Reports of Cases

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

Case C-286/13 P

Dole Food Company, Inc.
Dole Fresh Fruit Europe OHG, formerly Dole Germany OHG
v

European Commission

(Appeals — Competition — Cartels — Concerted practices — European banana market — Quotation prices — Market structure — Calculation of market shares — Green bananas and yellow bananas — Restriction of competition by object — Conduct of the judicial proceedings at first instance)

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I – **Introduction**

1. Hardly any other fruit has been the source over the years of as acrimonious and diverse legal disputes at European level as the banana.[2] In the present case, the Court is once again required to consider a number of issues of competition law pertaining to bananas, just as it did more than 30 years ago.[3]

2. Those questions are raised in the context of a 'banana cartel', the members of which have been found guilty of anti-competitive concerted practices in several Member States of the European Union. By decision of 15 October 2008,[4] the European Commission imposed fines amounting to millions of euros on certain participants in the cartel for infringement of Article 81 EC (now Article 101 TFEU). Dole Food Company, Inc. and its subsidiary Dole Fresh Fruit Europe OHG[5] were unsuccessful at first instance with their action brought against that decision and are now pursuing their request for legal protection before the Court of Justice in its appellate jurisdiction.

3. Of central interest now is the question whether yellow and green bananas may be 'lumped together' where an assessment of the market structure and the position and conduct of the undertakings involved on the market concerned is necessary. This issue arises time and time again in completely different contexts and runs like a common thread through the appeal. Dole submits that the General Court did not give sufficient consideration to its arguments advanced in this regard against the Commission's decision and that it distorted the facts. In addition, Dole complains of errors of law in relation to the concept of a restriction of competition by object and of various procedural errors which it claims the General Court made in its judgment of 14 March 2013 (Case T-588/08).[6]

4. The present proceedings in Case C-286/13 P are closely connected with the appeal proceedings in Joined Cases C-293/13 P and C-294/13 P, in which I am likewise delivering my Opinion today. However, with the exception of the concept of a restriction of competition by object, the points of law raised in those cases concern completely different legal issues from those to be settled in the present proceedings.

II – **Background to the legal dispute**

5. The subject-matter of the administrative procedure before the Commission was a concerted practice involving several undertakings active in the banana trade ('the undertakings involved') — including Dole[7] — by which they coordinated their quotation prices for bananas marketed in Northern Europe in the years 2000, 2001 and 2002.

6. According to the findings of the General Court, bananas are normally transported green by ship from Latin American ports to Northern Europe, where they usually arrive once a week.[8]

2 — See, in particular, the judgments in *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, on the abuse of a dominant position; *Cooperativa Co-Frutta*, 193/85, EU:C:1987:210, on a tax on the consumption of bananas; *Germany* v *Council*, C-280/93, EU:C:1994:367, on the legality of the common organisation of the market in bananas; *Atlanta Fruchthandelsgesellschaft and Others (I)*, C-465/93, EU:C:1995:369, on questions of interim legal protection before national courts; *Van Parys*, C-377/02, EU:C:2005:121, on the question of the ability to review acts of EU law in the light of WTO law; and *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, on the exclusion of rights to compensation where the Union institutions have acted lawfully.

3 — From the perspective of competition law, the issue of bananas occupied the Court as early as the 1970s in *United Brands and United Brands Continentaal* v *Commission*, EU:C:1978:22.

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

5 — Referred to jointly in the following as 'Dole' or 'the appellants'. Dole Fresh Fruit Europe at times traded under the name Dole Germany; it was under that name that it appeared as an applicant alongside Dole in the proceedings at first instance.

6 — *Dole Food and Dole Germany* v *Commission*, T-588/08, EU:T:2013:130.

7 — In addition to Dole, not least Chiquita and Internationale Fruchtimport Gesellschaft Weichert, a company affiliated to Del Monte, were likewise involved in the concerted practices.

8 — See, in this regard and in relation to what follows, paragraphs 8 to 23 of the judgment under appeal.

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

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

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

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

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

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

13. On 8 April 2005, relying on the 2002 Leniency Notice,[9] Chiquita submitted an application for leniency to the Commission. After carrying out inspections at various undertakings, inter alia at the premises of Dole Fresh Fruit Europe, and sending several requests for information, on 20 July 2007 the Commission sent a statement of objections to numerous undertakings active on the market for bananas. In the further course of the administrative procedure, the undertakings concerned were granted access to the Commission's file, and the submissions of those undertakings were heard from 4 to 6 February 2008. On 15 October 2008, the Commission finally adopted the contested decision.

14. In the contested decision, the Commission held that several undertakings, including Dole, had infringed Article 81 EC by participating in a concerted practice by which they coordinated quotation prices for bananas. From a geographical perspective, that infringement covered Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden.[10] The Commission found Dole to have participated in the infringement over the period from 1 January 2000 to 31 December 2002.[11]

9 — Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

10 — Article 1 of the contested decision.

11 — Article 1(e) and (f) of the contested decision.

15. For their participation in the infringement, in the contested decision the Commission imposed fines on several undertakings involved. The Commission imposed on the undertaking Dole, in the form of the companies Dole Food and Dole Fresh Fruit Europe, jointly and severally, a fine in the amount of EUR 45.6 million. [12]

16. Several of the addressees of the contested decision sought legal protection at first instance by way of actions for annulment before the General Court. The action for annulment brought by Dole Food Company and Dole Germany on 24 December 2008 was dismissed in its entirety by the General Court on 14 March 2013 by the judgment under appeal and the applicants were ordered to pay the costs.

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

17. By written pleading of 24 May 2013, Dole Food and Dole Fresh Fruit Europe jointly lodged the present appeal against the judgment of the General Court. They claim that the Court should:

— set aside in whole or in part the judgment under appeal, in so far as the appellants' action was dismissed;

— annul in whole or in part the contested decision in so far as it is related to the appellants;

— cancel or reduce the fine imposed on the appellants, also on the basis of the unlimited jurisdiction provided for in Article 261 TFEU;

— in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice;

in addition,

— order the Commission to pay the costs of these proceedings and of the proceedings before the General Court.

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

— dismiss the appeal;

— in the alternative, dismiss the action for annulment;

and

— order the appellants to pay the costs of the appeal and, in the alternative, the costs of the action for annulment.

19. The appeal was examined before the Court of Justice on the basis of the written documents and, on 8 October 2014, at a hearing.

IV – **Assessment of the appeal**

20. The numerous objections raised by Dole against the judgment under appeal form the subject of a total of four grounds of appeal, which I will now discuss in turn.

12 — Article 2(b) of the contested decision.

A – *First ground of appeal: procedural errors*

21. By the first ground of appeal, which is subdivided into five parts, Dole claims that the General Court committed a number of procedural errors when carrying out its review of the contested decision.

1. The admissibility of the arguments advanced by the Commission at first instance (first part of the first ground of appeal)

22. First of all, Dole claims that the General Court wrongly allowed the Commission to address in the judicial proceedings, for the first time, evidence contained in its administrative file that contradicted the findings made in the contested decision. By so doing, the General Court infringed the requirements governing the statement of reasons for legal acts of the European Union pursuant to Article 253 EC in conjunction with the prohibition on the late submission of pleas in law and arguments laid down in Article 48(2) of its Rules of Procedure.

23. The background to this objection is Dole's argument that its own quotation prices and those of Chiquita did not relate to the same calendar weeks and thus concerned bananas which were not in competition with each other at the retail level.[13] According to Dole, the Commission gave consideration to this argument for the first time in the procedure before the General Court, even though the evidence in the administrative file would have given it cause to make findings in this regard as early as in the contested decision.

24. According to the findings of the General Court, which are not called into question by the present appeal, Dole's argument about the lack of competition at the retail level between its own bananas and those of Chiquita was put forward not during the administrative procedure but only in the course of the procedure before the General Court.[14]

25. In those circumstances, it goes without saying that the General Court had to give the Commission the opportunity in the course of the proceedings at first instance to respond to this argument advanced by Dole for the first time in the application. An infringement of Article 48(2) of the Rules of Procedure of the General Court is thus precluded from the outset,[15] since in court proceedings the Commission, like any other party, has a right to an adversarial hearing.[16]

26. The Commission's right to an adversarial procedure must, however, be balanced appropriately against the right of the undertakings concerned to a fair procedure and effective legal protection (Article 47 of the Charter of Fundamental Rights).[17] Accordingly, although the Commission may, in the proceeding before the General Court, explain in more detail in its defence the reasons for the decision at issue, the Commission may not introduce completely new grounds for the decision at

13 — See paragraph 119 of the judgment under appeal.

14 — Paragraphs 128 to 132 of the judgment under appeal.

15 — See, to this effect, *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58.

16 — *Commission* v *Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraph 53; see, to the same effect, *Review of M* v *EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 42.

17 — See my Opinion in *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:11, point 110.

issue in those proceedings.[18] For the original lack of reasons cannot be cured by enabling the person concerned to learn of those reasons during proceedings before the European Union judicature.[19] This prohibition of adding grounds 'after the event' before a court is particularly strict in criminal proceedings and in quasi-criminal proceedings such as cartel proceedings.[20]

27. In the present case, the contested decision clearly and unambiguously sets out that, in the view of the Commission, the quotation prices of the undertakings involved served at least as market signals, market trends and/or indications as to the intended development of banana prices and, moreover, in some transactions, acquired significance on account of contractually agreed pricing formulae.[21]

28. It is clear from this statement of grounds for the contested decision on its own that, in the view of the Commission, concerted practices in relation to quotation prices were capable in the individual case in question of having an impact on the banana market irrespective of whether or not the actual products of the undertakings involved were in direct competition with one another at the retail level.

29. The General Court therefore rightly found that the statement of grounds for the contested decision satisfied the requirements laid down in Article 253 EC (now the second paragraph of Article 296 TFEU) and that the additional submissions made by the Commission in the proceedings at first instance, which were prompted solely by the argument advanced by Dole in its application, did not in some way serve to provide a statement of grounds for the contested decision after the fact but were rather simply intended as a defence against the claims made and to offer explanations.[22]

30. All in all, the first part of the first ground of appeal is thus unfounded.

2. The admissibility of the arguments advanced by Dole at first instance (second and third parts of the first ground of appeal)

31. Next, Dole complains that the General Court wrongly declared two of the documents produced by it to be inadmissible and disregarded them.

a) Production of a document at the hearing (second part of the first ground of appeal)

32. First, Dole complains of a procedural error, namely that the General Court refused it leave to produce a document at the hearing which Dole intended to use to rebut allegedly new claims made by the Commission in its rejoinder.[23]

33. The document in question was an extract from the administrative file which Dole — by its own admission — wanted to use to demonstrate that the 'Aldi price' is relevant only to yellow bananas, and not to green bananas, since it relates to the bananas to be purchased by Aldi two weeks later. By these means, Dole wanted to refute the argument allegedly raised by the Commission in its rejoinder to the effect that the Aldi price is likewise relevant to the pricing of green bananas.

18 — *Stora Kopparbergs Bergslags* v *Commission*, C-286/98 P, EU:C:2000:630, paragraph 61; see, as earlier judgments to the same effect, *Präsident Ruhrkohlen-Verkaufsgesellschaft and Others* v *High Authority*, 36/59 to 38/59 and 40/59, EU:C:1960:36, in particular 439 and 440, and *Picciolo* v *Parliament*, 111/83, EU:C:1984:200, paragraph 22.

19 — *Michel* v *Parliament*, 195/80, EU:C:1981:284, paragraph 22; *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 463; *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 149; and *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:479, paragraph 74.

20 — For criminal law in the strict sense, see *E and F*, C-550/09, EU:C:2010:382, paragraph 59; for the quasi-criminal field — in this case antitrust law — see *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraph 463, and *Elf Aquitaine* v *Commission*, EU:C:2011:620, paragraph 149.

21 — Paragraph 19 of the judgment under appeal and recital 115 of the contested decision.

22 — Paragraphs 133 to 135 of the judgment under appeal.

23 — Paragraphs 40 to 48 of the judgment under appeal.

34. An applicant in proceedings at first instance is, in principle, at liberty at the hearing before the General Court to respond to the defendant's written submissions contained in its last document, the rejoinder. If that document were to contain new elements, the applicant could not categorically be refused leave to produce additional evidence to rebut those submissions, not even at this late stage of the procedure.

35. This was not, however, the case here.

36. It must be borne in mind, first, that the Aldi price had already formed part of the subject-matter of the administrative procedure and of the contested decision.[24] In addition, as evidenced by the court file, the scope and significance of the Aldi price were, from the outset, a matter of debate between the parties at the written stage of the first-instance proceedings. This was therefore by no means a new aspect which had been introduced into the proceedings solely by the Commission's rejoinder.

37. Thus, if Dole attached importance to setting right the Commission's submissions regarding the Aldi price and, to that end, to relying on documents in the administrative procedure, it would have had sufficient opportunity to do so as early as in the written stage of the first-instance proceedings. In particular, as early as in its application, and at the latest in its reply, Dole could have pointed to the fact that the Aldi price related to the bananas to be purchased two weeks later.

38. Secondly, it must be pointed out that it was in fact Dole which stated in its application at first instance that Aldi's purchase price for yellow bananas served as a reference price for all purchasers of bananas in Northern Europe, irrespective of whether they purchased green or yellow bananas.[25]

39. In the light of those facts, Dole cannot seriously claim that it wanted to rectify at the hearing an — allegedly incorrect — assertion made by the Commission. It was rather an attempt, under the pretext of such a rectification, to put forward new pleas in law, which also contradicted Dole's own submissions advanced in the earlier written procedure. Such tactical manoeuvres are precluded by Article 48 of the Rules of Procedure of the General Court.

40. The General Court was therefore completely right to disregard the document produced by Dole at the hearing at first instance.[26]

b) The inadmissibility of an annex to Dole's reply (third part of the first ground of appeal)

41. Secondly, Dole submits that the General Court erred in law by finding that Annex C 7 to its reply at first instance was inadmissible. This objection is directed against paragraphs 460 to 470 of the judgment under appeal, in which that annex is in fact rejected by the General Court as 'inadmissible'.

42. Dole intended to use that Annex C 7 in the proceedings at first instance to argue that the Commission had taken some of Dole's statements during the administrative procedure out of context.

43. A glance at the court file reveals that Dole's reply does not contain any explanations whatsoever as to which of its statements made during the administrative procedure are concerned and to what extent those statements were misinterpreted by the Commission. Substantiated submissions in this regard can be found in Annex C 7 only.

24 — Paragraph 14 of the judgment under appeal and recital 104 of the contested decision.

25 — In the language of the case: '… Aldi's pricing for yellow bananas served as a reference price for all purchasers of bananas, whether green or yellow' (end of paragraph 47 of Dole's application in Case T-588/08; see also end of paragraph 46 of that application).

26 — In paragraph 48 of the judgment under appeal, the document is somewhat unusually 'declared inadmissible'.

44. Dole thus disregarded the procedural principle that the arguments of the parties must be set out in their written pleadings and that the annexes to those pleadings perform merely an evidential and ancillary purpose. [27] Under that principle, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which must appear in the particular pleading itself. [28] It is not for the General Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based. [29]

45. The General Court therefore quite rightly refused to consider the content of Annex C 7 in the present case.

c) Interim conclusion

46. The second and third parts of the first ground of appeal are therefore likewise unfounded.

3. The principle of equality of arms (fourth part of the first ground of appeal)

47. In the fourth part of the first ground of appeal, Dole argues that the General Court breached the principle of equality of arms by not allowing evidence to be adduced by Dole in the proceedings at first instance whilst permitting the Commission to advance new pleas and arguments.

48. As a corollary of the requirement of a fair hearing before the Courts of the European Union, great importance is undoubtedly attached to the principle of equality of arms. It implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. [30]

49. However, in the present case, with their complaint of an alleged infringement of the principle of equality of arms the appellants do not advance a substantiated line of argument from which a procedural disadvantage of any kind — and certainly not a *substantial* disadvantage — may be deduced on the part of Dole vis-à-vis the Commission in the proceedings at first instance.

50. Rather Dole justifies its complaint simply by a general reference to its submissions in the first, second and third parts of the first ground of appeal. In other words, this fourth part of the first ground of appeal stands or falls alongside the three previous ones.

51. Since the first, second and third parts of the first ground of appeal must be rejected, this fourth part based on the principle of equality of arms likewise cannot succeed.

27 — *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 97 and 100.

28 — *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 115, and *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 40.

29 — *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraphs 98 and 100, and *MasterCard and Others* v *Commission*, EU:C:2014:2201, paragraph 41.

30 — *Sweden* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 88, and *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 71.

4. The allegation of the inadequate establishment of the facts by the General Court (fifth part of the first ground of appeal)

52. Lastly, by the fifth part of this first ground of appeal, Dole claims that the General Court failed to establish the facts properly on the basis of Articles 64 and 65 of its Rules of Procedure. Dole alleges that the error of law consists in the fact that the General Court simply put oral questions and did not adopt any measures of organisation of procedure or measures of inquiry, even though it was 'clearly confused' in relation to certain decisive facts. Thus, in the appellants' view, the General Court breached both the principles governing the taking of evidence and its obligation to establish the facts correctly and, at the same time, infringed Dole's rights of defence.

53. It should be noted first of all that it is incumbent upon the appellants to indicate precisely in their appeal the contested elements of the judgment under appeal as well as the legal arguments specifically advanced in support of their objections. [31] An appeal lacking any coherent structure which simply makes general statements and contains no specific indications as to the points of the judgment under appeal which may be vitiated by an error of law must be dismissed as manifestly inadmissible. [32]

54. In view of the extremely vague nature of Dole's argument, I have serious doubts as to whether the fifth part of the first ground of appeal may be regarded as admissible at all, since the appeal contains very little more than a cryptic reference to 'confusion' on the part of the General Court regarding the 'facts surrounding the nature of the quotation prices'. The precise nature of that alleged 'confusion' is not explained nor is any indication given whatsoever as to the parts of the judgment under appeal in which that confusion is meant to have specifically manifested itself. [33]

55. However, regardless of the foregoing, it must in any event be noted that, according to well-established case-law, the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it. The question whether the procedural documents before it are convincing is a matter to be appraised by it alone, which, again according to well-established case-law, is not subject to review by the Court of Justice, unless the facts or evidence have been distorted. [34]

56. The fact referred to by Dole that the General Court put numerous questions to the parties at the hearing cannot seriously be regarded as negligence on the part of the General Court in its establishment of the facts. On the contrary, it may be concluded from the intensive questioning of the parties that the General Court dealt extremely conscientiously with the details of the subject-matter of the proceedings. Furthermore, the questioning of the parties is one of the options provided for in the rules of procedure, for example with a view to clearing up any existing uncertainties. [35] The results of such questioning can indeed render measures of organisation of procedure or the formal taking of evidence superfluous.

31 — *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 29, and *MasterCard and Others* v *Commission*, EU:C:2014:2201, paragraphs 151 and 215.

32 — *Telefónica and Telefónica de España* v *Commission*, EU:C:2014:2062, paragraph 30.

33 — The allegation of the distortion of facts, an allegation made simply in passing, is not clearly explained by Dole in the context of this fifth part of the first ground of appeal; rather Dole simply makes reference to the second ground of appeal. I will therefore likewise confine myself to considering this question in the context of the second ground of appeal (see below, points 61 to 70 of this Opinion).

34 — *Ismeri Europa* v *Court of Auditors*, C-315/99 P, EU:C:2001:391, paragraph 19; *Der Grüne Punkt — Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 163; and *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 115. See, to the same effect, *Viega* v *Commission*, C-276/11 P, EU:C:2013:163, paragraph 39.

35 — First sentence of the first paragraph of Article 24 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice.

57. Moreover, it must be borne in mind that, in competition cases, the procedure before the courts of the European Union is based on the principle that the parties determine the facts and evidence forming the basis for a decision.[36] If Dole had been under the impression in the first-instance proceedings that measures of organisation of procedure or the taking of evidence were necessary, it was at liberty to make specific requests in that regard to the General Court.[37] However, as the appellants had to concede at the hearing before the Court of Justice, at no point in the proceedings at first instance did Dole make any requests of that kind, even though it is wholly undisputed that it had sufficient opportunity to do so. Under these circumstances, Dole can hardly now, at the appeal stage, make the allegation that the General Court failed to fulfil its duties as regards the appraisal of the facts.[38]

58. Generally speaking, in a legal dispute relating to a cartel case, the General Court is not required to undertake of its own motion a new and comprehensive investigation of the file.[39] Only in very exceptional cases can it be assumed that the broad discretion enjoyed by the General Court in assessing which evidence is appropriate and necessary in order to prove a certain fact hardens into a duty to take further evidence on its own initiative, even if none of the parties have made a request to this effect, especially where, as is the case here, the parties are large undertakings with some experience in competition matters and are represented by specialist lawyers.[40]

59. In the present case, the appellants have not advanced any particular facts from which a duty on the part of the General Court to take evidence of its own motion may, exceptionally, be inferred. They were unable to point to any such facts even in response to my explicit question.

60. The fifth part of the first ground of appeal is thus likewise unsuccessful, meaning that this ground of appeal must be rejected in its entirety.

B – *Second ground of appeal: distortion of facts*

61. By its second ground of appeal, Dole claims that the General Court distorted a series of facts which are relevant to the correct assessment of the infringement in its legal and economic context. This ground of appeal is directed against paragraphs 152, 182, 184 and 232 of the judgment under appeal.

62. More specifically, this ground of appeal essentially raises three questions: first, whether the General Court incorrectly treated quotation prices[41] as equivalent to price quotes;[42] secondly, whether the General Court wrongly assumed that Dole used a quotation price for yellow bananas; and thirdly, whether the quotation prices for green and yellow bananas were so closely connected to one another on an industry-wide scale that they could be regarded as convertible.

36 — *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 64 and 66; *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 46; and *Siemens* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 321. In addition, see also my Opinion in *Schindler Holding and Others* v *Commission*, EU:C:2013:248, point 47, and my Opinion in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, point 87.

37 — See, to the same effect, *Siemens* v *Commission*, EU:C:2013:866, paragraph 322.

38 — *Schindler Holding and Others* v *Commission*, EU:C:2013:522, paragraph 46, and *Viega* v *Commission*, EU:C:2013:163, paragraphs 41 and 42.

39 — *Chalkor* v *Commission*, EU:C:2011:815, paragraph 66; *Kone and Others* v *Commission*, C-510/11 P, EU:C:2013:696, paragraph 32; and *Telefónica and Telefónica de España* v *Commission*, EU:C:2014:2062, paragraph 55.

40 — See, in this regard, my Opinion in *Schindler Holding and Others* v *Commission*, EU:C:2013:248, point 51, and my Opinion in *Nexans and Nexans France* v *Commission*, EU:C:2014:223, points 87 and 88.

41 — In the language of the case (English): ‘quotation prices’; in the language of the deliberations (French): ‘prix de référence’.

42 — In the language of the case: ‘price quotes’; in the language of the deliberations: ‘offres de prix’. The German translation of the judgment under appeal renders ‘price quotes’ sometimes by the words ‘angebotene Preise’ and sometimes by the term ‘Preisnotierungen’, with the latter seeming somewhat far-fetched in this context.

63. First of all, it should be pointed out that a finding of a distortion of facts or evidence is subject to strict requirements. Such distortion exists only where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect.[43]

64. There is nothing in Dole's argument which would point to a *manifestly incorrect* assessment of facts or evidence.

65. With regard, first, to the alleged treatment of quotation prices as the same as price quotes in paragraphs 152, 182, 184 and 232 of the judgment under appeal, this terminology is not even used in all those passages of the judgment in any case. The words 'quotation price' appear in paragraph 182 only, whereas reference is made in paragraph 152 simply to a 'yellow quote',[44] in paragraph 184 to a 'yellow price'[45] and, in turn, in paragraph 232 to a 'yellow price' and a 'green price'. At no point in the abovementioned passages of the judgment under appeal does the General Court equate quotation prices with price quotes, nor are quotation prices treated as equivalent to prices actually paid. Dole's allegation to that effect is unfounded.

66. Secondly, as regards the question of Dole's alleged use of a quotation price for yellow bananas, it should be noted in any case that the General Court used the term 'yellow quotation price' in connection with Dole in just one passage of the judgment under appeal, that is to say in paragraph 182 thereof. That reference is more likely to be an editorial mistake than a manifestly incorrect assessment of the facts. In any event, Dole's argument does not make plain the extent to which specifically this possible imprecision in the wording of paragraph 182 is meant to have had an impact on the General Court's appraisal of the facts for the purposes of competitive assessment and, ultimately, on the operative part of the judgment under appeal. In the absence of anything specific to that effect, there are no grounds for setting aside the judgment under appeal, even if a distortion of the facts were to be assumed.[46]

67. Thirdly, with regard to the issue of the industry-wide convertibility of green and yellow quotation prices, Dole's allegation of the distortion of facts relates to paragraph 232 of the judgment under appeal. Interestingly, the term 'quotation prices',[47] to which Dole objects, is not in fact used in that passage of the judgment. The only relevant observation is that, in that passage, the General Court finds there to be a close correlation between 'green prices' and 'yellow prices'. Dole has not put forward any evidence whatsoever that that finding might be incorrect, let alone *manifestly incorrect*. On the contrary, the conclusion drawn by the General Court is in fact the conclusion which clearly springs to mind if account is also taken of the evidence considered by the General Court and referred to in the immediately preceding paragraphs — paragraphs 220 to 231 — of the judgment under appeal, namely the e-mail from an Atlanta employee dated 2 January 2003. The interactions between the prices applied by Chiquita and Dole are clearly described in that e-mail, even though one undertaking bases its prices on a 'yellow price' and the other on a 'green price'. Taken as a whole, the allegation of distortion directed against paragraph 232 of the judgment under appeal is therefore likewise inherently weak.

43 — *PKK and KNK* v *Council*, C-229/05 P, EU:C:2007:32, paragraph 37; *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 37; and *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 17.

44 — In the language of the case: 'a yellow quote'; in the language of the deliberations: 'une offre jaune'.

45 — In the language of the case: 'a yellow price'; in the language of the deliberations: 'un prix jaune'.

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

47 — In the language of the case: 'quotation prices'.

68. Broadly speaking, it appears to me that, in the context of this second ground of appeal, Dole advances all manner of aberrant semantic quibbles, the sole aim of which is in fact to prompt the Court simply to reassess the facts under the guise of a complaint of an alleged distortion of facts. [48] It is not, however, for the Court of Justice, in its appellate jurisdiction, to substitute its own assessment of market data and the competitive position for that of the General Court. [49]

69. The allegations made by the appellants are further weakened by the fact that they take individual passages of the judgment out of context. If the criticised paragraphs of the judgment under appeal are viewed not in isolation but in the context of the other grounds stated for the judgment, it is clearly seen that the General Court correctly grasped the functioning of the banana market in Northern Europe, including its finer points. [50] The General Court did indeed also take note of Dole's constantly repeated argument about the lack of competition at the retail level between its own bananas and those of Chiquita; [51] the fact that the General Court was ultimately not convinced by that argument is incapable in itself of substantiating an allegation of distortion of facts or evidence.

70. Thus, all things considered, the second ground of appeal must be rejected.

C – *Third ground of appeal: 'inadequate assessment of the evidence' by the General Court*

71. By its third ground of appeal, which is subdivided into five parts, Dole alleges that 'the General Court's assessment of the evidence was inadequate'. If Dole's allegation were taken literally, this third ground of appeal would have to be found to be manifestly inadmissible, since — save in the case of a possible complaint of distortion — the assessment of the facts and evidence is a matter for the General Court alone and, in its appellate jurisdiction, the Court of Justice does not have jurisdiction to conduct such an assessment. [52] However, on closer inspection, the allegation of the alleged 'inappropriate assessment of the evidence' conceals in essence various objections relating to the reasons stated for the judgment under appeal, the legal requirements governing the statement of reasons for the contested decision and the legal characterisation of facts.

1. The market structure and market position of the undertakings involved — the significance of yellow and green bananas in the calculation of the market shares (first part of the third ground of appeal)

72. First, in the context of this third ground of appeal, Dole complains that, without providing an appropriate statement of reasons for so doing, the General Court upheld the calculations relating to the joint market share held by Dole, Chiquita and Del Monte/Weichert, upon which the Commission relied in the contested decision for the purposes of describing the relevant market structure.

48 — *Lafarge* v *Commission*, EU:C:2010:346, paragraph 23; *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 75 and 76; and *FLSmidth* v *Commission*, C-238/12 P, EU:C:2014:284, paragraph 31.

49 — *British Airways* v *Commission*, C-95/04 P, EU:C:2007:166, paragraph 137.

50 — See, in particular, paragraphs 226 to 228 of the judgment under appeal.

51 — See, once again, paragraphs 128 to 132 of the judgment under appeal.

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

73. This objection is directed primarily against paragraph 353 of the judgment under appeal, in which the General Court concurs with the Commission's finding 'that Dole, Chiquita and Weichert had a substantial share of the market'. The background to that finding was the Commission's conclusion in the contested decision that the combined market share held by Chiquita, Dole and Weichert accounted for 45% to 50% of the market based on the value of banana sales in Northern Europe in 2002,[53] and for 40% to 45% of the market based on the 'apparent consumption of fresh bananas in Northern Europe' over the same period.[54]

74. Dole argues that the assessment of the combined market share of the undertakings involved is excessively high in those estimates. The figures are inflated because the Commission added together the figures for green and yellow bananas without taking into account the fact that only green bananas are imported to Northern Europe and that some of those green bananas are first sold between importers before they are supplied to retailers in a ripened condition as yellow bananas. In this way, according to Dole, a percentage of the bananas sold on the Northern European market was taken into account twice in the calculation of the market share figures.

75. In the appellants' view, the General Court did not give sufficient consideration to this objection raised by Dole, with the result that — to this extent — it claims that the judgment under appeal is vitiated by a failure to state reasons.

76. This allegation is surprising, since, in paragraphs 351 to 354 of the judgment under appeal, the General Court expressly sets out its position on Dole's objection and, in essence, dismisses that objection by stating that Dole's line of argument 'is based on an incorrect premiss, namely the distinction between yellow bananas and green bananas'.[55]

77. Thus, given that the General Court does indeed provide an — albeit brief — statement of reasons, I cannot help but suspect that Dole in fact disagrees with the *substance* of the passage of the judgment at issue. However, as far as the duty to provide a statement of reasons is concerned, such a criticism of the substance is incapable of calling into question the formal legality of the judgment under appeal. Dole may take a different view from the General Court on the substance of the matter. However, that fact cannot in itself vitiate the judgment under appeal for failure to state reasons.[56]

78. Nevertheless, the objection relating to the statement of grounds made by Dole also raises the question of whether, from a formal perspective, the General Court could have been required *to provide a more detailed statement of reasons* for the judgment under appeal in relation to Dole's criticism of the calculation of the combined market share of the undertakings involved.

79. The obligation to give a proper statement of reasons for a judgment at first instance follows from Article 36 in conjunction with Article 53(1) of the Statute of the Court of Justice. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review.[57]

53 — Recitals 26 and 27 of the contested decision and paragraph 345 of the judgment under appeal.

54 — Recital 31 of the contested decision and paragraph 350 of the judgment under appeal.

55 — First sentence of paragraph 352 of the judgment under appeal.

56 — *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 80, and *Gogos* v *Commission*, C-583/08 P, EU:C:2010:287, paragraph 35.

57 — *Council* v *De Nil and Impens*, C-259/96 P, EU:C:1998:224, paragraphs 32 and 33; *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214, paragraph 29; and *Mindo* v *Commission*, C-652/11 P, EU:C:2013:229, paragraph 29.

80. It is true that a failure to state reasons may also exist where, in its judgment, the General Court has failed to rule on a head of claim,[58] a plea relied on at first instance[59] or otherwise on the arguments advanced by a party to the proceedings.[60]

81. However, it should be borne in mind that the General Court is not required to provide an account which follows exhaustively all the arguments put forward by the parties to the case, particularly if they were not sufficiently clear and precise.[61] Rather the reasoning provided by the General Court may be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.[62] The decisive factor is ultimately whether, in its statement of reasons, the General Court has responded to all alleged infringements of rights and has duly addressed *central parts of the line of argument* advanced by the parties to proceedings.[63]

82. It is difficult to claim in the present case that Dole's criticism of the figures used by the Commission to calculate the combined market share of the undertakings involved constituted a *central part* of its line of argument in the proceedings at first instance. This criticism was in fact made simply in passing in Dole's written submissions before the General Court. For example, Dole devoted just one paragraph to this issue in the application,[64] and not even half a sentence in the reply.[65] In substantive terms, Dole simply states that the market share taken as a basis by the Commission is 'significantly exaggerated', and that an independent consumer survey revealed that in Germany Chiquita, Dole and Del Monte/Weichert only had a combined market share of less than 25%.

83. Dole's allegation that the Commission should not have added together the figures for green and yellow bananas — now brought into the spotlight in the appeal proceedings — in fact appeared only in a footnote in the proceedings at first instance.[66] At no point in Dole's written submissions at first instance is there a single mention of any double counting of bananas owing to the possible inclusion of sales between importers.

84. As Dole had to concede in response to a specific question put by the Court, those two aspects — green and yellow bananas being counted together on the one hand, and the double counting of bananas traded between importers on the other hand — were also not discussed in any greater depth at the hearing before the General Court.

85. In those circumstances, the General Court cannot be criticised for having failed to give detailed consideration to those two aspects in the judgment under appeal. Accordingly, from no conceivable angle can there be said to be an infringement of the duty to state reasons here.

58 — *Evropaïki Dynamiki* v *Commission*, C-200/10 P, EU:C:2011:281, paragraph 33.

59 — *Vidrányi* v *Commission*, C-283/90 P, EU:C:1991:361, paragraph 29; *Commission* v *Greencore*, C-123/03 P, EU:C:2004:783, paragraphs 40 and 41; and *Gogos* v *Commission*, EU:C:2010:287, paragraph 29.

60 — See, in each case in relation to arguments supporting the reduction of fines, *Ferriere Nord* v *Commission*, C-219/95 P, EU:C:1997:375; *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraph 244; and *France Télécom* v *Commission*, EU:C:2009:214, paragraph 41.

61 — *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 121, and *FIAMM and Others* v *Council and Commission*, EU:C:2008:476, paragraph 91.

62 — *Ziegler* v *Commission*, EU:C:2013:513, paragraph 82; *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768, paragraph 35; and *MasterCard and Others* v *Commission*, EU:C:2014:2201, paragraph 189.

63 — *Komninou and Others* v *Commission*, C-167/06 P, EU:C:2007:633, paragraph 22, and *Mindo* v *Commission*, EU:C:2013:229, paragraph 41.

64 — Paragraph 118 of the application at first instance.

65 — Paragraph 40 of the reply at first instance contains only a reference in parentheses to the 'Commission's exaggerated figures'.

66 — Footnote 86 in the application at first instance; footnote 44 in the reply at first instance repeats this allegation.

2. Supplementary comments on the substantive criticism of the market share figures

86. Solely for the sake of completeness, I would also point out that the argument advanced by Dole in the context of this first part of the third ground of appeal is likewise not an appropriate basis on which to mount a substantive challenge to the General Court's considerations regarding the combined market share of the undertakings involved.

87. Since the assessment of facts and evidence is a matter for the General Court alone, it is certainly not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the General Court. [67]

88. It is indeed the case that, in appeal proceedings, the Court of Justice is competent to review the legal characterisation of facts by the General Court and to establish whether there has been any distortion of facts or evidence. [68] However, Dole has made neither complaint before the Court of Justice in relation to the point at issue here, namely the calculation of the combined market share of the undertakings involved. [69]

89. Leaving aside the foregoing, Dole's statements on the alleged inaccuracies in the calculation of the combined market share of the undertakings involved are far too general and imprecise for a reasonable response to be given. [70] In particular, Dole gives no indication whatsoever of the alleged extent of the sales of bananas between importers to which it refers. Was this a widespread practice or just a marginal phenomenon? [71] In the absence of a substantiated argument from Dole in this regard, [72] it is ultimately impossible to assess whether any inclusion of sales between importers could have had any significant influence at all on the market shares estimated in the contested decision and taken as a basis by the General Court.

90. All in all, the first part of the third ground of appeal must therefore be rejected.

3. The description of the exchange of information between the participants in the cartel (second, third and fourth parts of the third ground of appeal)

91. By the second, third and fourth parts of the third ground of appeal, Dole complains of a series of errors of law committed by the General Court, all of which are connected with the description of the exchange of information at issue between the undertakings involved.

67 — *British Airways* v *Commission*, EU:C:2007:166, paragraph 137.

68 — *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 49; *Commission* v *Schneider Electric*, EU:C:2009:459, paragraph 191; *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 55; and *Ziegler* v *Commission*, EU:C:2013:513, paragraph 74.

69 — Dole did *not* base its allegation of the distortion of facts, made by it as part of the second ground of appeal, on allegedly incorrectly calculated market shares.

70 — *Lindorfer* v *Council*, C-227/04 P, EU:C:2007:490, paragraph 83; *Schindler Holding and Others* v *Commission*, EU:C:2013:552, paragraph 45; and *MasterCard and Others* v *Commission*, EU:C:2014:2201, paragraph 151.

71 — According to the explanations provided by the Commission at the hearing before the Court, explanations which Dole did not contradict, the sales of bananas between importers were not of a significant volume. The same conclusion may likewise be drawn from the uncontested findings of the Commission contained in recitals 451 to 453 of the contested decision, even though those findings are made in a different context.

72 — It might have been expected that specific statements would be made in the course of the judicial proceedings at least in relation to any of Dole's own sales to other importers or to purchases by Dole from other importers, since Dole is in possession of all relevant information about its own business dealings involving bananas.

a) The requirements governing the statement of reasons for the contested decision (second and third parts of the third ground of appeal)

92. First, Dole alleges that the requirements imposed by the General Court on the statement of reasons for the contested decision were inadequate. In Dole's view, the General Court should have demanded that the Commission provide a more precise description of the matters on which the undertakings involved engaged in a mutual exchange of information with an anti-competitive object (second part of the third ground of appeal), and it should have required the Commission to comment in detail on the pricing factors to which the established infringement having an anti-competitive object related (third part of the third ground of appeal). There is a quite considerable overlap between these two points. They should therefore be examined together.

93. The legal requirements applicable to the statement of reasons for decisions of the Commission in the field of antitrust law follow from Article 253 EC (now the second paragraph of Article 296 TFEU). In accordance with settled case-law, that statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court of the European Union to exercise its jurisdiction to review legality.[73]

94. However, it is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[74]

95. The General Court cited at length from the recitals of the contested judgment and pointed out, inter alia, that the exchange of information between the undertakings involved in the present case related to stocks, left-over import stocks at the ports, the expected market demand and the market development — for example on the basis of 'promotions' — as well as the likelihood of a general market increase or decrease in banana prices or whether prices would generally remain at status quo.[75]

96. I take the view that it is sufficiently clear from that list that Dole could not have been in doubt about the exact subject of the infringement imputed to it. This is *a fortiori* true inasmuch as the details relating to the exchange of information between the undertakings involved were taken inter alia from the statements made by Dole itself in the course of the administrative procedure.[76]

97. In addition, the General Court rightly stated that Article 253 EC does not require the Commission 'to set out in a general manner an exhaustive list of factors which had to be regarded prima facie as unlawful in the relevant sector'.[77] Indeed, contrary to what Dole appears to believe, it is not for the Commission, in a decision adopted under Articles 7 and 23(2)(a) of Regulation No 1/2003,[78] to provide the participants in the cartel with any advice about how to organise their future conduct on the market. It is rather for the undertakings involved, as well as all other market operators, to ensure entirely as matter of their own responsibility that they do not infringe the competition rules of the internal market by their conduct on the market.

73 — *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 166; *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 147; and *Ziegler* v *Commission*, EU:C:2013:513, paragraph 115.

74 — *Bertelsmann and Sony Corporation of America* v *Impala*, EU:C:2008:392, paragraph 166; *Elf Aquitaine* v *Commission*, EU:C:2011:620, paragraph 150; and *Ziegler* v *Commission*, EU:C:2013:513, paragraph 116.

75 — Paragraphs 262 and 263 of the judgment under appeal.

76 — Paragraph 264 in conjunction with paragraphs 262 and 263 of the judgment under appeal.

77 — Paragraph 261 of the judgment under appeal.

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

98. The General Court therefore quite rightly rejected Dole's complaint of a defective statement of reasons for the contested decision. [79]

b) Dole's argument that the employees involved in the exchange of information were not themselves responsible for the setting of quotation prices (fourth part of the third ground of appeal)

99. Next, Dole complains [80] that the General Court did not respond to its argument that the relevant employees of Chiquita and Dole could not credibly be involved in an exchange of information because they had no power within those undertakings to set the quotation prices. By this complaint, Dole is alleging a failure to state reasons in the judgment under appeal. [81]

100. As the Commission rightly points out, this complaint is based on an incorrect reading of the judgment under appeal. In reality, paragraphs 577 to 582 of that judgment deal expressly with this argument advanced by Dole. Dole may take a different view from the General Court on the substance of the matter. However, that fact cannot in itself vitiate the judgment under appeal for failure to state reasons. [82]

101. Dole's argument is also unfounded in substantive terms, since, even if the employee of an undertaking does not personally determine that undertaking's quotation prices, he may still be in possession of the underlying internal information, exchange that information with his contacts from other undertakings and thereby contribute to removing uncertainty as to the operation of the market which would normally exist in a competitive environment. The general principle is that an employee who does not have the power internally to make decisions about an undertaking's commercial policy and prices may still be involved externally in infringements of competition law. [83]

102. Thus, taken as a whole, the second, third and fourth parts of the third ground of appeal are all unsuccessful.

4. The concept of a 'restriction of competition by object' (fifth part of the third ground of appeal)

103. Lastly, by the fifth and final part of this third ground of appeal, Dole argues that the General Court erred in its legal characterisation of the facts and infringed the rules governing the burden of proof where it found that the communications between the employees of the undertakings involved constituted a restriction of competition by object. Dole takes the view that the exchange of information in the present case is incapable of removing uncertainties concerning the intended conduct of the participating undertakings in relation to their pricing policy.

79 — Paragraph 267 of the judgment under appeal.

80 — In so far as this complaint is also relevant in the context of the fifth part of the third ground of appeal, I will address it here in the comments which now follow.

81 — See, to this effect, *Komninou and Others* v *Commission*, EU:C:2007:633; *Gogos* v *Commission*, EU:C:2010:287, paragraph 29; and *Mindo* v *Commission*, EU:C:2013:229, paragraph 41.

82 — *Wunenburger* v *Commission*, EU:C:2007:322, paragraph 80, and *Gogos* v *Commission*, EU:C:2010:287, paragraph 35.

83 — See, to this effect, *Musique diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 97; *Slovenská sporitel'ňa*, C-68/12, EU:C:2013:71, paragraph 25; and my Opinion in *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:248, points 128 to 131.

104. At first sight, the conclusion might be drawn that, by this submission, Dole seeks to prompt the Court of Justice, in its appellate jurisdiction, to take the improper step of substituting its own assessment of the facts and evidence for that of the General Court. In reality, the Court of Justice is being asked here to examine whether the General Court applied the correct criteria and standards in its assessment of the facts and evidence. That is a question of law amenable to review by the Court of Justice in its appellate jurisdiction [84] and of particular interest in the light of the recent judgment in *CB* v *Commission*. [85]

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

a) The relevant legal criteria

106. Within the scope of Article 81 EC (now Article 101 TFEU), the anti-competitive nature of an undertaking's conduct may follow not just from the effects of that conduct but also from its object. This applies equally to agreements, decisions and concerted practices. [86]

107. Not every exchange of information between competitors necessarily has as its object the prevention, restriction or distortion of competition within the common market within the meaning of Article 81(1) EC. [87]

108. The question whether, by its very nature, such an exchange of information reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object within the meaning of Article 81(1) EC must be assessed having regard to the subject-matter of the information exchanged, the objectives of the exchange and the economic and legal context in which that exchange takes place. [88] When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. [89] The parties' intentions may likewise be taken into account, even though they are not a factor which must necessarily be considered. [90]

84 — *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 125; *Bertelsmann and Sony Corporation of America* v *Impala*, EU:C:2008:392, paragraph 117; and *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 59.

85 — C-67/13 P, EU:C:2014:2204.

86 — *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 24.

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

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

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

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

109. If, on the basis of the criteria set out above, it appears that an exchange of information between competitors can be regarded, by its very nature, as being harmful to the proper functioning of normal competition, that is to say, in other words, that the exchange of information reveals in itself a sufficient degree of harm to competition, the actual effects of the exchange of information on competition need not be considered or taken into account. [91] The only requirement in those circumstances is that the exchange of information is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. [92]

110. Furthermore, in accordance with the case-law of the Court, there is a rebuttable presumption that undertakings participating in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market; it is for the undertakings concerned to prove the contrary. [93]

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

111. Contrary to the view taken by Dole, I can see no indications whatsoever that, in the present case, the General Court might have ignored or incorrectly applied the legal criteria set out above. [94]

i) The nature of the exchange of information and its subject-matter

112. One of Dole's main arguments, and an argument which the appellants advance not just here but also again and again in other contexts, is that the undertakings involved exchanged no information whatsoever about actual prices but simply about quotation price trends.

113. It should be noted in this regard that an exchange of information is not vitiated by an anti-competitive object just where it relates directly to the prices applied on the market by the undertakings involved. As the Court has already ruled, Article 81 EC (Article 101 TFEU) protects the structure of the market and thus competition as such. [95] Accordingly, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices. [96] Nor does there have to be a direct link between the information exchanged and the wholesale prices. It is in fact sufficient for a finding of an anti-competitive object that information is exchanged between competitors about factors relevant to their respective pricing policy or — more generally — to their conduct on the market. [97]

114. That is precisely the situation here.

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

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

93 — *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 121 and 126; *Hüls* v *Commission*, C-199/92 P, EU:C:1999:358, paragraphs 162 and 167; and *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 51. See also my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, point 75.

94 — In the following points, I will consider not only the arguments put forward by Dole in the context of this fifth part of the third ground of appeal but also a number of others that Dole has advanced in passing on this issue in the context of other grounds of appeal.

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

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

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

115. According to the extremely detailed findings of the General Court, against which Dole has made no allegation of distortion whatsoever, bilateral pre-pricing communications were exchanged in the present case between the undertakings involved; as part of those communications, the undertakings discussed their own quotation prices and certain price trends. [98]

116. Once again according to the findings of the General Court, which — incidentally — can be traced back not least to Dole's own submissions, the quotation prices were relevant to the market concerned. [99] In particular, in the present case, market signals, market trends and/or indications as to the intended development of banana prices could be inferred from those quotation prices of the banana importers; moreover, in some transactions, the prices were directly linked to the quotation prices on the basis of contractually agreed pricing formulae. [100]

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

118. Following a very detailed discussion of the actual market conditions and the arguments advanced by Dole, the General Court thus rightly concluded that the exchange of information conducted between the undertakings involved had an anti-competitive object. [101]

119. Indeed, such an exchange of information between competitors about price-relevant factors is blatantly contrary to the requirement of independence, which is a key feature of the market conduct of undertakings operating within a system of effective competition. [102] Consequently, and without this requiring any further explanations, the exchange of information alone reveals in itself a sufficient degree of harm to competition and can be regarded, by its very nature, as being harmful to the proper functioning of normal competition. [103]

120. In this connection, the present case differs fundamentally from the case of *Asnef-Equifax*, [104] to which Dole has referred and which related to the Spanish credit information exchange system. This is because the primary purpose of an exchange of information about the creditworthiness of borrowers, such as in the case of Asnef-Equifax, is to enhance the functioning of the market and to create equal conditions of competition for all credit providers, without one market operator in any way disclosing to its competitors the conditions which it intends to offer to its customers. The effect of an exchange of information such as that at issue here, which essentially relates to the factors relevant to the setting of expected quotation prices and price trends, is exactly the opposite: by means of that exchange, the undertakings involved disclose to their competitors — at least to some extent — their intended conduct on the market and sensitive information connected to their future price ideas. This is quite obviously capable of removing uncertainties concerning the intended conduct of the participating undertakings and allows conditions of competition to be created which do not correspond to the normal conditions of the market in question.

98 — See, in particular, paragraphs 15 to 17, 74, 187, 256, 375 and 583 of the judgment under appeal and recitals 51 to 57 of the contested decision.

99 — Paragraphs 434 to 576 of the judgment under appeal; see also paragraphs 442 to 470 of that judgment, which are based on Dole's own submissions.

100 — Paragraphs 19, 574 and 638 of the judgment under appeal and recital 115 of the contested decision.

101 — See, in particular, paragraphs 553, 585 and 654 of the judgment under appeal.

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

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

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

121. Dole continues to try to ridicule the General Court's finding of an anti-competitive object by claiming that irrelevances — 'mere gossip on general market conditions' — and 'the weather' were the primary topics of discussion between the undertakings concerned.

122. This argument is likewise unsuccessful from a legal standpoint. After all, it is irrelevant whether an exchange of information about price-related factors constituted the main purpose of the contact between the undertakings involved or simply took place in the framework (or under the auspices) of a contact which in itself had no unlawful object. [105]

123. In the light of the foregoing, Dole's criticism in connection with the nature and subject-matter of the exchange of information must be rejected in its entirety.

ii) The frequency and regularity of the exchange of information

124. A further objection advanced by Dole, which is likewise raised at various points in its arguments in the appeal proceedings, relates to the frequency and regularity of the exchange of information between the undertakings involved. Dole claims that the contested decision and the judgment under appeal lack clarity in this regard.

125. Contrary to what Dole appears to suggest, and from a purely legal perspective, the finding of an exchange of information having an anti-competitive object is by no means dependent on the existence of a frequent or regular exchange of information between the undertakings involved. It is settled case-law that even a single exchange of information can form the basis of a finding of infringement and the imposition of a fine if the undertakings concerned remained active on the market after that exchange of information. [106] The frequency and regularity with which information having an anti-competitive object was exchanged can at most potentially be relevant to the amount of the fine.

126. Accordingly, Dole's criticism of the allegedly defective findings made by the Commission and by the General Court regarding the frequency and regularity of the exchange of information between the undertakings involved misses the mark.

iii) The market structure

127. Finally, Dole emphasises at various points in the appeal proceedings that the combined market share figures of the undertakings involved used by the Commission and the General Court are 'exaggerated' or 'inflated'. [107] It is my impression that, by this criticism, Dole ultimately seeks to undermine the General Court's finding that, although the banana market in Northern Europe 'cannot be described as oligopolistic', it is likewise not 'characterised by supply of a fragmented nature'. [108]

105 — See my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, point 51. See, to the same effect, *IAZ International Belgium and Others* v *Commission*, 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraph 25; *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 64; and *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21.

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

107 — See, in this regard, the first part of this third ground of appeal (see above, points 72 to 90 of this Opinion).

108 — Paragraph 353 of the judgment under appeal.

128. The underlying basis for Dole's line of argument may be the view that an exchange of information between competitors can have an anti-competitive object only on a highly concentrated oligopolistic market.[109] That view would, however, be wrong. It is true that the finding of an anti-competitive object on such a market is particularly obvious.[110] Nevertheless, in accordance with case-law, an information exchange system may constitute a breach of competition rules even where the relevant market is *not* a highly concentrated oligopolistic market.[111] The only general principle applied in relation to the market structure is that supply must not be fragmented.[112]

129. Since, according to the findings of the General Court — findings not refuted by Dole[113] — there is no evidence that supply is fragmented on the Northern European market for bananas, the appellant's line of argument regarding the market structure is ineffective.

iv) Summary

130. All things considered, Dole's argument is thus incapable of invalidating the General Court's legal characterisation of the exchange of information at issue as a concerted practice having an anti-competitive object prohibited under Article 81 EC.

5. Interim conclusion

131. As none of the individual objections raised by Dole is successful, the third ground of appeal must be rejected in its entirety.

D – *Fourth ground of appeal: calculation of the fine*

132. Finally, the fourth ground of appeal is devoted to the calculation of the fine. As part of this ground of appeal, Dole raises a total of two objections to the judgment under appeal, to which both parts of this ground of appeal are dedicated.

1. First part of the fourth ground of appeal: consideration of the sales of Dole subsidiaries not involved in the cartel

133. First, in the context of this fourth ground of appeal, Dole complains that the General Court erred by calculating the fine based on sales of 'undertakings' in relation to which no finding of an infringement was made, namely Dole's subsidiaries VBH, Saba, Kempowski and Dole France, who were not addressees of the statement of objections. This complaint is directed against paragraphs 619 to 623 of the judgment under appeal.

134. It appears to me that this complaint is based on a profound misunderstanding of the settled case-law on the responsibility of parent companies for infringements of the antitrust rules committed by their wholly owned subsidiaries and all other subsidiaries under their decisive influence.

135. The fundamental basis of that case-law is the notion that a parent company and its subsidiaries form a single undertaking.

109 — As per the wording used in *Deere* v *Commission*, EU:C:1998:256, paragraph 88.

110 — See my Opinion in *T-Mobile Netherlands and Others*, EU:C:2009:110, point 53.

111 — *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraph 86.

112 — *Thyssen Stahl* v *Commission*, EU:C:2003:527, paragraph 86, and *Asnef-Equifax and Aministración del Estado*, EU:C:2006:734, paragraph 58.

113 — See again, in this regard, my comments in relation to the first part of this third ground of appeal in points 72 to 90 of the present Opinion.

136. If a parent company and one or more of its subsidiaries under its decisive influence are regarded as part of a single undertaking for the purposes of the *finding* of an infringement, the same must likewise be true for the purposes of *penalising* that infringement by means of a fine. This is because the concept of an undertaking within the framework both of Article 7 of Regulation No 1/2003 and of Article 23 of that same regulation is identical and in each case may be traced back to Article 81 EC (Article 101 TFEU).

137. Only by considering the sales of the parent company and those of all subsidiaries under that company's decisive influence is it possible, when calculating the amount of a fine, to take proper account of the financial strength of the entire group involved in the cartel. [114]

138. Dole's objection that only one of its subsidiaries, namely Dole Fresh Fruit Europe, was directly involved in anti-competitive practices is as invalid in the context of the penalising of the infringement as it is in the context of the finding of that infringement. This is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking. If that undertaking intentionally or negligently infringes the competition rules, that gives rise to the collective personal responsibility of all the principals in the group structure. [115]

139. A contrary conclusion does not follow from the case-law in *Tomkins* referred to by Dole. It is true that the secondary nature of the parent company's liability for its wholly owned or almost wholly owned subsidiaries is stressed in *Commission* v *Tomkins*. [116] However, that secondary nature in no way calls into question the use of the group sales as the basis for the calculation of a fine. The consequence of that secondary nature is rather simply that corrections to the fine imposed on a subsidiary may also benefit the jointly and severally liable parent company if the subsidiary and the parent company bring parallel actions for annulment before the General Court against the decision imposing the fine.

140. The General Court therefore rightly rejected Dole's suggestion that, when calculating the fine, the sales of all subsidiaries not directly involved in the infringement should have been disregarded. [117]

141. In those circumstances, there is no need to give further consideration to whether the additional element of the grounds, upon which the General Court also relied in the present context, was also valid. According to that element, Dole's argument as to the autonomy of some its subsidiaries and the disregarding of their sales is meant to relate to the distinction between green and yellow bananas. [118] I admit that this additional element of the grounds relied upon by the General Court is somewhat surprising. However, from a legal perspective, the judgment under appeal is correct on the basis of the abovementioned considerations on the concept of a single undertaking. [119]

142. Consequently, this first part of the fourth ground of appeal is unsuccessful.

2. Second part of the fourth ground of appeal: consideration of the same sales twice

143. Secondly, in the context of this fourth ground of appeal, Dole complains that the General Court erred by counting sales of the same products twice for the purposes of calculating the fine. This complaint advanced by the appellants is directed against paragraph 630 of the judgment under appeal.

114 — See, in this regard, my Opinion in *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:11, point 1.

115 — See, in this regard, my Opinion in *Alliance One International and Standard Commercial Tobacco* v *Commission*, EU:C:2012:11, point 173, and my Opinion in *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:262, point 97.

116 — *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraph 39.

117 — Paragraphs 619 and 620 of the judgment under appeal.

118 — Paragraph 621 of the judgment under appeal.

119 — See, in this regard, points 134 to 140 of this Opinion.

144. More specifically, the complaint is that, for the purposes of the calculation of the fine, the Commission — with the endorsement of the General Court — counted twice in the sales figures those bananas which Dole initially sold to third parties not participating in the cartel and then bought back from those third parties. The only example given by Dole relates to the sale of its own bananas to the company Cobana and the re-sale of those same bananas by Cobana to Dole's subsidiary Kempowski.

145. It should be noted in this regard that appeal proceedings are limited to points of law.[120] It is unclear from Dole's arguments in connection with this second part of the fourth ground of appeal what error of law the General Court is alleged to have committed. Dole's submissions on this point are too general and imprecise for a reasonable response to be given.[121] I therefore propose that they be dismissed as inadmissible.

146. In the alternative, I would also point out that all questions connected with the amount of the fine fall within the unlimited jurisdiction of the General Court (Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003). The General Court's exercise of that power is reviewed by the Court of Justice solely to establish whether, in exercising that power, the General Court committed manifest errors.[122] Errors of that kind must be assumed, first, where the General Court disregarded the extent of its powers under Article 261 TFEU,[123] second, where it did not fully consider all the material points,[124] and, third, where it applied incorrect legal criteria,[125] not least having regard to the principles of equal treatment[126] and proportionality.[127]

147. As the value of the goods to which the infringement of Article 81 EC (now Article 101 TFEU) directly or indirectly relates is used as an indicator of the significance of the infringement,[128] it is perfectly reasonable — for the purposes of calculating the fine — to take into account all sales of those goods by a participant in the cartel. If a participant in a cartel has conducted multiple commercial transactions involving the very same goods — for example, by first selling those goods to a third party and then later buying them back again from that third party or even from a fourth party — that double sale may be deemed to be evidence of the economic significance of those goods to the cartel participant.

148. In view of the foregoing, the General Court did not commit a manifest error by not criticising, as part of its review of the calculation of the fine, the double counting of Dole transactions by which it first sold bananas and then bought them back again.

149. Consequently, the fourth ground of appeal must fail in its entirety.

120 — *Vidrányi* v *Commission*, EU:C:1991:361, paragraphs 11 to 13; *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraphs 47 and 48; and *Telefónica and Telefónica de España* v *Commission*, EU:C:2014:2062, paragraph 84.

121 — *Lindorfer* v *Council*, EU:C:2007:490, paragraph 83; *Schindler Holding and Others* v *Commission*, EU:C:2013:552, paragraph 45; and *MasterCard and Others* v *Commission*, EU:C:2014:2201, paragraph 151.

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

123 — See, in this regard, my Opinion in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2005:751, point 137, and my Opinion in *Schindler Holding and Others* v *Commission*, EU:C:2013:248, point 190. See, to the same effect, *Schindler Holding and Others* v *Commission*, EU:C:2013:522, paragraphs 155 and 156, and *Kone and Others* v *Commission*, EU:C:2013:696, paragraphs 40 and 42.

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

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

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

127 — *E.ON Energie* v *Commission*, EU:C:2012:738, paragraph 126, and *Schindler Holding and Others* v *Commission*, EU:C:2013:522, paragraph 165.

128 — *Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraphs 76 and 88.

E – *Summary*

150. As none of the grounds of appeal put forward by Dole is successful, the appeal must be dismissed in its entirety.

V – **Costs**

151. Under Article 184(2) of its Rules of Procedure, the Court is to make a decision as to costs where it dismisses an appeal.

152. It follows from Article 138(1) and (2) in conjunction with Article 184(1) of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings; where there is more than one unsuccessful party, the Court is to decide how the costs are to be shared. Since the Commission has applied for costs against the appellants and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs. Since they brought the appeal jointly, they must bear the costs jointly and severally. [129]

VI – **Conclusion**

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

(1) dismiss the appeal;

(2) order Dole Food Company, Inc. and Dole Fresh Fruit Europe OHG to pay the costs of the dispute on a joint and several basis.

129 — *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraph 123. See, to the same effect, *D and Sweden* v *Council*, C-122/99 P and C-125/99 P, EU:C:2001:304, paragraph 65; in the latter case, even though D and the Kingdom of Sweden had brought two separate appeals they were nevertheless ordered to bear the costs jointly and severally.