UBC requires its bananas to be uniformly yellow in colour when they are sold by retailers. It does not allow its bananas to be sold green (colours 1, 2 and 3). Its own market research has shown the following consumer preferences:

- colour 3: 3 %,
- colour 4: 13 %,
- colour 5: 36 %,
- colour 6: 41 %,
- colour 7: 7 %.

This indicates that bananas which have a good yellow colour (colours 5 and 6) must be provided in order to maintain the reputation which its advertising is designed to build up in the mind of the consumers. UBC can do this because of its ability to supply very large quantities of bananas of uniform quality.

According to the information supplied to the Commission by UBC itself, this marketing policy based on the Chiquita brand enables UBC to sell Chiquita bananas at a price which is on average

between 30 and 40 % higher than that of its unbranded bananas. UBC's advertising budget is also considerably larger than that of its competitors. In the BLEU, Denmark, Germany, and the Netherlands, which account for roughly half of UBC's banana sales in the EEC, advertising costs were running at an annual rate of about two million units of account in 1967 and 1968, when the Chiquita brand was launched in these Member States, and then settled at an average of 1 500 000 units of account for each of the years thereafter.

6. UBC's sales system for its customers in the BLEU, Denmark, Germany (except as regards Scipio sales), the Netherlands and Ireland operates as follows: On a given day of the week distributor/ripeners place their orders. Three days later UBC informs them of the price they will have to pay. There is never any discussion over price. Officially UBC gives no discounts. Once this price is announced, however, distributor/ripeners are free to reduce their orders or to cancel them altogether. UBC may also reduce the quantities ordered, and nearly always does so. In 1973, for instance, the orders of its Danish distributor/ripeners were reduced as follows: Lembana 14.5 %, Holmskov 3.4 %, Interfrugt 8.1 %, Th. Olesen A/S (Olesen) 18.6 %, København's Frugtauktioner 21.7 %, Petersen 10.9 %, Erlandsen 21.5 % and Kjaer 14.3 %. At least two consignments arrive in the week following. Thus the time-lag between placing the order and receiving the goods is shorter than the actual duration of the voyage. By the time the orders are placed by its customers, UBC already knows exactly how many bananas will be arriving in the ships which are currently in transit.

7. *UBC's position in the Community is as follows*

Through UBC-Rotterdam, UBC handles about 40 % of the total banana sales in *the Netherlands*, where UBC sells its bananas direct to a large number of ripeners (approximately 80). UBC-Rotterdam also unloads and sells bananas destined for customers in the BLEU, Germany and Ireland. In addition, UBC-Rotterdam handles the transport by road and ferry for the bananas sold to UBC customers in Ireland.

In the *BLEU*, UBC distributes its bananas chiefly through two companies, first through another wholly owned subsidiary, Ets. B. M. Spiers and

Son, NV, Antwerp, which owns about a third of the BLEU ripening capacities, and also to Banacopera SC, Brussels, a group of distributor/ripeners which handles UBC bananas virtually exclusively. Through these two companies, UBC handles some 50 % of the total banana sales in the BLEU.

For *Germany*, UBC sells its bananas for the most part to the Scipio Group, with which it has had a close business relationship for more than 30 years. This group, which owns eight banana boats, mainly purchases bananas from UBC fob Central and South American ports for sale exclusively in Germany and Austria. Scipio ripens the UBC bananas it has imported in its own premises. UBC bananas sold to Scipio account for more than 35 % of the total banana sales in Germany. UBC sells bananas also to a number of other distributor/ripeners who purchase from UBC f.o.r. (free on rail) Bremerhaven or Rotterdam. The bananas which UBC sells in Germany to these importers account for about 10 % of banana sales there. Altogether, UBC thus supplies more than 45 % of the bananas sold in Germany. UBC maintains a technical control over ripening and supervises the marketing of all these bananas, including those sold to Scipio fob Central and South American ports. Scipio cooperates fully with UBC's marketing policy and has never sought to act independently of UBC.

For *Denmark*, UBC sells to a number of distributor/ripeners; about half its sales are accounted for by Lembana and the other half by Interfrugt, Holmskov and, until October 1973, Olesen. Thus the four largest distributor/ripeners in Denmark, which own more than two-thirds of the ripening capacity in that country, work for UBC. UBC sales account for about 45 % of total banana sales in Denmark. Most of these bananas are unloaded at Bremerhaven.

In *Ireland*, UBC's banana sales formerly amounted to only about 3 % of total sales. For one year only, from March 1972 to March 1973, UBC sold its bananas to Banana Importers Ltd, which is a group of distributor/ripeners. Since the end of 1973, UBC has increased its Irish sales. Whereas in the last quarter of 1973 it accounted for only about 3 % of the Irish market, in the first quarter of 1974 the proportion rose to more than 10 % and in the second and third quarters of 1974 to around 30 %, which represents about 25 % over the whole year.

Since the consumption of bananas in Ireland per head was already high and therefore relatively stable, this increase in UBC's sales has been at the expense of its competitors. All UBC bananas sold in Ireland since January 1974 have been unloaded at Rotterdam and carried by road and ferry to Dublin for sale cif Dublin.

UBC also sells bananas in *France*, through its wholly-owned subsidiary Compagnie des Bananes SA and through Omer Decugis, a company in which it has an 80 % shareholding. These bananas are mainly imported from Guadeloupe and Africa and account for approximately 20 % of the total banana sales in France. UBC does not sell bananas in France under any brand name and does not confine its sales to bananas of the Cavendish variety.

In *Italy* UBC sells through CIF, which is under its control (40 % of the shares are held by Compagnie des Bananes SA, 20 % by Spiers NV and 40 % by Caraïbische Scheepvaart NV, which UBC also owns). UBC is responsible for more than 40 % of Italian banana sales and more than a third of the ripening capacities. UBC does not always sell Cavendish bananas in Italy.

In *the United Kingdom*, through its wholly-owned subsidiary Fyffes, UBC accounts for more than 40 % of the total banana sales and owns more than a third of the ripening capacities. Most of these bananas are imported from Jamaica, are not of the Cavendish variety and are sold under the Fyffes brand.

UBC is also very strongly placed in several countries outside the Community where it has sizeable market shares; examples are the United States (37 %) ⁽¹⁾, Canada, Japan, Switzerland, Austria and Sweden. In the latter three countries, UBC delivers exclusively to distributor/ripeners who also sell competitors' bananas. These distributors undertake joint advertising campaigns for Chiquita bananas with other banana brands without objection from UBC.

(c) UBC's competitors

UBC's main competitors are the following

Castle and Cook, which operates primarily in the United States (37 %) and in Asia; this group has taken over the Standard Fruit Company and sells its bananas to a number of European importers, the main ones being combined together in Eurobana, Hamburg. Eurobana includes the International Fruit Company, Rotterdam, and Port and Astheimer, both of Hamburg. Castle and Cook have also taken over the banana business of Gérard Koninkx Frères, Antwerp. Castle & Cook sells most of its bananas under the Dole brand, which has replaced the Deloro and Cabana brands (13 % of total sales in Germany, 18 % in the Netherlands, 22 % in the BLEU, 15 % in Italy and 20 % in Denmark). Castle and Cook's total banana sales in the EEC account for a little more than 9 % of total banana sales there. The group does not have its own fleet. Eurobana charters eight ships for the transport of Dole bananas.

Del Monte, which does not operate directly in the Community, works through its exclusive importer Internationale Fruchtimport Gesellschaft Weichert & Co. (Inter-Weichert), Hamburg. Its sales account for 9 % of total banana sales in Germany, 15 % in the Netherlands, 3 % in the BLEU, 24 % in Denmark, 35 % in Ireland, 2 % in France and 1 % in Italy. Inter-Weichert sells its bananas mainly under the Del Monte brand and accounts for about 5 % of Community banana sales. Del Monte also does business in the United States (10 %), Japan, and elsewhere. It does not have its own ships.

Del Monte, which previously was not involved with bananas, came into the trade as a result of certain financial transactions. In 1972, in particular, UBC transferred to Del Monte a part of its plant and equipment, much of it in Guatemala. This followed action by the United States antitrust authorities which had resulted in a consent decree. In the final judgment, dated 4 February 1958, the Court held, following the principles laid down in Sections 1 and 2 of the Sherman Act, that UBC had restricted and monopolized various stages of the banana trade; UBC was accordingly ordered to create, out of its own assets, a new firm capable of importing nine million stems of bananas into the United States each year. In 1972, Del Monte concluded with UBC a two-year agreement for the purchase and carriage of bananas. This agreement lapsed at the end of 1973.

⁽¹⁾ In the United States the antitrust authorities have now prohibited UBC from ripening bananas or selling bananas at retail.

The '*Alba*' group (Allgemeine Bananengruppe Hamburg), which consists of a number of European importers, has nine ships and accounts for 15 % of total banana sales in Germany and 5 % in Denmark. This group sells its bananas mostly under the Onkel Tuca brand and accounts for some 5 % of total Community banana sales. It has recently set up a production cooperative in Costa Rica and has a number of ripening plants in Germany.

The '*Belhoba*' group (Belgische-Hollandse Bananengroep), which is made up of two importers, Velleman & Tas, Rotterdam, and Van Parys, Antwerp. This group, which sells its bananas under the Sundrop and Bonita brands, accounts for 7 % of total banana sales in Germany, 20 % in the Netherlands, 24 % in the BLEU and 1 % in Denmark. Belhoba collaborates with Noboa, the principal exporter of Ecuador, which in turn sells its bananas in other countries under the same Bonita brand (30 % in Ireland and 5 % in Italy). Noboa has a majority shareholding in Van Parys. The group charters six ships and has a number of ripening plants in the BLEU and in the Netherlands. The bananas sold under these brands represent approximately 6 % of total Community banana sales.

Geest Industries Ltd, whose banana business consists solely in the sale of Windward Island bananas in the United Kingdom, accounts for some 30 % of the total banana sales in the United Kingdom. This group has a fleet of eight ships and controls about 6 % of total Community banana sales. The group ripens virtually all its bananas itself, which are marketed in the United Kingdom under the Geest brand.

Società Mercantile d'Oltremare (SMO), whose banana business consists solely in the sale of bananas imported from Somalia to Italy, where it accounts for 20 % of total banana sales. SMO sells most of its bananas under the Somalita brand and controls about 3 % of total Community banana sales.

W. Bruns, Hamburg, which accounts for 10 % of total banana sales in Germany and 2 % in the Netherlands and sells most of its bananas under the Bajella brand. It has six ships and accounts for about 3 % of total Community banana sales.

A number of *other companies*, mainly in France, Italy and the United Kingdom, import bananas into

these countries as a consequence of their former links with the French overseas departments and the ex-colonial territories, such as the Ivory Coast, Jamaica, and Somalia. However, their sales in the Community are low and do not amount to more than 6 % of total banana sales.

On the basis of the figures for 1971 to 1974, UBC supplied on average about 40 % of the bananas sold in the Community and sold appreciably more than any of its competitors in each of the Member States except France and Ireland. If only that part of the Community consisting of Germany, Denmark, Ireland, the Netherlands and the BLEU is taken into account, UBC's market share amounts to about 45 %. Of those competitors whose bananas are sold in several Member States, both Castle and Cook, with about 9 % of total sales of bananas in the Community, and Del Monte with about 5 %, should be noted, with respective shares of 15 to 20 % and 10 to 12 % in that part of the Community referred to above.

The other companies, which do most of their business in a smaller part of the Community, such as Alba and Bruns (Germany), Belhoba (the Netherlands and the BLEU), Geest (United Kingdom), SMO (Italy), and a few other firms in France, each sell from 3 to 6 % of the total quantity of bananas sold in the Community.

Since 1967, furthermore, UBC has pursued a marketing policy within this part of the Community based on the sale of its bananas under the Chiquita brand, supported by large-scale and regular advertising campaigns. This policy has also been based on the extensive reorganization of its production arrangements (changeover to the Cavendish/Valery variety), of its packaging facilities (changeover to box exports with the bananas already marked with the Chiquita brand), of its transport facilities (modernization of its fleet), of its ripening facilities (new ventilation and refrigeration facilities), and of its marketing arrangements (sales representative network, advertising and promotion campaigns). This reorganization of UBC's business centred on the Chiquita brand has been extremely successful and has had a great impact on the market. The other companies have endeavoured to adapt to this new type of policy, but not all have succeeded. Furthermore, it is extremely difficult for undertakings new to the banana market to gain access because of the need to have a vertical business structure capable of making the heavy investments required in order to get established, which in any event, takes several years to accomplish.

2. UBC's MARKET BEHAVIOUR

(a) General sales conditions

Since 25 January 1967, UBC has imposed general conditions on the sale of its bananas, which were notified on 15 November 1968 insofar as the Netherlands was concerned following enquiries made by the Commission. They included a prohibition on the sale of bananas other than those supplied by UBC while the distributor/ripeners was a distributor of UBC bananas, a prohibition on the resale of UBC bananas to competing ripeners and an obligation not to resell such bananas while still green. UBC also insisted that its distributor/ripeners should not sell bananas to dealers from other countries, with the assurance that UBC had demanded similar terms from its distributor/ripeners in other countries. Distributor/ripeners could use the Chiquita brand name only if they had written authorization to do so from UBC.

The introduction of these new general conditions of sale coincided with the period when UBC, which had hitherto been selling its bananas in Europe under the Fyffes brand and was changing from the Gros Michel variety to the Cavendish/Valery variety, was endeavouring to introduce this product in Europe under the new brand name Chiquita.

UBC was, therefore, through its general conditions of sale, reinforcing the effect of its Chiquita advertising campaign by prohibiting its distributor/ripeners from distributing competing bananas. Secondly, by insisting that distributor/ripeners should not export, UBC was able to segregate the market and thus prevent the Gros Michel variety, which it was still selling in the Netherlands and in the BLEU, from upsetting the advertising campaign for Cavendish/Valery in Germany. Following intervention by the Commission, UBC has deleted all these requirements from the general conditions of sale, except for the requirement not to resell green bananas.

Although it is not always set down in writing, the requirement not to resell green bananas has, since 1967, also been imposed on UBC's importers and distributor/ripeners in all other Member States including the Scipio Group and is followed by its own subsidiaries. Owing to their highly perishable nature, bananas can be transported only when green; once they have ripened and become yellow they cannot be transported without great risk of damage.

UBC applies this prohibition on the resale of green bananas strictly, as for example can be seen from its

telexed reply of 19 December 1973 to an order from Olesen. In refusing the order, UBC informed Olesen that it could obtain Chiquita bananas from any EEC country, but only in a ripened condition. Furthermore, the other Danish distributor/ripeners refused to supply Chiquita green bananas to Olesen. Scipio also refused to supply Olesen.

(b) Pricing practice

Apart from bananas sold by UBC in France, Italy and the United Kingdom, all the bananas sold by UBC to customers from the other Member States come from the dollar-area countries of Central and South America, are of the Cavendish/Valery variety and when labelled are sold under the same brand Chiquita. UBC's selection techniques for Chiquita bananas have eliminated all differences of quality between these bananas.

Bananas for sale to customers in the various Member States concerned are unloaded by UBC in two main ports, Bremerhaven and Rotterdam. They are then loaded by UBC into the refrigerator vans (rail or road) of the purchasing distributor/ripeners, the conditions of sale and terms of payment being, with the following two exceptions, the same in all cases. Sales to the Scipio Group of Hamburg are fob port of shipment Central or South America, while those to Irish customers are at a price cif Dublin. After unloading at Rotterdam, UBC transports its bananas for its Irish customers by road and ferry to Dublin.

Unloading charges at Bremerhaven and Rotterdam differ by only a few US cents per 20 kg box. A box of Chiquita bananas itself was sold on average for between \$ 3 and 4 until 1974, when the price rose to nearer \$ 5. (A 20 kg box of bananas contains a net weight of 18.15 kg of bananas). In 1973 the average freight per box from Central America was around \$ 1.12.

Freight rose sharply in 1974 following the oil crisis, but there is still no difference in freight between the two ports of unloading. The cost of carriage by road in a refrigerator van from Rotterdam to Dublin, including ferry charges, is approximately \$ 1.10 per box.

Bananas from dollar area countries attract duty at 20 % under the EEC's Common Customs Tariff. One country, Germany, has been authorized to waive the EEC duty in respect of a quota fixed

annually under the Protocol on the tariff quota for imports of bananas annexed to the Treaty of Rome. Bananas under this quota enter Germany duty-free. If they are re-exported to other Member States duty is chargeable exactly as if they had been imported direct into those States. Furthermore, bananas from countries which have signed the Lomé Convention enter the EEC duty-free. The three new Member States, Denmark, Ireland and the United Kingdom, are still phasing in the Common Customs Tariff. From 1 January 1974 their rate of duty was 8 % on bananas from third countries. The rate was increased on 1 January 1975 and is due to be altered again on 1 January 1976 and 1 July 1977. The new Member States will then be applying the Common Customs Tariff in full. Since 1 January 1975, the rate of import duty applied in the new Member States to bananas from third countries has been 12 %.

Although its bananas are sold f.o.r. Bremerhaven or Rotterdam, the sales prices which UBC fixes each week for Chiquita bananas vary substantially according to the Member State where the customer has his business and the bananas are to be retailed. This is clear from UBC's replies to the Commission's requests for information contained in their letters of 14 May, 13 September, 10 and 11 December 1974 and 13 February 1975.

The variations are not attributable to any differences in customs duties or transport costs, since these are borne by the distributor/ripeners, who purchase UBC bananas at Bremerhaven or Rotterdam and transport them thence in their own refrigerator vans, either by rail or road, and themselves pay transport costs and duties under the Common Customs Tariff. Outside Ireland, where UBC sells its bananas cif Dublin, UBC prices include no transport costs or customs duties. Prices charged in Ireland cover the cost of transport from Rotterdam to Dublin, but do not include customs duties. UBC has been applying this policy of varying prices according to the Member State of the customer and of intended sale since at least 1971 as far as German, Dutch and BLEU customers are concerned, since January 1973 for Danish customers, and since November 1973 for Irish customers. Except in the case of customers in Ireland, UBC's prices are generally higher than those of its competitors in this part of the Community.

Details of the manner in which UBC's price differences are applied between customers in the various Member States are set out below.

The average over the year of the maximum weekly differences in prices to customers in different Member States was 17.6 % in 1971, 11.3 % in 1972, 14.5 % in 1973 and 13.5 % in 1974.

The highest such weekly differences (price per box) were:

- 1971: \$ 2.53 for customers in Germany and
\$ 3.34 for customers in the BLEU (+ 32 %)
\$ 2.32 for customers in Germany and
\$ 3.18 for customers in the Netherl. (+ 37 %)
- 1972: \$ 2.48 for customers in Germany and
\$ 3.00 for customers in the BLEU (+ 21 %)
\$ 2.48 for customers in Germany and
\$ 3.22 for customers in the Netherl. (+ 30 %)
- 1973: \$ 3.73 for customers in Germany and
\$ 4.40 for customers in the BLEU (+ 18 %)
\$ 2.29 for customers in Germany and
\$ 3.28 for customers in the Netherl. (+ 43 %)
\$ 3.80 for customers in Denmark and
\$ 4.70 for customers in the BLEU (+ 24 %)
\$ 2.20 for customers in Denmark and
\$ 3.32 for customers in the Netherl. (+ 51 %)
- 1974: \$ 4.66 for customers in Germany and
\$ 5.84 for customers in the BLEU (+ 25 %)
\$ 2.05 for customers in Germany and
\$ 3.15 for customers in the Netherl. (+ 54 %)
\$ 5.71 for customers in Denmark and
\$ 6.60 for customers in the BLEU (+ 16 %)
\$ 5.60 for customers in Denmark and
\$ 6.22 for customers in the Netherl. (+ 17 %)

The weekly prices used for these calculations relate only to Chiquita bananas sold by UBC to customers from Germany, Denmark, the Netherlands and the BLEU at the ports of Rotterdam and Bremerhaven. Comparisons between banana sales in France, Italy and the United Kingdom are of less value because neither the product type nor the marketing conditions are exactly the same.

In Ireland the cost of transport by road and ferry from Rotterdam to Dublin, approximately \$ 1.10 per box, has to be deducted before the price to UBC's customers there can be compared with the f.o.r. Bremerhaven or Rotterdam prices for customers in other Member States. The f.o.r. Rotterdam price for Belgian customers is, on average, 80 % higher than the delivered Rotterdam price for customers in Ireland. The greatest recorded difference in price is 138 % between UBC's

delivered Rotterdam price for customers in Ireland and its f.o.r. Bremerhaven price for customers in Denmark. At this maximum price gap, Danish customers were paying 2.38 times the price charged to Irish customers. With regard to the prices charged to Irish customers, UBC has stated in its letter to the Commission dated 10 December 1974 that it had sold its bananas to its Irish customers for a one-year experimental period and that the prices it charged there gave it a profit margin which was considerably smaller than in some other Member States.

It should be pointed out that at an earlier period, from March 1972 to March 1973, UBC had already sold Chiquita bananas to an Irish distributor/riper who had his own ripening facilities. UBC subsequently decided to sell its bananas to customers who were not already in the banana trade and had no ripening facilities. The interruption in sales of Chiquita bananas in Ireland from March to November 1973 marks the period when distributor/riper were setting up the new ripening facilities needed, some with financial assistance from UBC.

(c) Refusal to continue supplies to Olesen

For nearly 50 years, up to 1952, A. W. Kirkebye A/S, Copenhagen (Kirkebye), was exclusive distributor for UBC bananas in Denmark. During that period between 80 and 85 % of all imported bananas came from the Canary Islands. Thereafter UBC began selling to several distributor/riper. In 1967 UBC reorganized its sales arrangements in Denmark. It appointed eight distributor/riper for its Chiquita bananas.

The most important distributor/riper is now Lembana A/S, Copenhagen. This company is a joint subsidiary owned by a fresh fruit distributor, Lembcke, Copenhagen, which has a 50 % shareholding, and two other groups, the Danish shipping group A. P. Møller and the Swedish group Salén, each with 25 %. A Salén group company is also UBC's exclusive distributor in Sweden. Through its relations with the Salén group, Lembana has always enjoyed a privileged position in its relations with UBC. Lembana is currently UBC's major distributor/riper in Denmark, where it accounts for more than half the total Chiquita sales

in Denmark. It has recently set up new large-scale ripening facilities at Aarhus, with financial assistance from Salén.

Lembana operates a system of fidelity contracts with 18 customers. These agreements provide for bulk discount, which can be as much as 5 %, depending on sales in any three months, provided that the customer regularly places its orders for bananas with Lembana, though Lembana does not object to their meeting casual orders from other distributor/riper. Some 70 % of Lembana's sales are covered by this system of fidelity contracts. Most of its other sales are to Fællesforeningen for Danmarks Brugsforeninger (FDB), a very strong retailers' cooperative selling some 15 % of the bananas in Denmark.

In 1967, Olesen absorbed Kirkebye, thereby becoming UBC's second largest distributor/riper in Denmark. In addition, Olesen is a large importer of vegetables and fruit other than bananas, such as oranges, apples, etc. The other main companies distributing UBC bananas are Interfrugt, Holmskov and Københavns Frugtauktioner.

In 1969 Olesen became the exclusive distributor in Denmark for the Dutch importer of Dole bananas, International Fruit Company of Rotterdam. In 1973 Københavns Frugtauktioner became exclusive distributor in part of Denmark for the Alba group, Hamburg, which supplies Onkel Tuca bananas. All UBC's other distributor/riper in Denmark sell, in addition to Chiquita, varying quantities of other brands (Del Monte, Onkel Tuca, Turbana, etc.) and varying quantities of unbranded bananas.

Since 1969, when Olesen became exclusive distributor for Dole bananas in Denmark, UBC has consistently reduced the orders placed by Olesen. In particular, during the first 40 weeks of 1973, the quantities ordered by Olesen were reduced on average by 15 to 20 % each week, and from June 1973 onwards reductions of up to 40 to 50 % were made. All the orders for Dole bananas made by Olesen were, however, met in full. From 1972 onwards, Olesen had been selling more Dole bananas than Chiquita. Other Danish distributor/riper also sell more bananas of other brands than Chiquita. Interfrugt, for instance, sells more Del Monte than Chiquita bananas.

In September 1973, UBC conducted an advertising campaign based on the fact that Denmark's four largest banana importers, Lembana, Olesen, Interfrugt and Holmskov, recommended Chiquita bananas.

In April, September and October 1973, Castle and Cook also launched an extensive advertising campaign to draw public attention to its new Dole brand. Previously Castle and Cook had been selling its bananas under the Cabana and Deloro brand names. This campaign, which covered the whole of Europe, was devised and paid for directly by Castle and Cook. In Denmark the campaign was accompanied by further sales promotion campaigns in September and October 1973.

On 10 October 1973, UBC informed Olesen that it would no longer supply it with Chiquita bananas, stating as its reason the advertising campaign launched that month in Denmark for Dole bananas. Olesen was taking part in this advertising campaign for Dole bananas in the same way as it had also participated in advertising campaigns for other bananas which it sold, including UBC bananas; an example is UBC's September 1973 campaign in Denmark.

Following UBC's withdrawal of supplies from Olesen in October 1973, Olesen turned to UBC's other Danish distributor/ripeners to obtain green Chiquita bananas. It was, however, unsuccessful. Olesen also approached a company of the Scipio Group in Hamburg, which is UBC's main German importer/distributor, but again without success. As a consequence of UBC's withdrawal of supplies, Olesen lost a number of major customers, including FDB, which no longer wished to do business with Olesen if Olesen could not supply Chiquita bananas. Olesen also suffered loss as a result of its sudden inability to use to the full the ripening facilities constructed by it in 1967/68 to enable it to distribute UBC bananas.

On 11 February 1975, however, UBC and Olesen entered into an agreement under which UBC undertook to resume supplies of bananas to Olesen. Olesen, in turn, undertook not to discriminate between the various brands of bananas which it sells, and also agreed to withdraw the complaints lodged with the Commission and the Danish authorities. UBC has accordingly resumed supplies to Olesen, which, on 13 March 1975, withdrew its complaint to the Commission.

II. APPRAISAL

A

Under Article 86 of the Treaty, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

1. United Brands Company of New York, together with United Brands Continentaal BV of Rotterdam and its other subsidiary companies, which are under its control and do not possess any real autonomy, form a single economic unit and therefore constitute an undertaking within the meaning of Article 86 of the EEC Treaty.

2. Undertakings are in a dominant position when they have the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers. Such is the case where an undertaking's market share, either in itself or when combined with its knowhow, access to raw materials, capital or other major advantage such as trademark ownership, enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive all other market participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes, even if there are differences in the extent to which it dominates individual submarkets.

The relevant market consists of bananas of all varieties, whether branded or unbranded. It is not the fruit market in general, as UBC has claimed in its reply to the Commission's statement of objections, but rather the market for bananas, for which there is a separate demand. It might be asked whether other varieties of fruit are acceptable as substitutes, or regarded as such by the consumer by reason of their nature, price or use. However, research carried out by the Food and Agricultural Organization (FAO) ⁽¹⁾ has shown that the prices or available quantities of other fruits have very little influence on the prices and availabilities of bananas, and this applies not only to those fruits which are available all the year

⁽¹⁾ Demand interrelationships between major fruits. FAO commodity policy studies No 19, Rome 1969.
Competition between bananas and summer fruits: preliminary case studies. CCP BA 73/8, July 1973.

round, such as oranges and apples, but also to most seasonal fruits. At the three places where the FAO carried out its research, Rungis in France, Frankfurt and London, such effects, which were in any case of very brief duration, were noted only in respect of certain varieties of seasonal fruit: peaches at Rungis and Frankfurt and table grapes at Frankfurt and in London. It is therefore fair to conclude that the effects of the prices and availabilities of other types of fruit are too brief, too ineffective and too sporadic, applying to different fruit in different places, for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefor. It should also not be overlooked that bananas form a very important part of the diet of certain sections of the community such as the very young, the sick and the very old. The choice of bananas is thus a matter of customer preference, and customers do not readily accept other fruits as a substitute.

The relevant geographical market consists of a substantial part of the Community, comprising the BLEU, Denmark, Germany, the Netherlands and Ireland. Economic conditions in this part of the Community allow importer/distributors to carry on their trade in bananas normally and there are no noticeable economic obstacles in the way of UBC as compared with other importer/distributors. The whole structure of UBC's European operations, with their concentration on its Rotterdam subsidiary, is geared to the marketing of its bananas from a single centre for the whole of that part of the Community. The cost of transport is not so high as to prevent UBC's distributor/ripeners from collecting their bananas from ports as distant as Bremerhaven or Rotterdam. These ports also supply customers as far afield as Switzerland and Austria. UBC is even prepared, despite the length and inconvenience of the journey from Rotterdam to Dublin, to market in Ireland bananas unloaded by it in Rotterdam from the same ships which supply other Community countries. The other Member States of the Community, France, Italy and the United Kingdom, must however, be excluded from this geographical definition of the market, notwithstanding the significant presence of UBC in these countries, due to the special circumstances which exist there. Such circumstances include the import arrangements and trading conditions in these countries and the fact that bananas of various types and origin are sold there. Accordingly the relevant geographical market is that part of the Community referred to above. It is in respect of this market that it must be examined

whether UBC has the power to hinder effective competition.

UBC has, on the basis of the figures for 1971 to 1974, supplied some 40 % of the bananas sold in the Community and had a market share of about 45 % in that part of the Community consisting of the BLEU, Denmark, Germany, Ireland and the Netherlands. The Scipio Group is a customer of UBC, though buying its bananas fob Central or South American ports, and thus cannot in all the circumstances be considered to be a genuine competitor. There is no indication that it behaves in a competitive manner towards UBC. On the contrary UBC treats the Scipio Group as regards the control imposed over ripening facilities and the organization of marketing in exactly the same way as it treats its own subsidiaries and the other distributor/ripeners. There is, in fact, no difference between the Scipio Group and the other distributor/ripeners in Germany as regards the manner in which they sell Chiquita bananas; neither is there any indication that the Scipio Group's maritime transport costs are lower than those of UBC. UBC's two major competitors are considerably weaker, and its other competitors, many of them operating in a single Member State only, have even smaller market shares. Notwithstanding a slight drop in sales in 1974, UBC's market share has remained relatively stable in recent years and there are no indications to suggest that any substantial change is imminent.

Furthermore, since 1967 UBC's marketing policy has been concentrated on the sale of bananas under the Chiquita brand. The regular, intensive publicity campaigns which it has mounted for this purpose have been accompanied by a thorough reorganization of the arrangements for the production, packing, carriage, ripening and sale of bananas. The reorganization of the greater part of its banana activities so as to be able to maintain a marketing policy based on the sale of bananas under its Chiquita brand has given and enabled UBC to keep an appreciable advantage over its competitors, who have had to adjust to UBC's policy. Its competitors have not only had to face what is for them the high cost of mounting advertising campaigns, but they have also had considerable difficulty in supplying the right quantities of bananas of uniform quality. This ability of UBC to supply

large quantities of bananas of uniform quality provides UBC with a great advantage over its competitors, since it enables UBC to make its advertising campaigns much more effective. The current popularity of the Chiquita brand puts UBC in a powerful position on a substantial part of the Community banana market. The fact that it sells in all Member States enables it to organize its distribution so as to be more flexible and to divert supplies so as to take advantage of price differences as between Member States; few of its competitors, working in one country or in part only of the Community, can do this, and few of them have the resources to finance advertising campaigns of the scale undertaken by UBC to launch and publicize its Chiquita brand.

UBC's ability to pursue a marketing policy based on the sale of bananas under the Chiquita brand is due to the following facts.

The strong vertical integration of its banana business from the plantation to marketing affords UBC a distinct advantage in marketing a highly perishable product with a short shelf life and enables its bananas to be distributed more quickly and more efficiently than those of its competitors which do not have these advantages. In UBC's case, this is reinforced by the fact that it also operates in other areas complementing its banana trade, such as packaging, telecommunications, sea and rail transport, and chemicals.

UBC has a very important position in a number of tropical banana-producing countries as a result of its control of plantations and of the numerous contractual and financial links which it has in these countries. It has therefore considerable control over sources of supply. UBC also has a very important position on the world banana market, in which it controls some 35 % of the world's entire banana exports.

UBC owns a large fleet of refrigerator vessels, which are essential for the shipping of bananas, and is therefore able to guarantee more regular supplies than its competitors, who have to charter ships. UBC can also make available more frequent supplies than its competitors, who do not have the same number of refrigerator vessels available.

The extensive knowhow UBC has acquired compared with its competitors, thanks to its research

into new varieties of banana less prone to disease and wind damage, has enabled it to achieve better yields per hectare.

The great financial power and reduced risk which UBC derives from its multinational organization and status as a conglomerate; in 1973 the production, transport, distribution and marketing of bananas throughout the world accounted for only 18.5 % of UBC's total turnover.

UBC, as the only undertaking now in the banana market to enjoy all the advantages described above, is in a position thereby to obstruct the effective competition of its existing competitors to a substantial degree; potential competitors wishing to establish themselves in the banana market must overcome the barriers to entry and would need several years before they could achieve all these advantages. UBC therefore enjoys a degree of overall independence in its behaviour on the market in question which enables it to hinder effective competition within this part of the Community. UBC must, therefore, be considered to be in a dominant position.

3. UBC is abusing its dominant position in a number of ways.

(a) In the first place it prohibits its distributor/ripeners in the BLEU, Denmark, Germany (including the Scipio Group), Ireland and the Netherlands from reselling green bananas supplied by UBC; whether this requirement is formally written into its general conditions of sale or whether it is imposed by other means, it nevertheless constitutes an abuse of a dominant position.

As a result of this requirement, these distributor/ripeners may resell bananas supplied to them by UBC only after they have been ripened, which means they have to have their own ripening facilities, or at least access to such facilities. They cannot even resell bananas to other distributor/ripeners with idle ripening capacity and are also prevented from acting as resellers as they might wish, even though some of them had operated in these fields before UBC introduced its new policy. The effect, therefore, of this requirement is to prevent UBC's distributor/ripeners, who are frequently the main ripeners of bananas in the Member States concerned, from entering into

competition at the resale level with UBC and the other importer/distributors in business on the banana market, since at that stage all trade has to be in green bananas only.

As well as making an indirect contribution to strengthening and consolidating UBC's dominant position in this market, this requirement also makes it difficult, if not impossible, for trade to be carried on in UBC bananas when green, whether Chiquita or unbranded, either within one Member State or between Member States. UBC's prohibition on the resale of green UBC bananas therefore amounts to a prohibition on exports and thus maintains an effective market segregation.

UBC's argument on this point is that this obligation helps to guarantee the quality of the products sold to the consumer, thereby assuring the supply of good quality bananas, properly ripened. It is to be emphasized, however, that not only does UBC prohibit sales of green bananas to consumers, as its argument implies, but also all resales of green bananas at whatever the stage of marketing. UBC's argument cannot, therefore, be taken as a justification for this obligation. UBC also claims that the obligation is not intended to prevent trading in green bananas between ripeners/distributors. However, the terms of the obligation quite clearly prohibit such sales and ripener/distributors have interpreted these terms accordingly.

- (b) UBC is also abusing its dominant position by, both at Bremerhaven and at Rotterdam, charging its distributor/ripeners in the Member States concerned differing prices for Chiquita bananas for equivalent transactions without objective justification. These differences can in some weeks reach as much as 30 to 50 %. UBC's transactions with customers other than the Scipio Group in the various Member States in question are equivalent. The bananas are all freighted in the same ships, are unloaded at the same cost in Bremerhaven or Rotterdam, and are of the same variety, of similar quality, packaged in the same way and sold in substantially similar quantities under the same Chiquita brand name. Moreover, UBC sells these bananas under the same conditions of sale and payment (free on rail) in

these two ports for loading on to the purchaser's own means of transport. The purchasers have to pay customs duties, taxes and transport costs from these ports.

The only exception is Ireland, where UBC sells its bananas cif Dublin. However, the cost of carriage by road and ferry from Rotterdam to Dublin does nothing to reduce the price gap; on the contrary, a comparison of the delivered Rotterdam prices for bananas to be sold cif Dublin and the prices charged at Bremerhaven or Rotterdam to other customers shows a gap that is wider still. Despite the additional transport charges, prices cif for Irish customers are still lower than those f.o.r. for customers in the other Member States concerned.

This policy of differing prices has been applied by UBC since 1971 in the case of customers from the BLEU, Germany and the Netherlands, and was extended at the beginning of 1973 to Denmark and in November 1973 to Ireland.

Such a practice has the effect of tending to maintain substantially differing price levels in each of the Member States in question. Accordingly, the distributor/ripeners which are charged such differing prices by UBC are also placed on an unequal competitive footing if they wish to sell UBC bananas in Member States other than those where they are established and for which UBC had supplied such bananas. This would be relatively easy for them to do, provided that they were allowed to sell green UBC bananas, since most of them buy the bananas f.o.r. Rotterdam or Bremerhaven and use their own means of transport. Certain distributor/ripeners are accordingly placed at a competitive disadvantage. Competition is thereby distorted.

In this case the differences in price charged by UBC to its customers in the various Member States are wide. No objective justification for this has been advanced by UBC, or indeed, discovered by the Commission. The reason given by UBC is that it has adapted its prices to what each part of the market could bear; thus it claims that these

unequal prices are justified by the fact that retail prices for ripened bananas vary between Member States. However, the marketing conditions in these Member States are in fact broadly comparable. For an undertaking in a dominant position, a policy of systematically setting prices at the highest possible level, resulting in wide price differences, cannot be objectively justified, particularly where that undertaking maintains market segregation.

UBC's bananas are practically all sold at the same place, the ports of Bremerhaven and Rotterdam, and at the same time, the time of arrival in the EEC. Differences in transport costs, taxes and duties or marketing conditions might justify different levels in price on resale at the retail level. These differences can, however, never justify objectively UBC's differing prices to its distributor/ripeners for equivalent transactions at Bremerhaven and Rotterdam, and still less so given that the quantities of bananas sold to each such distributor/ripeners are approximately the same.

Such a policy of differing prices accordingly constitutes an abuse of a dominant position, in that UBC is applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

- (c) UBC has also abused its dominant position by charging unfair prices to certain of its distributor/ripeners. The marketing policy of UBC has resulted in the segregation of the market in question and has enabled UBC to charge prices for Chiquita bananas which are sheltered from effective competition. The Court of Justice ⁽¹⁾ has ruled that a wide variation in price which is not justified on objective grounds can be a determining factor of an abuse within the meaning of Article 86 of the EEC Treaty. In this case the differences in price for Chiquita bananas charged by UBC to its customers in the

various Member States are wide, particularly in view of the fact that the product is a food product which is widely consumed. These differences in price cannot be justified objectively.

UBC's lowest prices are those charged to its customers in Ireland. These, as UBC itself acknowledges, still produce a profit, albeit a reduced one in relation to that achieved from the prices charged to its customers in the other Member States concerned. The Commission would not however contend that the prices throughout the Member States concerned should be as low as those charged to the customers in Ireland. For customers in Ireland the prices were applicable only during a sales campaign of limited duration directed at fostering UBC's sales promotion. The prices for bananas unloaded at Rotterdam, for subsequent carriage by road and ferry to Dublin, must include the same cost elements as those for bananas sold f.o.r. Bremerhaven or Rotterdam to customers in the other Member States concerned. To these must then be added the further element of cost relative to transport by road, including ferry charges, from Rotterdam to Dublin. In these circumstances it is not unreasonable to conclude, without analysing UBC's cost structure, that the delivered Rotterdam prices for bananas to be sold to Irish customers cif Dublin at least reflect UBC's costs for the bananas in question. Therefore the amount by which actual prices f.o.r. Bremerhaven and Rotterdam exceed the delivered Rotterdam prices to Irish customers must represent a profit of the same order of magnitude.

Prices charged for the substantial quantities sold to customers in Germany (other than the Scipio Group), Denmark, the Netherlands and the BLEU are considerably higher, sometimes by as much as 100 %, than the prices charged to customers in Ireland, and accordingly produce a very substantial profit.

UBC's prices are excessive in relation to the economic value of the product supplied. This is confirmed by the substantial difference of 30 to

⁽¹⁾ Case 78/70 (DGG/Metro), Judgment of 8 June 1971, XVII-5 ECR, p. 487.

40 % between the prices of unbranded bananas sold by UBC and those sold under the Chiquita brand, although the quality of unbranded bananas is only slightly lower than that of Chiquita bananas. At the very most, half of this difference in price cannot be accounted for by differences in quality or the costs of advertising campaigns. Furthermore UBC's prices for its customers in all the Member States involved, except those in Ireland, are currently higher than the prices of competing brands of bananas which are of a quality comparable with Chiquita bananas. UBC's principal competitors still operate at a profit notwithstanding their lower prices, and are indeed constantly seeking to enlarge their sales. In these circumstances, for the purposes of this Decision it would be sufficient if UBC were to reduce its price levels to prices at least 15 % below those currently charged to its customers in Denmark and Germany (other than to the Scipio Group). In conclusion, the prices which are currently charged to customers in the BLEU, Denmark, Germany (other than to the Scipio Group) and the Netherlands are unfair and therefore constitute an abuse by UBC of its dominant position.

- (d) Finally, UBC has abused its dominant position by ceasing to supply its Chiquita bananas to one of its most important customers among the distributor/ripeners, which had reconstructed its ripening facilities in 1967/68 in order to be able to distribute Chiquita bananas. The withdrawal of supplies was made on the grounds that the distributor/ripeners concerned had taken part in an advertising campaign for bananas of a competing brand.

The effect of the withdrawal of supplies was to damage the business interests of the firm concerned. This would discourage it and other distributor/ripeners from selling competing brands any more, or at least from participating in advertising and sales promotion campaigns for such brands, as is normally the practice in this field. In this manner UBC succeeds in keeping its principal distributor/ripeners within its own marketing network and in preventing its competitors from having access to them, thus denying to such competitors the essential facilities which they may require in order to ripen their bananas before sale.

Moreover, the reason given by UBC for its refusal to continue to supply, namely that Olesen had taken part in a competitor's advertising campaign, cannot justify such behaviour on the part of an undertaking in a dominant position, such as UBC.

UBC's argument there is that Olesen had become the sole distributor of a competitor and could therefore no longer promote sales of Chiquita bananas in a manner satisfactory to UBC. In point of fact, it would seem that the termination of supplies in 1973 was motivated, not by the existence of the exclusive dealing agreement, which dates from 1969, but by Olesen's participation in the advertising campaign of the firm supplying it under that agreement. Moreover, UBC's exclusive distributors in other countries, such as Austria and Sweden, do carry out joint advertising campaigns for a number of brands including Chiquita without opposition from UBC. Furthermore, Olesen had frequently taken part in UBC's advertising campaigns. There is no substance, therefore, in this part of UBC's argument.

UBC also took objection to the fact that Olesen was steadily reducing its sales of Chiquita bananas and raising its Dole sales and had since 1972 been selling more Dole than Chiquita bananas. On this there are two comments to be made. First, UBC has raised no objection to UBC's other Danish distributor/ripeners doing the same thing, though admittedly the brand involved, Del Monte, is not extensively advertised in Denmark, which may explain UBC's forbearance in this respect. Secondly, from 1969 onwards, when Olesen became exclusive distributor for Dole bananas in Denmark, UBC consistently reduced the orders placed by Olesen. Reductions of even 40 or 50 % were not uncommon from June 1973 onwards, whereas Olesen's orders for Dole bananas were hardly ever reduced. In these circumstances the fall in Chiquita sales by Olesen cannot be used to justify the withdrawal of supplies.

By preventing Olesen from advertising competing brands of bananas, UBC hampers the effective selling of such competing brands. A buyer must

be allowed the freedom to decide what are his business interests, to choose the products he will sell, even if they are in competition with each other; in effect to determine his own sales policy. When dealing with a supplier in a dominant position, such buyer may well find it worthwhile to sell several competing products, including those of the dominant firm, and to advertise them, but to an extent which he must remain free to decide for himself. This applies particularly where the dominant firm has carried out intensive advertising so as to make its brand a household name. Moreover, in the present case, the advertising campaign was devised not by Olesen but by Castle and Cook, which also paid for the campaign. Thus Olesen cannot be held to blame, since it could scarcely object. The refusal to continue supplies to Olesen is accordingly a restriction of competition and an abuse of a dominant position.

4. These abuses by UBC of its dominant position are capable of affecting trade between Member States to an appreciable extent as follows.

The prohibition on the sale of green bananas impedes trade between distributor/ripeners in different Member States, and deflects the flow of trade from its normal course. It is capable of affecting trade between those Member States and thus of dividing up the market, particularly as the prohibition applies to all the bananas sold by UBC to its customers from this part of the EEC.

The application in respect of sales of Chiquita bananas of dissimilar prices for equivalent transactions according to the Member State in which the customer operates and the bananas are to be sold, is liable to encourage or discourage the export of those bananas from one Member State to another according to the different price levels in the various Member States.

The imposition of unfair prices on customers in certain Member States is liable to affect the quantities of Chiquita bananas traded between Member States, in that it encourages exports from Member States where such unfair prices are not imposed and vice versa.

Olesen is one of the main distributor/ripeners of bananas in Denmark and could have been able to

expand its business in other Member States. The cutting off of supplies by UBC prevented it from doing this, for example with the green bananas it was buying f.o.r. Bremerhaven and then importing into Denmark. Trade has also been affected by the fact that, due to the withdrawal of supplies, Olesen was no longer able to import the same quantities of bananas into Denmark.

B

Under Article 15 (2) of Regulation No 17/62, the Commission may, by decision, impose on undertakings or associations of undertakings fines of from 1 000 to one million units of account, or a sum in excess thereof, but not exceeding 10 % of the turnover of the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or 86 of the EEC Treaty. In fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

UBC has infringed Article 86 of the Treaty in several respects. These infringements by UBC were, at the very least, negligent, since UBC was aware, or at any rate should have been aware, of the anti-competitive effects of such conduct, particularly as certain of its practices in this respect are specifically referred to in Article 86 of the Treaty. Furthermore, in considering the amount of the fine to be imposed, these illegal actions must be considered in their economic and legal context and account must in particular be taken of their combined effect, though at the same time care must be taken to ensure that the same acts are not penalized more than once.

In considering the duration of the infringements account must be taken of the fact that the prohibition on the sale of green bananas has been imposed since at least January 1967 on UBC's customers in the BLEU, Germany and the Netherlands, since January 1973 on customers in Denmark and since November 1973 on customers in Ireland. UBC's pricing policy has been applied since at least 1971 to customers in the BLEU, Germany and the Netherlands, since January 1973 to customers in Denmark and since November 1973 to customers in Ireland. The withdrawal of Chiquita banana supplies from Olesen lasted from 10 October 1973 to 11 February 1975.

As regards the gravity of the infringements, account must be taken not only of the nature of the illegal conduct described above and of the position of UBC on the banana market and its position in relation to its customers, but also of the fact that the product is widely consumed and important to the consumer and that UBC's conduct is manifestly inconsistent with the Treaty objectives of integrating markets and establishing a system under which competition in the common market is not distorted. It should not be overlooked, moreover, that the actions under consideration are all designed to achieve in the long term the same aim, namely to strengthen and consolidate UBC's dominant position in the banana market, although the method of accomplishing these objectives may vary depending on the different situations existing on that market.

The prohibition on the resale of green bananas was contained in the general conditions of sale for the Netherlands notified to the Commission on 15 November 1968. Although the notification covered only the general conditions for the Netherlands and does not refer to sales to the other Member States concerned, the general conditions relating to such sales are substantially the same. UBC can therefore reasonably have considered that the notification covered all its general conditions of sale. The acts taking place after notification have remained within the scope of the activity described therein. There has accordingly been no negligence on the part of UBC, and no fine should be imposed on account of its acts in this respect.

With regard to UBC's pricing policy, account should also be taken of the fact that this Decision represents the first occasion on which such a policy has been fully considered in the light of Article 86 of the EEC Treaty. A provision has moreover been included whereby the Commission is to be informed for a specified period of UBC's prices, so that it may ensure that they are not abusive. In all the circumstances the amount of the fine should be moderate in so far as it relates to infringements arising from UBC's pricing policy.

With regard to the refusal to continue supply to Olesen, account must be taken of the fact on the one hand that the termination of deliveries was sudden and unexpected, but on the other that UBC has already put an end to this infringement of its own accord, following the intervention of the Commission.

Having regard therefore to the above considerations, the Commission considers that it may properly impose a fine of one million units of account. The amount of this fine should be considered in the light not only of UBC's total annual turnover of US \$ 2 000 million and its annual turnover in bananas in the relevant part of the Community, which amounts to more than US \$ 50 million, but also in the light of the high profits achieved by this undertaking as a result of its pricing policy.

C

Under Article 3 (1) of Regulation No 17/62, where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or 86 of the Treaty, it may, by decision, require the undertakings or associations of undertakings to bring such infringement to an end. UBC has infringed Article 86 of the EEC Treaty in a number of respects and should be required to bring such infringements to an end without delay in so far that it has not already done so of its own accord. In the matter of the refusal to continue supplies of Chiquita bananas to Olesen, however, UBC has already brought such infringement to an end of its own accord.

To ensure that the remaining infringements are effectively brought to an end, the manner in which they can be terminated must be stated precisely. The infringements concerned are: the prohibition on sales of green bananas between distributor/ripeners, the application of dissimilar prices for equivalent transactions and the imposition of unfair selling prices.

With regard to the prohibition on the resale of green bananas, UBC should be required not only to delete this condition from those terms and general conditions of sale in which it is still contained, but also to inform all its distributor/ripeners in the relevant Member States to that effect.

With regard to the application of dissimilar prices for equivalent transactions, UBC should be required to eliminate differences in the prices charged to its distributor/ripeners in the various Member States concerned, in so far as the transactions are equivalent and as there is no objective justification for those differences.

UBC must be required to cease applying the unfair prices imposed on its customers in the BLEU, Denmark, Germany (other than the Scipio Group) and the Netherlands. However, the responsibility for fixing prices and the choice of the method involved rests exclusively with the undertaking concerned. The Commission has a duty to take action under Article 86 of the EEC Treaty in cases where an undertaking in a dominant position imposes unfair prices, but it is no part of its duty to take over such undertaking's responsibilities in the matter of fixing the prices of its products. Nevertheless the Commission is obliged to give such an undertaking sufficiently clear indications of the manner in which the infringement may be terminated. UBC will satisfy its obligation under this Decision to bring this infringement to an end if it reduces the prices charged to customers in the BLEU, Denmark, Germany (other than to the Scipio Group) and the Netherlands to a level on average at least 15 % (see II A (3) (c)) below that of the prices currently charged to its customers in Denmark and Germany (other than to the Scipio Group). UBC accordingly remains free to charge its prices, in accordance with its costs, as long as such prices are not unfair.

However, UBC should be required to submit every six months to the Commission details of prices charged to its customers in the Member States concerned, in order that the Commission may satisfy itself that such prices are not abusive. The period during which UBC should submit these details should however be limited to two years, a period sufficient to enable the Commission to satisfy itself that acceptable competitive conditions, in accordance with the rules on competition laid down by the EEC Treaty, have been restored to the market in question.

D

Under Article 16 (1) of Regulation No 17/62, the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them to put an end to an infringement of Article 86 of the EEC Treaty in accordance with a decision taken pursuant to Article 3 of the Regulation. UBC has infringed Article 86 in several respects. If UBC is to put an end to these infringements, the Commission must be provided with the necessary means to ensure that its requirements in this respect are properly carried out. UBC should accordingly be required to

satisfy the obligations set out in Article 3 (b) of this Decision. Furthermore, if these obligations are not so satisfied, periodic penalty payments should be imposed.

Accordingly, each of the obligations imposed on UBC by Article 3 (b) of this Decision should be made subject to a periodic penalty payment of 1 000 units of account in respect of each day of delay.

E

This Decision is to be enforceable in accordance with Article 192 of the EEC Treaty.

F

As UBC has appointed United Brands Continental BV, Rotterdam, as its representative in this proceeding, notice of this Decision should be given to that company,

HAS ADOPTED THIS DECISION:

Article 1

It is hereby declared that United Brands Company has infringed Article 86 of the Treaty establishing the European Economic Community:

- (a) by requiring its distributor/ripeners in the Belgo-Luxembourg Economic Union, Denmark, Germany, Ireland and the Netherlands to refrain from reselling its bananas while still green;
- (b) by, in respect of its sales of Chiquita bananas, charging other trading parties, namely distributor/ripeners other than the Scipio Group in the Member States referred to above, dissimilar prices for equivalent transactions;
- (c) by imposing unfair prices for the sale of Chiquita bananas on its customers in the Belgo-Luxembourg Economic Union, Denmark, the Netherlands and Germany (other than the Scipio Group);
- (d) by refusing from 10 October 1973 to 11 February 1975 to supply Chiquita bananas to Th. Olesen A/S, Valby, Copenhagen, Denmark.

Article 2

A fine of one million units of account is imposed on United Brands Company in respect of the infringements of Article 86 of the Treaty referred to in Article 1 hereof.

Article 3

(a) United Brands Company shall bring to an end without delay the infringements referred to in Article 1 hereof, unless it has already done so of its own accord.

(b) United Brands Company shall

- (i) inform all its distributor/ripeners in the Belgo-Luxembourg Economic Union, Denmark, Germany, Ireland and the Netherlands that it has ceased to apply the prohibition on the resale of green bananas and inform the Commission that it has done so by not later than 1 February 1976;
- (ii) inform the Commission by 20 April 1976 and thereafter twice yearly not later than 20 January and 20 July for a period of two years of the prices charged during the previous six months to customers in the Belgo-Luxembourg Economic Union, Denmark, Germany, Ireland and the Netherlands.

Article 4

In respect of each obligation set out in Article 3 (b) hereof a periodic penalty payment of 1 000 units of account per day shall be payable in respect of each day of delay from the dates stated therein.

Article 5

This Decision shall be enforceable in accordance with the provisions of Article 192 of the Treaty establishing the European Economic Community.

Article 6

This Decision is addressed to United Brands Company, New York, United States of America, and to its representative United Brands Continentaal BV, Van Vollenhovenstraat 32, Rotterdam 3002, the Netherlands, which shall be notified thereof.

Done at Brussels, 17 December 1975.

For the Commission

A. BORSCHETTE
Member of the Commission