with other trading parties, thereby placing them at a competitive disadvantage is an abuse of a dominant position.

9. Charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied may be an abuse of a dominant position within the meaning of subparagraph (a) of Article 86; this excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin.

In Case 27/76

UNITED BRANDS COMPANY, a corporation registered in New Jersey, United States of America,

and

UNITED BRANDS CONTINENTAAL B.V., a Netherlands company having its registered office at 3 Van Vollenhovenstraat, 3002 Rotterdam, represented and assisted by Ivo Van Bael and Jean-François Bellis of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Mr Elvinger and Mr Hoss, 84 Grand Rue,

applicants

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Antonio Marchini-Camia and John Temple Lang, with an address for service in Luxembourg at the office of Mr Mario Cervino, Bâtiment Jean Monnet,

defendant,

APPLICATION for the annulment of Decision "IV/26.699 Chiquita" (Official Journal L 95 of 9 April 1976, p. 1 *et seq.)* whereby the Commission, on 17 December 1975, found that the marketing of bananas grown and imported by the applicants infringed Article 86 of the EEC Treaty, and also for payment of damages as well as for the cancellation or reduction of the fine imposed upon them by the Commission,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, procedure and the arguments of the parties may be summarized as follows:

I — Facts and procedure

The "United Brands Company" (hereinafter referred to as "UBC") of New York, was formed in 1970 by the merger of the United Fruit Company and the American Seal Kap Corporation.

UBC is at the present time the largest group on the world banana market and accounted for 35% of world exports in 1974. Its European subsidiary, United Brands Continental B.V. (hereinafter referred to as "UBCBV"), whose registered office is in Rotterdam, is responsible for co-ordinating banana sales in all the Member States of the EEC except the United Kingdom and Italy.

(1) The procedure leading up to the decision

On 19 March 1975 the Commission decided, pursuant to Article 3 (1) of Regulation No 17/62 of 6 February 1962 (Official Journal, English Special Edition, 1959-1962, p. 87 *et seq.*), to initiate a procedure for infringement of Article 86 of the EEC Treaty against UBCBV following complaints made to it by the Th. Olesen undertaking, Valby (Denmark) on 20 February 1974 and by the Tropical Fruit Co. and Jack Dolan Ltd. undertakings, Dublin and the Banana Importers undertaking, Dundalk (Ireland) on 27 May 1974.

On 11 April 1975 the Commission notified UBCBV that in its opinion it was engaging in an abuse of a dominant position in that it:

— required its distributor/ripeners not to sell bananas while still green;

— charged its distributor/ripeners in the various Member States prices which differed considerably, without any objective justification, for bananas of the same quality, even though the conditions of the market were to all intent and purposes the same;

— applied to its distributor/ripeners differing prices, the difference sometimes amounting to 138%;

— refused to supply the Danish firm Olesen with bananas of the Chiquita brand on the ground that this undertaking had taken part in an advertising campaign for bananas of a competing brand.

In the same letter, it informed UBCBV that, in accordance with Article 19 (1) of Regulation No 17/62 and Regulation No 99/63 (Official Journal, English Special Edition 1963-1964, p. 47 *et seq.)* it could make known its views concerning the complaints of which it had thus been notified.

UBC and UBCBV replied in a statement dated 12 June 1975. The parties concerned were heard and in the presence of each other during a hearing on 24 June 1975.

(2) The facts relied on in the decision and during the administrative procedure. Statement of the reasons upon which the Commission's decision is based. Operative part of the decision

The Commission at the end of the procedure which it had initiated in this way adopted on 17 December "IV/ 26.699 Chiquita" (Official Journal L 95 of 9 April 1965) which it notified to UBC and its subsidiary in the Netherlands.

In order to explain the facts of this case the Commission begins by describing the structure of the banana market viewed as a whole and then describes the position and conduct of UBC and its subsidiary on this market.

A — The structure of the market

(a) The world banana market

Fresh bananas (heading No ex 08.01 in the Brussels Nomenclature) are a highly perishable product grown in the tropics all the year round.

The Member States of the EEC import about a third of the total of world banana exports. In 1974 these imports amounted to 1 978 000 metric tons, of which approximately 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. There are different varieties of bananas including "Gros Michel" and "Cavendish" produced by crossing "Gros Michel" with a Canaries variety out of which the sub-variety "Valery-Cavendish" was born. In 1969, the "Cavendish" variety accounted for 85% of world banana exports, as against only 30% in the early 1960's. All these banana varieties are pre-packed in the producer countries and now always exported while still green. They have to be ripened artificially when they arrive in the country where they are to be consumed. Most of the ripening, which requires airtight ventilating and cooling facilities is carried out by the importer/ wholesalers, although it is done sometimes by independent ripeners.

Marketing these bananas under "brand names" which means that each hand of bananas and sometimes each banana in the producer country has to be marked, has expanded considerably. This sales policy was introduced by United Fruit Company in 1967 for the sale of its "Cavendish-Valery" bananas under the brand name "Chiquita". The other undertakings only adopted this trend much later.

(b) The position of the United Brands Company

On the world banana market most of the business is carried on by certain large American undertakings, *inter alia:*

— United Brand Company of New York,

— Castle and Cooke Company of San Francisco,

— Del Monte Company of California.

UBC also carries on business in several sectors such as agriculture, chemicals, packaging, transport, telecommunications, etc. . . .

Bearing in mind that the banana business alone of its predecessor, United Fruit Company, was restricted by the final judgment of 4 February 1958 following the principles laid down in Sections 1 and 2 of the Sherman Act, delivered by the American antitrust authorities which complained that it had restricted and monopolized the banana market, the production, transport, distribution and marketing of its bananas throughout the world, that business in 1973 represented only 18·5% of the whole of its annual turnover of some two thousand million dollars.

UBC, the largest banana group in the world, owns more than 30 000 hectares of banana plantations and in 1974 sold about two million metric tons of bananas (35% of world exports).

UBC has formed a large number of subsidiary companies throughout the world which are run by its Central Board in New York.

(a) The countries in which UBC is a major banana producer are Colombia, Costa Rica, Honduras and Panama. It also buys 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.

(b) UBC is also very strongly placed in banana shipping.

It owns or charters more than 40 refrigerator ships and its own vessels alone represent a capacity of nearly 10 million cubic feet.

The main ports for unloading in the EEC are Bremerhaven, Rotterdam, Antwerp, Hamburg and certain ports in France, Italy and Great Britain.

(c) UBC has a very solidly constructed *distributive network* in Europe where its operations are co-ordinated by three wholly owned subsidiaries:

(a) United Brands Continentaal B.V., Rotterdam,

(b) Fyffes Group Limited, London, for the sale of bananas (and other products) in the United Kingdom,

(c) Compagnia Italiana delle Frutta S.p.A., Milan.

(d) As bananas are a highly perishable product the question of ripening them is extremely important and UBC pays special attention to it. UBC has its own ripening facilities in certain Member States. It owns one-third of the ripening facilities in the Belgo-Luxembourg Economic Union (BLEU), the United Kingdom and Italy.

In Germany it sells its bananas mainly to the Scipio Group which owns more than one-third of the ripening facilities in that country. In those Member States where it does not own any ripening facilities UBC invited a limited number of undertakings to ripen and distribute its Chiquita bananas on condition that they had equipment meeting its own technical specifications. Sometimes UBC lends money to these distributor/ripeners to enable them to build or modernize their ripening facilities but in general without imposing any restriction on trading.

It also set up a department for technical assistance and supervision to advise ripeners, prepare plans of the installations, determine the ripening methods to be used, train personnel and make periodic checks.

(e) *The marketing policy* of UBC is centred solely on the sale of its bananas under the "Chiquita" brand name and its guide-line is the need to see to it at all times that their quality complies with very high standards. UBC determines the sale policy to be adopted for all

bananas which it sells itself or through intermediaries. The "Chiquita" brand name is only affixed to bananas of certain varieties, mainly the "Cavendish-Valery" variety, which have a minimum size of not less than 8 inches, a very smooth skin, are capable of taking on a uniform yellow colour and have no defects. Any bananas not satisfying these criteria are sold without a brand name being affixed to them.

This marketing policy enables UBC to sell Chiquita bananas at a price which is on average between 30 and 40% higher than that of its bananas sold without a brand name.

UBC organizes large advertising campaigns for its bananas, sales promotion in the retail shops and the supermarkets by means of demonstrations, and by providing promotional material and gifts. It spends on average each year one million and a half units of account on advertising.

(f) *The position* of UBC in the EEC is as follows:

— UBC handles 40% of banana sales in *the Netherlands;*

— It handles 50% of banana sales in *Belgium and Luxembourg;*

— UBC sells most of its bananas for *Germany* to the Scipio Group with which it has had a close business relationship for more than 30 years. The bananas handled by this group account for 35% of the bananas sold in Germany;

In addition UBC sells "Chiquita" bananas to a number of other distributor/ripeners and these account for 10% of sales in Germany. Altogether UBC thus supplies approximately 45% of the bananas sold in Germany;

— UBC bananas account for about 45% of all banana sales in *Denmark;*

— In *Ireland* there has been a striking increase in the sale of UBC bananas: 3% at the end of 1973, 25% in 1974;

— In *France* UBC bananas are not sold under any brand name: they account for 20% of all bananas sold;

— In *Italy* UBC sells 40% of the bananas which are consumed;

— In the *United Kingdom* UBC sells 40% of the bananas consumed there under the brand name "Fyffes".

(c) UBC's competitors

UBC's main competitors are:

— *Castle and Cooke* which carries on business mainly in the United States (37%) and in Asia. This company sells its bananas under the brand name "Dole" to several European importers who are associated under the umbrella of the Eurobana company in Hamburg and has taken over the banana business of the Gérard Koninkx Frères company, Antwerp. It sells 13% of all bananas sold in Germany, 18% in the Netherlands, 22% in the BLEU, 15% in Italy and 20% in Denmark, or if you like 9% of all the bananas sold in the Community.

— *Del Monte,* which is situate in the United States (10%) and Japan, sells its bananas to the Community under the brand name "Del Monte" through a sole importer: la Société Internationale Fruchtimport Gesellschaft Weichert und Co., Hamburg.

It sells 9% of the bananas sold in Germany, 15% in the Netherlands, 3% in the BLEU, 24% in Denmark, 35% in Ireland, 2% in France, 1% in Italy, or about 5% of all the bananas sold in the Community.

— The *Alba* group, Hamburg, which consists of half a dozen European importers, has nine ships and sells 15% of the bananas sold in Germany, 5% in Denmark, handles about 5% of the bananas sold in the Community under the brand name "Onkel Tuca".

— The *Belhoba* group is made up of three Netherlands and Belgian importers. It sells its bananas under the brand names "Sandrop" and "Bonita": it accounts for 7% of the bananas sold in Germany, 20% in the Netherlands, 24% in the BLEU, 12% in Denmark, or about 6% of the bananas sold in the Community.

— *La Société Geest Industries Ltd.* accounts for 30% of the bananas sold in the United Kingdom. It has a fleet of eight ships and controls rather less than 6% of the bananas sold in the Community under the brand name "Geest".

— *La Société Mercantile d'Oltremare* which sells exclusively in Italy 20% of the bananas sold in that country under the brand name "Somalita" and controls rather more than 3% of the bananas sold in the Community.

— *La Société W. Bruns,* Hamburg, which sells 10% of the bananas sold in Germany and 2% in the Netherlands under the brand name "Bajella", has six ships and controls rather more than 3% of bananas sold in the Community.

— *A number of other companies* mainly in France, Italy and the United Kingdom sell altogether 6% of the bananas sold in the Community.

During the years 1971-1976 UBC supplied on average 40 to 45% of the bananas sold in the Community. It is possible to endeavour with the help of the data supplied by the Commission in the decision to describe the Community market in bananas with the help of the table opposite:

B — UBC's market behaviour

(a) General conditions of sale

Since 25 January 1967 UBC has forbidden its distributor/ripeners to sell bananas other than those with which it supplies them, to resell UBC bananas to competing ripeners and made it binding upon them not to resell bananas while still green.

Following intervention by the Commission, UBC has deleted all these provisions from the general conditions of sale except for the condition only to resell green bananas to Chiquita ripeners, a clause strictly enforced in all the Member States against importer/distributor/ripeners of UBC including the Scipio group and its subsidiaries.

(b) The 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 same geographic source, are of the same variety and it may be said that they are all of the same quality. These bananas, most of which are unloaded at Bremerhaven and Rotterdam, are resold, except in two cases, subject to the same general conditions of sale and payment after being loaded by UBC into the refrigerator vans (rail or road) of the purchasing distributor/ripeners. UBC sells its Chiquita bananas f.o.b., port of shipment Central America to the Scipio group alone, while it sells these bananas in Ireland at a price c.i.f. Dublin to which they are carried from Rotterdam by road and ferry. In 1973 the average freight per box from Central America to Europe was 1.12 dollars per box weighing 20 kg gross and 18.15 kg net. In 1974 the price of one box was 5 dollars. The cost of carriage by road and ferry from Rotterdam to Dublin is about 1.10 dollars per box.

In order to give particulars of the various items in the cost price it is necessary to point out that when the bananas are cleared for customs purposes those from the dollar area attract duty of 20 % under the EEC's Common Customs Tariff except in the

% of bananas sold	UBC	Castle and Cook	Del Monte	Alba	Belhoba	Geest	Société Mercantile d'Oltremare	Bruns	Various
Germany	45%	13%	9%	15%	7%	—	—	10%	—
The Netherlands	40%	18%	15%	—	20%	—	—	2%	—
BLEU	50%	22%	3%	—	24%	—	—	—	—
Denmark	45%	20%	24%	5%	1%	—	—	—	—
Ireland	25%	—	35%	—	30%	—	—	—	—
France	20%	—	2%	—	—	—	—	—	6%
Italy	40%	15%	1%	—	5%	—	20%	—	6%
United Kingdom	40%	—	—	—	—	30%	—	—	6%
Community	45%	9%	5%	5%	6%	6%	3%	3%	6%
Under brand name	Chiquita	Dole	Del Monte	Onkel Tuca	Sandrop and Bonita	Geest	Somalita	Bajella	
No of ships	40			9		8		6	

case of Germany which has been authorized to allow a quota fixed annually under the Protocol on the tariff quota for imports of bananas annexed to the Treaty of Rome to enter duty free. Furthermore bananas from countries which have acceded to the Lomé Convention enter the EEC duty free. Finally the three new Member States are adopting the external Common Customs Tariff by progressive stages (1974: 8 %, 1975: 12 %) and will not pay the generally applicable rate in full until 1 July 1977.

UBC's prices are in general higher than those charged by competing undertakings except in the case of the prices invoiced to Irish customers; furthermore, although its bananas are sold under the brand name "Chiquita", f.o.r. Bremerhaven or Rotterdam, the sales prices which UBC fixes each week vary substantially according to the Member State where the customer has his business and the bananas are to be retailed. 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 — 13.5 % in 1974. The *highest* such weekly differences between two customers with the goods leaving the same ports were per box:

1971: 32 % between German and BLEU customers and
37 % between German and Netherlands customers;

1972: 21 % between German and BLEU customers and
30 % between German and Netherlands customers;

1973: 18 % between German and BLEU customers and
43 % between German and Netherlands customers;
24 % between Danish and BLEU customers and
51 % between Danish and Netherlands customers;

1974: 25 % between German and BLEU customers and
51 % between Danish and Netherlands customers;

1974: 25 % between German and BLEU customers and
54 % between German and Netherlands customers;
16 % between Danish and BLEU customers and
17 % between Danish and Netherlands customers.

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.

As far as Ireland is concerned the price paid by Belgian customers is, on average, 80 % higher than that paid by Irish customers and Danish customers pay 2.38 times more than Irish customers; with regard to these price differences in its letter of 10 December 1974 to the Commission UBC stated that it had sold its bananas to its Irish customers for a one-year experimental period but that the prices it charged there gave it a profit margin which was considerably smaller than in any of the other Member States.

(c) Refusal to continue supplies to Th. Olesen

In 1967, UBC appointed eight distributor/ripeners to sell its bananas in Denmark including Lembana which sold more than half of them and Th. Olesen which, in 1967, became the second largest distributor/ripener of UBC. All UBC's other distributor/ripeners in Denmark sell, in addition to "Chiquita", varying quantities of other brands and also of bananas which have no brand name affixed to them But in 1969 Olesen became the exclusive distributor for "Dole" bananas in Denmark sold by the Castle and Cooke group and since that date UBC has consistently reduced the orders placed

by Th. Olesen: at the beginning of 1973 by 15 to 20 %, at the end of 1973 from 40 to 50 %. From 1972 onwards Olesen sold more "Dole" than "Chiquita" bananas.

In April, September and October 1973 Castle and Cooke launched an advertising campaign for its brand name "Dole" in every European country and Th. Olesen took part in it in the same way as it had co-operated with UBC in September 1973 in the promotion of the brand name "Chiquita".

On 10 October 1973 UBC informed Olesen that it refused to continue to supply it with bananas, giving as its reason that Olesen and participated in the campaign for "Dole" bananas. This was the reason why Olesen complained to the Commission. However on 11 February 1975 UBC and Olesen entered into an agreement under which UBC resumed supplies to Olesen which withdrew its complaint to the Commission.

C — Appraisal of the situation by the Commission and the grounds for its decision

The Commission first of all gives its definition of a dominant position and states that undertakings turn such a position to their advantage 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 when 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 brand loyalty, 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 independence, 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 Commission then proceeds to consider the market which has to be taken into consideration and states in this connexion that the banana market is not the fruit market in general. It mentions as evidence of this view the research carried out on the markets at Rungis (France), Frankfurt and London which showed that the effects of the prices and available quantities of other fruits are too brief, too effective and too sporadic to be regarded as forming part of the same market as bananas or as a substitute therefor. It points out again that the relevant geographic market which must be investigated to ascertain whether UBC has the power to hinder effective competition, is limited to Germany, Denmark, Ireland, the Netherlands and BLEU. France, Italy and the United Kingdom must therefore be excluded from the said market owing to the special circumstances in these countries. 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.

The Commission then deals with the dominant position of UBC and the way it has been set up. It points out that the reason why UBC has a share of about 45 % of the market in question is that its marketing policy has been concentrated on the sale of bananas under the "Chiquita" brand name which it has adopted since 1967 and is based upon regular, intensive publicity campaigns which were accompanied by a thorough reorganization of the arrangements for production, packaging, carriage, ripening and sale of the bananas. This policy has given and enabled UBC to maintain an appreciable advantage over its competitors who have not only had to face the high cost of mounting such

publicity campaigns but have also had considerable difficulty in supplying large quantities of bananas of uniform quality. The loyalty of consumers to 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. This ability to adopt such a marketing policy based on the sales of bananas under the Chiquita brand is determined by the following facts:

— the very substantial control which UBC has over the sources of banana supplies in tropical countries and on the world banana market in which it controls about 35 % of the world's entire banana exports;

— the ownership of a very large fleet of refrigerator vessels which are essential for the shipping of bananas regularly;

— 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;

— the 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.

On the basis of all these facts the Commission concludes that, since UBC enjoys a degree of general independence in its behaviour on the market in question which enables it to hinder effective competition within this part of the Community, it must be considered to be an undertaking in a dominant position.

Starting with this finding the Commission takes the view that UBC has been abusing this dominant position in a number of ways:

(a) First because it forbids its distributor/ripeners to resell its bananas while still green; now, the effect of this requirement is to prevent them — and they 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 on the banana market, since at that stage all trade has to be in green bananas only. The prohibition on the resale of green UBC bananas therefore amounts to a prohibition on exports and distorts the normal pattern of trade. Furthermore it maintains a relatively effective partitioning of the market, since it applies to all bananas sold by UBC to its customers in a part of the EEC and may thus appreciably affect trade between Member States. In answer to UBC's argument that this obligation helps to guarantee the quality of the products sold to the consumer the Commission calls attention to the fact that the prohibition at issue not only forbids the resale of green bananas to consumers but all resales of green bananas at whatever the stage of marketing. In the notification of its complaints the Commission stated that because of the risk of damage to yellow bananas this amounts in fact to a prohibition on the resale of all bananas at the wholesale level. This abuse of a dominant position which prevents UBC's distributors from freely acting as wholesalers helps to maintain an effective partitioning of the market between the Member States concerned.

(b) Next, because UBC is charging its distributor/ripeners in the Member States concerned, without any objective justification, in the ports of Bremerhaven and Rotterdam, differing prices

for equivalent transactions and quantities of "Chiquita" bananas. These differences can in some weeks amount to as much as 30 to 50 % for equivalent transactions and have been charged in the case of Germany, BLEU and the Netherlands since 1971, in the case of Denmark from the beginning of 1973 and in the case of Ireland since November 1973. These differing prices prevent the various distributor/ripeners of the Member States from reselling bananas in equivalent conditions of competition in another Member State, more especially as they cannot sell them while still green. By reason of these practices, competition has thus been distorted. It is true that, in order to justify these price differences, UBC has explained that it has adapted its prices to what each part of the market could bear, since these differing prices are justified by the fact that retail prices for ripened bananas vary between Member States. The Commission's answer to this argument is that the marketing conditions in these Member States are in fact broadly comparable and that, in addition, 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, especially where that undertaking maintains a partitioning of the market. 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. In any event, since these differing prices may encourage or discourage the export of bananas from one Member State to another according to the various price levels in these two countries, they may appreciably affect trade between Member States.

(c) Further UBC has also abused its dominant position by charging certain of its distributor/ripeners unfair prices resulting in differences in price which cannot be justified objectively. The lowest prices are those charged to its customers in Ireland and UBC still makes a profit from them as it itself acknowledges; they may therefore be regarded as at least reflecting the costs of this undertaking for the bananas in question and, therefore, the amount by which actual prices f.o.r. Bremerhaven and Rotterdam exceed the delivered Rotterdam prices to Irish customers, and this is sometimes more than 100 %, must represent a profit of the same order of magnitude. Therefore UBC's prices in the area under consideration less Ireland are excessive in relation to the economic value of the product supplied.

In these circumstances it would be sufficient if UBC were to reduce its price level to prices at least 15 % below those currently charged by UBC to its customers in Denmark and Germany (other than the Scipio group). These prices are therefore unfair and for this reason constitute an abuse by UBC of its dominant position which may affect appreciably trade between Member States, since charging such unfair prices is bound to encourage exports from Member States where such prices are not charged and vice versa.

(d) Finally, UBC has abused its dominant position by ceasing to supply its "Chiquita" bananas to one of its distributor/ripeners, the Danish company Olesen, on the grounds that the latter had taken part in an advertising campaign for bananas of a competing brand. Following the refusal on the part of UBC in October 1973 to sell to it Olesen applied to UBC's other vendors in Denmark and also the Scipio group at Hamburg for green Chiquita bananas. They all refused Olesen's request. Olesen thus lost several

customers and also suffered losses because part of this ripening rooms was suddenly not in use. The effect of this withdrawal of supplies was to damage the business interests of this distributor/ ripener and consequently to discourage it — and other distributor/ ripeners — from selling bananas under a competing brand name or, at least, from participating in advertising and sales promotion campaigns for such brands, as is normally the practice in this field. In this way 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 and therefore in fact from having access to the market, and all this consolidates the dominant position of UBC. Moreover the refusal to continue supplies to Olesen which is one of the largest distributor/ripeners of bananas in Denmark affected appreciably trade between Member States, because this refusal made it impossible for Olesen, who could have increased his business in other Member States, to carry on such business; the effect on trade between Member States is also determined by the fact that, because of the withdrawal of supplies, Olesen was no longer able to import the same quantities of bananas into Denmark.

The Commission, in order to determine the fine which had to be imposed in respect of all these complaints, took into consideration the fact that the infringements by UBC were, at the very least, negligent, since UBC was, or at any rate should have been aware, of the anti-competitive effects of such conduct, especially as certain of its practices in this respect are specifically referred to in Article 86 of the Treaty; when the Commission evaluated this market behaviour constituting more than one abuse it also had in particular to take account of the fact that in their economic and legal context they are interrelated.

The Commission also took account of the duration of the infringements: the prohibition on the sale of green bananas dates from January 1967 in the case of customers in Germany, the Netherlands and BLEU, from January 1973 in the case of customers in Denmark and from November 1973 in the case of customers in Ireland.

The course of conduct relating to the pricing policy has been adopted since 1971 in Germany, the Netherlands and BLEU, since January 1973 in Denmark and from November 1973 in Ireland.

Finally the refusal to sell to Olesen lasted from 10 October 1973 to 11 February 1975.

As regards the gravity of the infringement, the Commission finds that UBC's conduct is manifestly inconsistent with the Treaty objectives of integrating markets and establishing a system where competition exists and that it must also be borne in mind that all the acts of UBC are designed in the long term to strengthen and consolidate its dominant position. However the Commission, in order to determine the amount of the fine to be imposed upon UBC, took into account the circumstances militating in favour of this company:

(a) The notification by UBC to the Commission of 15 November 1968 of its general conditions of sale in the Netherlands, which included the prohibition on the resale of green bananas. Although this notification only applied to the Netherlands, the Commission is of the opinion that UBC could reasonably have believed that it referred to all the Member States concerned and the Commission therefore concludes that, as far as concerns the acts of UBC after 15 November 1968 which remained within the scope of

the operations described in the notification, 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.

(b) The fact that this is the first occasion on which the Commission has carried out a thorough examination of every aspect of a pricing policy in the light of Article 86 of the EEC Treaty and that the decision also provides that the Commission is to be informed for a period of two years of the prices charged by UBC, so that it may check that they do not amount to an abuse.

(c) As far as the refusal to continue supplies to Olesen is concerned, the fact that UBC has already put an end to this infringement of its own accord, following the intervention of the Commission.

For all these reasons the Commission, before taking the decision referred to above, which is designed to bring to an end the infringements of Article 86 which it had established, thought it right, since it was anxious that its decision should be effective, to explain the measures which it had to adopt.

With regard to the prohibition on the resale of green bananas the Commission requires UBC not only to delete this prohibition from the general conditions of sale but also to inform all its distributor/ripeners in the relevant Member States to that effect.

With regard to the discontinuance of the practice of charging its commercial partners dissimilar prices which are not justified objectively, the Commission requires UBC to eliminate differences in the prices charged to its distributor/ripeners in so far as the transactions are equivalent.

Finally with regard to the charging of unfair prices to its customers in Germany (with the exception of the Scipio group) Denmark, the Netherlands and BLEU, the Commission requires UBC to cease charging such prices but stresses however that the responsibility for fixing prices rests exclusively with the undertaking.

However, it is for the Commission to give the undertaking sufficiently clear indications of the manner in which the infringement may be brought to an end.

This method of terminating this infringement — according to the Commission — consists in reducing 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 % below that of the prices currently charged to its customers in Germany and Denmark, the Commission acknowledging that UBC will afterwards remain free to charge its prices in accordance with its costs, as long as such prices are not unfair, and this should be disclosed by the checking of these prices of which UBC has to inform the Commission every six months.

D — The operative part of the decision of 17 December 1975

It is on this statement of reasons that the Commission based its Decision IV/26.699, the operative part whereof is as follows:

"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 B.V., Van Vollenhovenstraat 32, Rotterdam 3002, the Netherlands, which shall be notified thereof."

3. Judicial proceedings following the decision

UBC and its subsidiary have brought an application, which was registered in the Court Register under Case No 27/76 on 15 March 1976, against this decision in which they seek its annulment, the payment of damages and, in the alternative, the annulment or reduction of the fine.

(a) Procedure for the adoption of an interim measure

By a separate document the applicants made an application for the adoption of an interim measure under Article 185 of the Treaty requesting the President of the Court to suspend the enforcement of Article 3 (a) and (b), paragraph 1 of the Decision until a decision on the application for annulment pending before the Court has been made.

In support of this application UBC submitted several arguments and pointed out that there were measures which had already been adopted in accordance with certain orders of the Commission.

As far as concerns the Commission's order to delete from their conditions of sale the condition prohibiting the resale of green bananas the applicants stated that on 30 January 1976 they sent a circular to all their distributor/ripeners which clarified the clause at issue and completed it by inserting the words "except for sales between Chiquita ripeners".

As far as concerns the order to apply a uniform price, UBC called attention to the fact that by reason of the price fluctuations on the market in bananas, which are a highly perishable agricultural commodity, this order appeared to it to be "unintelligible, contradictory and unworkable", that its immediate and ruthless application would cause it considerable irreversible damage and would adversely affect the whole trade and especially the profit margins of its distributor/ripeners and all this would place the latter in a difficult position *vis- à-vis* their local competitors.

It also pointed out that this pricing method had lasted for 50 years and from all these considerations concluded that the Commission cannot claim that it was suddenly a matter of urgency for the applicants to give up a practice which has been established for so long; however in order to show its goodwill it agreed to notify its prices to the Commission.

Although in its observation submitted on 29 March 1976 the Commission challenged the arguments realting to the substance of the application, it left the matter to be determined by the Court.

By an order of 5 April 1976 the President of the Second Chamber of the Court of Justice of the European Communities, exercising the functions of the President of the Court by virtue of the second paragraph of Article 85 and the first paragraph of Article 11 of the Rules of Procedure after finding that:

"The file shows that the application to suspend the operation of the decision refers in practice to:

— the obligation to bring to an end the prohibition on the distributor/ripeners' reselling UBC bananas while still green, and to inform all the distributor/ripeners concerned without delay that it has ceased to apply the prohibition, as well as to inform the Commission that it has done so by not later than 1 February 1976 (Article 3 (a) and 1 (a); Article 3 (b), first indent);

— the obligation to cease to charge the distributor/ripeners dissimilar prices for equivalent transactions (Articles 3 (a) and 1 (b));

— the obligation to cease imposing unfair selling prices (Articles 3 (a) and 1 (c))."

and taking note of the parties' statements concerning the amendment of the clause relating to the resale of bananas while still green, made the following order:

"The suspension of the operation of Article 3 (a) and the first indent of Article 3 (b) of the Decision of the Commission of 17 December 1975 (IV/26.699) is granted until judgment is given on the substance of Case 27/76, in so far as the applicants have not already of their own accord brought to an end the infringements referred to by the Commission in Article 1 of the said decision;"

and reserved the costs.

(b) Conclusions of the parties

The *applicants* in their application respectfully petition the Court to

"1. Set aside the decision under review

— for infringement of Articles 85 and 86 of the Treaty establishing the European Economic Community, the rules of law relating to their application, in particular Regulation No 17 of the Council of 6 February 1962;

— for lack of motivation, violation of substantial forms and lack of clarity.

2. Order the Commission to pay to applicants moral damages in the amount of one unit of account.

3. Cancel or reduce the fines imposed by the Commission should its decision be upheld on the substantive points.

4. Order the Commission to bear the costs of the proceedings."

and upheld their conclusions in their reply.

The *defendant* in its defence and rejoinder contends that the Court should:

"1. Dismiss the application by UBC as unfounded.

2. Order the applicant to bear the costs".

II — Outline of the submissions and arguments of the parties

Preliminary observation

The applicants do not agree with the Commission's decision and criticize the grounds upon which it is based. Their application is founded upon various submissions which must be followed for the purpose of studying the arguments of the parties in a rational way.

1. They challenge the analysis made by the Commission of the *relevant market*, the product market as well as the geographic market;

2. In their view all the market factors deny the existence of their alleged *dominant position* within the meaning of Article 86 of the Treaty;

3. In their view they have not charged *excessive prices;*

4. In their view they have not charged *discriminatory prices;*

5. They consider that the clause relating to the conditions of *sale of green bananas*, to which the Commission objects, is justified by the need to safeguard the quality of the product sold to the consumers;

6. They intend to show that the *refusal to supply* the Danish firm Th. Olesen was justified;

7. Finally, the applicants submit general and specific observations on the *fine* and its amount.

1. The relevant market

The *applicants* submit that in cases based on Article 86 the delimitation of the product market in question is crucial, since the opportunities for competition can only be evaluated realistically with reference to the features of this product and of the areas in which it is marketed.

The *defendant* does not appear to object to this distinction which it adopts in its submissions.

(a) The product market

The *applicants* challenge the Commission's argument that there is a banana market which includes bananas sold under a brand name as well as those to which no label is affixed.

They maintain that the banana market is part of the fresh fruit market, since bananas are reasonably interchangeable by consumers with other kinds of fresh fruit: for example, apples, oranges, grapes, peaches, strawberries etc. and these other kinds of fruit offered on the same stalls or shelves at comparable prices can be substituted for bananas at

the level of consumption, distribution and of the wholesale trade.

Consequently the presence of other varieties of fresh fruit is a factor of major importance to be taken into account especially when pricing bananas (the applicants produce some graphs showing that bananas sell best in March through mid June, when other fruits are only available in small quantities at relatively high prices). From two studies made by the FAO (Food and Agriculture Organization) in 1969 and 1973, upon which the Commission relies to show that the banana market is a separate market, the applicants draw conclusions which are the opposite of the Commission's and are confirmed by a more recent study by the FAO entitled "Price Elasticity of Bananas at Retail" and a study of the Belgian apple market by the Institut Économique Agricole Belge (Le marché de la pomme en Belgique, Analyse globale de la fluctuation des prix à la production de 1950 to 1957 — Jansen (1969), pp. 58 to 59).

The *Commission* points out in its defence that it has never stated that bananas and other fruit are never or almost never interchangeable.

Substitutability of products is almost never total, but practically always a matter of degree. Therefore the problem in this case is not to decide whether bananas can be replaced by other fruit but to decide what degree of substitutability is required under competition law for two or more different products to be regarded as constituting a single "product market", for the purpose of answering the question whether a specific undertaking has a dominant position or not on the said market.

In competition law for two products to be treated as constituting a single product market, it is essential that there should be a high degree of substitutability between them (as a judgment of the American Supreme Court has held: "For every product substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly" (Times-Picayune Case, 1953).

The degree of substitutability is evaluated having regard to all the features of the products involved and all the factors which influence consumer choice.

Now, bananas have special characteristics

(a) physical (appearance, chemical composition, taste, softness, vitamin and mineral content)

(b) functional (easy and hygienic handling, convenience in eating, special nutritional value, digestibility)

(c) economic (constant level of production throughout the year, a fruit which lends itself particularly to advance planning of production and supply, marketing on lines normally associated with industrial products).

No other fruit possesses all these characteristics. Bananas therefore are particularly apt to satisfy constant needs.

The banana is a fruit which is in season throughout the year, consequently any investigation into substitutability should relate to the whole year.

As far as prices are concerned, the two FAO studies prove that bananas are only affected by the prices of other fruits (and only in the case of peaches and table grapes) to a limited extent and only during the summer months, to be more precise, in July (FAO Studies 1973, p. 1, paragraph 6).

It is therefore fair to assume that the effects of the prices and availabilities of other types of fruit are too brief, too ineffective and too sporadic for such fruit to be regarded as forming part of the same market as bananas, as a substitute therefor.

In short, the Commission takes the view that the banana is "only to a limited extent interchangeable with other products" because it is "particularly apt" to satisfy the constant needs of consumers.

The *applicants* begin their reply, in which they deal with the nature of the market under consideration, with an interesting brief description of the world banana trade and of the Chiquita banana in particular, that is to say with a description of:

— the sources of supply

— the quantities, qualities and costs of products offered and purchased, of which there are many because there is a very high degree of interchangeability between fresh fruits, all of which are capable of satisfying the same needs (the analyses of seasonal consumption of fresh fruits on a comparative basis prove this)

— the perishable nature of the raw material which entails carriage, ripening, distribution, checking and the affixing of brand names to bananas of sufficiently high standard to be offered under the Chiquita brand name

— marketing and pricing having regard to seasonal and geographic fluctuations (on the last point the work "The Banana Common Market" proves that the German market is in a privileged position and that it is impossible to treat the market considered by the Commission as a single territorial market)

— the resultant price levels.

The *Commission* states in its rejoinder that the main difference between it and the applicants is the question whether the relevant market is the fresh fruit market or, as the Commission maintains, the banana market. The Court has held that there can be limited interchangeability between products which belong to a given market and products which do not belong to it and this is tantamount to saying that there would have to be unlimited or at least a very high degree of interchangeability in order to establish that there is a single market for the products in question. Now the average consumer distinguishes between the banana and other fresh fruits; this is what the FAO calls the "desire for variety in the consumption of fruits"; neither the ordinary housewife nor the retailer disagrees with this. But there are more striking examples at the level of the wholesaler and a typical case is that of Olesen who, when deprived by the applicants of bananas, found himself in appalling difficulties both because of the nature of the demand and of the special features of his plant. The banana is therefore interchangeable to some slight extent with other fruits, and has been in particular in the post-war period when throughout the world the banana as a foodstuff ready to eat has been second only to milk (this accords with the UBC Annual Report 1972 annexed as Annex II b to its defence!). If the various factors below are added together:

— taste (only a banana . . . tastes like a banana!);

— appearance, softness, easy and hygienic handling, seedlessness, which make it a select food for all consumers and especially for certain categories of consumers;

— the chemical composition, vitamin and mineral content, nutritional value and digestibility;

— production of a fresh fruit on industrial lines throughout the year,

it must be inferred that the banana is particularly apt to satisfy constant needs and is only to a limited extent interchangeable with other products. It therefore constitutes the relevant product market as the antitrust actions brought against the applicants in the USA prove.

Studies by experts have proved three points beyond doubt:

— there is no constant interchangeability between the banana and all other fresh fruits;

— there is no generalized cross-elasticity between the banana and the other fruits which, like the banana, are available all the year round (FAO study of 1973);

— even among seasonal fruits a significant degree of cross-elasticity has not been established or could only possibly be inferred in the case of certain fruits.

Even if all the factors in favour of UBC's arguments were to be accepted it remains nevertheless true that any substitutability of the banana with seasonal fruits is by definition limited to part of the year and to a proportion of these fruits; as far as concerns the two fruits available throughout the year (oranges and apples), the first are not substitutable and in the case of the second only a relative degree of substitutability was recorded in 1969, while in 1975 it was recorded in only two of the seven countries studied. Therefore the relevant market is indeed the market in bananas whether the factual tests of European law or of American law (see the Cellophane and Brown Shoe Cases) are adopted.

UBC produced as an annex to its application and later to its reply, in order to counter this evidence, two papers by two officials of the FAO, Messrs Viton and Perkins, and it may be asked whether they express the official views of their organization and have not read the pleadings (in the case of the second). The Commission asks the Court:

"that, if it has doubts as to the interpretation of those points in the FAO's studies which it considers relevant to this case, it should hear a representative of the FAO who is duly qualified and authorized to give a clear and authoritative statement of this organization's point of view".

The argument used in the note written by Perkins is that there are cyclical seasonal variations of prices and in the quantities of bananas sold. Although these cycles are short-lived they exist and appear to indicate some seasonal cross-elasticity. It can be concluded that "fluctuations in prices and quantities of bananas are only to be taken into account in so far as they reflect a cross-elasticity. This cross-elasticity by its irregular and short-term character cannot lead to a definition of the relevant product market as covering all fresh fruits".

(b) The geographic market

The *applicants* in their application lay down the principle that "only areas where competitive conditions are homogeneous may be included in the relevant market".

Now the Commission has excluded France, Italy and the United Kingdom from this market because of the special circumstances in those countries:

— in the case of France, because of State measures reserving the banana market for the production of those countries which have special relations with France;

— in the case of the United Kingdom, because it benefits from "Commonwealth preferences";

— in the case of Italy, because the State monopoly which regulated the market was abolished in the mid-sixties and replaced by import quotas on bananas coming from countries which are not members of the EEC; however bananas of the "Cavendish" variety as well as the "Chiquita" brand are sold on this market.

The applicants criticize the Commission for having failed to take account of the differences in the conditions of competition between the other Member States. Because of them three substantially different systems of customs duty apply in this area;

— a zero tariff in Germany,

— a transitional tariff in Denmark and Ireland,

— the Common Customs Tariff, that is to say 20%, in Benelux countries.

Other equally significant factors differentiate these various markets, such as their size, consumer habits (the consumption of fresh fruit *per capita* in Germany is 109 kg per year, that is to say 2.5 times that of Ireland and twice that of Denmark, whereas it is 93 kg in the Netherlands and 76 kg in Belgium), the concentration at various levels (a very high degree of concentration in Germany), and the different financial points of view.

The applicants draw the conclusion from all these factors that the geographic market includes areas in which the conditions of competition are so different that they cannot be considered as constituting a single market and that the decision adopted by the Commission covering France, Great Britain and Italy should also be applied to the six other Member States.

The Commission points out that the reason why it excluded these three countries from the "relevant market" is that their applicable domestic arrangements favoured bananas other than UBC bananas and that the latter were not on equal terms with the other bananas sold in these three States, whereas the market in Germany is entirely free and the other five Member States also constitute a free market, if the application of certain non-discriminatory tariff headings is disregarded.

The Commission does not take seriously and rejects the argument that, if the market to be taken into consideration is not homogeneous, the dissimilarities should at least not be "appreciable".

2. Alleged dominant position

In their application the *applicants* criticize the Commission for having wholly failed to take into account the special nature of bananas as an agricultural commodity. In the absence of stabilizing measures agricultural commodities are characterized by wide and frequent price fluctuations. It follows that a supplier of agricultural products must be able to exercise a particularly high degree of control over supplies in order to regulate supply to a sufficient extent and to be in a position to influence prices substantially.

Price instability is higher for perishable agricultural products which cannot be kept in storage and have to be sold at any price. Now, the banana is a highly perishable foodstuff — unsuitable for storage — with a life span from harvesting to the consumer's table of about 20 days; once this period has elapsed, it cannot be sold.

In view of these special features of the product under consideration the vendor is under pressure to sell and the vendors' power to control prices is very limited. Thus it would be virtually impossible for any given firm to effectively determine banana prices unless it actually controlled close to 100% of the production, prices being directly influenced by the quantities marketed.

And, even if one firm ever achieved such a degree of control, there is no absolute guarantee that it could impose its prices, in view of the high degree of substitutability and competition between bananas and other fruits (see 1 (a) above).

The applicants also blame the Commission for not having taken sufficient account in its appraisal of the

dominant position which it claims they have of the presence of strong and aggressive competitors which guarantee that banana prices remain as low as possible, and they mention;

— *Castle and Cooke*, a large diversified company whose turnover in 1974 amounted to $753 131 000 and which employs more than 23 000 full-time employees and more than 9 000 seasonal workers. It sells bananas under the brand name "Dole" in the United States, Canada, Japan and in Europe, and under the brand name "Cabana" in Southern Europe. In 1974 "Dole" was the No 1 brand in the USA and Canada with a 41% market share and also in Japan where the market share was 25%. Castle and Cooke has thus perfectly equipped itself for world-wide competition in the banana market. It carries on business in Europe through a group of banana importers called Eurobana, accounting for 16% of the market.

— *Del Monte* which manufactures 250 fresh fruits marketed under the brand name "Del Monte". In 1974 its turnover amounted to $1 042 608 000 and it employed about 32 000 full-time employees and 7 000 to 41 000 seasonal workers. It owns a 12 reefer banana fleet, large plantations in Latin America and the Philippines and accounts for 10% of the market in the area formed by Germany, Denmark, Benelux and Ireland. This market benefits from the spill-over effect of its advertising of other fruits and Del Monte represents a significant competitive force at work in all markets of the area under consideration.

— *Alba* sells bananas under the brand name "Onkel Tuca" and accounts for 12% of the German and Danish markets.

— *Bruns* owns six reefers used for the carriage of its "Bajella" bananas and accounts for 10% of the German market.

— *Van den Brink*, a Netherlands company, sells bananas under the "Bonita" brand name in Germany and the Netherlands.

— *Velleman and Tas*, a Netherlands importer of fruit, started by distributing "Turbana" bananas and in 1975, in view of the severe competition which followed on the Netherlands market, prices reached an all-time low compared to those of the other markets.

In order to demonstrate the aggressiveness of their competitors the applicants mention the launching of the "Dole" brand name by an advertising campaign which was begun in Hamburg on 26 April 1973 by a press conference amounting to a "veritable declaration of war", on UBC, price "cutting" by Alba in Germany and in particular in Denmark, the introduction of the "Turbana" brand name onto the Netherlands market, a competitive situation which the Commission implicitly acknowledges when it states in its decision that the "applicants' principal competitors are constantly seeking to enlarge their sales".

The applicants also stress that access to the European banana market is not blocked and that it is all the more accessible because the quantities of bananas produced far exceed those which may be marketed in consuming countries, that the banana is not protected by any patent, that in view of the homogeneity of the product advertising does not create the degree of product differentiation that is found in industrial markets, that access to ripeners and distributors is not impeded.

These circumstances have permitted the entry into the European market of Del Monte in 1972, of Velleman and Tas

which has carved out for itself 23% of the Netherlands market in 1975, the German firm T. Port from March 1976 when it began importing bananas sold under the brand name "Golden B".

The applicants then point out that the Commission has not taken sufficient account, for the purposes of evaluating the conditions of competition, of the substantial power of customers which is one more check on UBC's alleged power to set prices.

This is in particular the case of the applicants' main customer, the giant German Scipio group, "the *world's* biggest combination of distributor/ripeners", over which they have no control and which purchases bananas from all suppliers in Germany except "Del Monte" and even bought some cargoes of bananas from independent growers in Martinique.

This group's f.o.b. purchases from UBC amount to about 250 000 metric tons per annum (the equivalent of twice the total consumption in the Netherlands) accounting for 80% of UBC's sales on the German market, 56% of its sales on the relevant market and 12% of its world-wide sales. The Scipio group controls about 50% of the German ripening capacity with branches in more than 50 German cities; it owns an 8 reefers fleet and special unloading facilities at Bremerhaven. The applicants conclude that any company confronted with an independent customer of that size and with many aggressive competitors does not have the power to control prices.

Edeka, UBC's second customer, is anything but a small sized company. Its group comprises about 29 000 retail food outlets, specializing in the sale of food and accounts for 17% of the German grocery turnover.

In 1975 Edeka purchased from the applicants 915 830 boxes, i.e. 26.2% of its ripening capacity, 60% thereof being allocated to "Onkel Tuca" bananas coming from the Alba group of which Edeka is one of the principal shareholders. Edeka also buys Bajella, Dole, Del Monte and unbranded bananas.

The applicants' third customer in Germany is *Van Wylick*, a large company with ripening plants spread all over Germany.

The same applies to *Banacopera* in Belgium, a co-operative group composed of a number of ripener/distributors.

These four customers who are not in any way controlled by UBC and who can distribute its competitors' products account for some 73% of its sales in the area under consideration, excluding sales to Spiers, the applicants' wholly owned subsidiary in Belgium.

UBC points out that the prices quoted to Edeka and Van Wylick are not different from those quoted to the smaller ripener/distributors which account for 72% of its sales in Germany and which benefit consequently from the pressure exerted by the larger customers.

The customers' independence is in particular established by the fact that they can withdraw their custom for all or part of their supplies, which occurred for example in the case of: København Frugtauktioner which became a customer of Onkel Tuca in 1973 and Migros, the largest Swiss ripener/distributor, which switched to Del Monte in 1975 for 50% of its requirements.

Since the customers have not entered into any long term contracts and since they have access to competitors and do not only depend upon the banana trade, they are not therefore under the control of UBC.

Moreover, in order to show how intense competition is on the banana market, it is only necessary to point out that, as reports of FAO and UNCTAD show, during the last 20 years banana prices

have decreased by 50% in real terms and that, as opposed to a non-competitive market where prices are controlled by the monopolist, the main feature of the banana trade is the wide fluctuations in price on a monthly and even on a weekly basis. And the fact that the applicants do not achieve the same price in each of the national markets in question confirms the view that they do not have the power to set prices, because, if they were in a dominant position, they could fix their prices at a uniform level at which they would maximize their profits.

UBC concludes from all these specific facts, together with the fact that its financial position during the last five years has been more often characterized by losses than by profits, that it has not been established that it has a dominant position on the banana market within the meaning of Article 86 of the Treaty.

In these circumstances the question even arises whether the applicants' market shares warrant the conclusion that they could occupy a dominant position.

A preliminary observation is necessary namely that in the agricultural sector market shares are much less relevant than in the industrial sector and that in the case of perishable agricultural commodities these market shares indicate nothing more than the quantities brought to a given market.

In the short run the quantities produced are inelastic while at the same time being subject to unpredictable circumstances (e.g. hurricanes, disease, etc.). Once on the market they have to be disposed of because they cannot be stored. Thus no inference of economic power can be drawn from market shares in the case of a perishable agricultural commodity because they do not imply any control over production and/or prices.

Furthermore, bananas being a homogeneous agricultural commodity, if a competitor does not bring any of them to the market, the latter's previous market share is immediately lost to competitors. Thus, for example, the applicants' share in Ireland after seven months of absence which amounted to 39% in 1972, dropped to 3% in 1973

If the applicants' alleged market share amounted to 45%, it would only represent one-half of the market share held by the Commission up to the present to indicate a dominant position in the field of manufactured products. In this connexion UBC mentions the five decisions in which the Commission has applied Article 86. In these five decisions the firms concerned enjoyed an almost complete monopoly. This does not apply in this case; furthermore, seeing that agricultural products are involved, the Commission has acted in a reckless manner. It has applied a substantially lower standard to measure control whereas it should have done exactly the opposite, since banana importing companies are in an entirely different situation from that found on other product markets. It should have therefore proved that the applicants have particularly large market shares merely to raise a presumption that they occupy a dominant position.

The applicants' alleged market share of 45% should be reduced to 20% because f.o.b. transactions should be excluded. The relevant f.o.b. transactions are those with the Scipio group representing 56% of the applicants' sales in the sector; the Commission has not claimed that they led to unfair and discriminatory prices.

The applicants' alleged market share of 45% should also be reduced by its turnover in unlabelled bananas, since the Commission specifically excluded this type of product from its complaints that there was an abuse of a dominant position and because, moreover, it has rested its case on the impact of the advertising campaigns centred on the brand names. Excluding unlabelled

bananas the applicants' market shares (including its f.o.b. sales to Scipio) during 1975 were:

Germany:	35.9%	
Netherlands:	31.4%	
Belgium/		Average: 35.5%
Luxembourg:	42.5%	
Denmark:	43.5%	

UBC reviews the various national markets where it is supposed to have made use of its dominant position and, with figures in support, emphasizes two factors:

— on each of these markets the competing firms' share of the market was larger than its share;

— on most of these markets the competing firms since 1970 have increased their market share at the expense of UBC's market share.

This fact and this trend are "all but an indication of dominance". And UBC makes use again here of its argument concerning the product market which has to be taken into consideration, and relating to substitute products; their existence reduces proportionally the ratios and percentages calculated for the banana market alone.

UBC considers that it has next to call attention to two mistakes made by the Commission:

— The one concerns the new marketing policy as from 1967, for which the Commission maintains UBC was responsible, and which relates to the systems of production, packaging, transport, ripening and marketing, whereas in fact this reorganization of production and packaging was forced upon the applicants by the ravages due to the Panama disease caused by a mushroom which killed the "Gros Michel" banana plant, and by the universal adoption of the "Cavendish" variety, which is the result of Castle and Cooke's initiative.

— The other relates to brand advertising which according to the Commission has been engaged in since 1967 whereas in fact it has been carried out since 1920; the 1967 advertising campaign was not designed to monopolize the banana market but to inform the consumers of the changeover from the "Fyffes" to the "Chiquita" brand name for reasons found in the brand names' programme for the United States Market. Standard Fruit moreover launched a similar advertising campaign when it decided to replace its Cabana brand name by the Dole brand name; the applicants point out that between 1971 and 1975 their advertising budget for Germany, the Netherlands and the BLEU, which was on average in the order of $1.1 million *per annum*, was usual in the sector of the fruit business and not very high compared with the other sectors.[1]

Moreover, the applicants' competitors also carry out similar advertising campaigns and the use of brand names has been beneficial to consumers in giving to banana importers a strong incentive to sell only fruits of the best quality.

A further contention of the Commission is that the applicants' competitors would allegedly have difficulties in supplying large quantities of bananas of uniform quality, but, all the official reports are unanimous in recognizing that the world banana production is characterized by a surplus supply position.

UBC goes on to say and asserts that — whatever the Commission may say on this point in page 13 of the Decision — it has never adopted a policy of diverting supplies so as to take

1 — In 1974 a budget of 3.0 million units of account was allocated by the EEC authorities to an advertising campaign to promote the consumption of meat.

advantage of price differences between Member States.

The Commission rests its case to a great extent on the vertical integration of UBC's banana operations in order to show that this firm has a dominant position.

However, the applicants confirm that the plantations controlled by UBC cover only 50% of its requirements, the rest being purchased from independent producers. Furthermore, to supply Europe with bananas the applicants do not use their own vessels but "charter" ships; with the exception of the "Spiers" network UBC does not own a single ripening room, and by the same token it does not control a single retail outlet.

The applicants are no more vertically integrated than their two major competitors: Standard Fruit and Del Monte, and even less integrated than Alba and Bruns and UBC's know-how is shared by its competitors. [1]

The applicants point out again that during the period 1971-1974 they accumulated a total loss of $24 548 000, while Castle and Cooke and Del Monte's aggregate profits during the same period were $92 871 000 and $110 243 000 respectively. [2]

On the question of its alleged dominant position, UBC's conclusion is to call attention to the fact that the Commission

"has failed to adduce conclusive evidence that applicants would have the power to control prices to a substantial degree as required by Article 86, but has also failed to take into account numerous factors negating applicants' alleged dominance, such as the special nature of the product, the competition from substitute products, the presence and strength of other banana suppliers, the power of customers, the low level and volatility of prices and the absence of monopoly profits on the part of the applicant".

The *Commission* in its defence considers in turn the different factors which have made it come to the conclusion that UBC has a dominant position:

(a) Characteristics of the product under consideration

The Commission first of all points out that unlike most other agricultural produce bananas are produced and harvested fairly evenly over the whole year.

For this reason the banana is a fruit which lends itself particularly well to production and marketing on industrial lines. Only the production stage could possibly be affected by the inelasticity of supply and even in this connexion it must be borne in mind that UBC cultivates directly in a number of separate countries only about 50% of the bananas which it sells, but that it is primarily an importer and distributor of bananas.

The importer is in a strong position since he is in full control of the initial distribution of a highly perishable commodity, and is therefore in a position to control the volume of the supply to the importing markets.

In these circumstances the perishability of bananas does not have the same implication for him as it does farmers who have succeeded in disposing of production which they do not control.

In other words the perishability of bananas would only be seriously harmful to UBC if it erred in assessing what the market will bear and this may explain why the amounts transported are nearly always lower than the orders given by UBC's customers.

(b) Prices

1 — The growing of the Cavendish variety which constitutes close to 100% of world banana exports was first developed by Standard Fruit.

2 — The applicants have not paid any dividend during the last three years on its common stock, whereas in 1974 Castle and Cooke and Del Monte paid dividends amounting to $12 200 000 and $15 300 000 respectively.

It must also be noted that demand is also relatively inelastic. If it is true that the price is determined by demand the material problem is to decide whether and, if so, to what extent the supplier can control prices at a given level of demand.

Now, in all the countries which were considered it was found that the elasticity of prices directly attributable to demand is less than minus one which means that a given percentage increase in prices will cause consumption to decline by only a smaller percentage.

The direct price elasticity of the demand for bananas varies from minus 0.72 in Germany and minus 0.44 in the Netherlands which means that a 100% price increase would lead only to a 72% drop in demand in Germany and a 44% drop in demand in the Netherlands.

Furthermore, through advertising, the supplier can increase the relative inelasticity of demand.

(c) UBC's market share

UBC's market share has been calculated specifically by the Commission at 45%, because in order to establish the existence of a dominant position, it is necessary to assess the extent of the firm's power; it is therefore unnecessary in this case to exclude in the calculation of the market share the sales f.o.b. to Scipio and sales of unlabelled bananas [1] and this share unquestionably has evidential value so far as UBC's power on the banana market is concerned.

The Commission has never claimed that competition had been eliminated; in order to establish the existence of a dominant position there is no need to show that the firm has impeded effective competition; it is sufficient to show that the firm has been in a position to impede effective competition on the relevant market.

1 — Under German law "it is presumed that ... an enterprise is market-dominaung ... if it has a market share of at least one-third for a specific kind of goods or ...".

Under English law a market share of 25% is required.

The "behaviour" of competitors and in particular of Castle and Cooke might have been "aggressive" but the "declarations of war" failed to attain their objectives and Castle and Cooke has not succeeded in increasing its market share to a significant extent.

Therefore the Commission submits that:

— UBC was able to make "Chiquita" the leading brand name for bananas;

— by having the highest volume of sales compared with its competitors backed up by a quality control organization at least equivalent to that of its major competitors and by operating throughout the Community UBC is of all firms the one which benefits from the greatest "economies of scale" in advertising;

— because UBC sells bananas in all Community countries it can apply a more flexible distribution system, able to profit from the price differences existing between Member States (and to profit from the different prices that the market can bear in different Member States).

(d) Vertical integration

UBC cannot deny that it is vertically integrated to a high degree and, for the assessment of its dominant position, it is indeed necessary to bear in mind that this vertical integration affects every one of the links in the chain of distribution which brings bananas from the plantations to the consumer.

Only a tiny number of competitors benefit from such integration and *never* quite on the same scale as UBC.

UBC also derives advantages from "know-how" and from the results of its research.

Finally the reason why the Commission referred to UBC as a multinational company carrying on operations typical of a conglomerate is that it considers that this advantage contributed, along

with all the others mentioned in the decision, to UBC's dominant position.

(e) Barriers to competitors entering the market

The major barrier to entry for the potential competitor is constituted by a characteristic which only one of UBC's leading competitors also possesses, namely: vertical integration.

As far as "Del Monte's" entry into the market is concerned, it is only necessary to remember that this was only made possible by the American authorities' "consent decree" (décision d'agrément) compelling UBC's predecessor in title, the United Fruit Company, to divest itself of a complete division of its banana operations in November 1972.

As far as concerns the countervailing power of its customer Scipio and other customers the Commission denies that this power exists because Scipio is unable to do without the sales of "Chiquita" bananas the quality whereof is undeniable and which is maintained by its advertising and sales promotion. Scipio does submit to technical control by UBC, is subject to the ban on reselling green bananas and for the last 30 years has never sought to act independently of UBC.

(f) Profits and performance

The Commission points out that it cannot be maintained that UBC's profits on its activities as a whole or on its banana operations alone have been abnormally low or non-existent over a substantial period.

However it must be added that this does not matter much, because in defining monopoly the first question, which is crucial, is whether there is a dominant position and not whether the use made of it is reasonable. Any test claiming to assess an undertaking's power according to its performance is of limited value.

In fact a low profit margin is not inconsistent with a monopoly situation just as high profits can be consistent with a situation of effective competition. Business performance cannot, then, be taken as a test for determining the existence or non-existence of a dominant position for the purposes of competition law.

But "the best and simplest evidence, of course, that defendants have a requisite degree of power over market price, or over competitors' entry is its actual use" (report of the Attorney General's National Committee to Study the Antitrust Laws, 31 March 1955).

Now the greater the distributor/ripeners' countervailing power — as described by UBC — the greater must have been the power that enabled UBC to insist that they refrain from exporting its bananas or selling them in the green state.

Similarly UBC's practice of charging different prices for equivalent transactions (and prices which were sometimes excessive), confirms the extent of UBC's power.

The Commission regarded UBC's dominant position as proved by the preponderance of its market share taken together with a whole series of advantages of which UBC is not always the sole beneficiary, nor in certain cases even the main beneficiary, but from all of which, taken together, only UBC can profit.

The *applicants* in their reply point out that since this case is concerned with allegations of abuse of a dominant position contrary to Article 86 of the Treaty, it is for the Commission to establish in the first place, *as a matter of fact* and not as a matter of assertion, that the applicants enjoy a dominant position in what is properly to be regarded as the relevant market. Unless that is established, no question of abuse can arise.

Since the Treaty does not define what is meant by a "dominant position", it is

necessary in the first instance to ascertain from the context what is the concept which the phrase encapsulates. The context of Article 86 shows that what is meant is such a position in the market as enables an undertaking to engage in unfair and anti-competitive practices.

Accordingly, a "dominant position" assumes that a market in which a particular undertaking operates lacks that degree of competitiveness which could be relied upon to exercise restraint upon the activities of the undertaking and in particular to prevent or restrict any significant, unfair or anti-competitive behaviour. In short, a finding that an undertaking occupies a dominant position in a particular market involves a finding that the market is not competitive to any material extent. *Per contra*, if on analysis the relevant market is seen to be competitive, that situation excludes a finding that an undertaking operating in the market occupies a dominant position.

In seeking to establish that the applicants occupy a dominant position the Commission has embarked upon something which is inherently improbable, for what the applicants are supplying is one variety of fresh fruit to the market for fresh fruit as a whole, in all its varieties. It could not sensibly be denied that the fresh fruit market is intensely competitive, with suppliers of the different varieties competing for a share of consumers' total expenditure on fresh fruit.

In order to escape from that situation, the Commission seeks to define the product market more narrowly as bananas, for which, as they allege (second paragraph of Section II 12 of the Decision) there is a "separate demand". But it is really an affront to common sense to seek to isolate bananas in this way when they are so clearly in competition with other fruits, and the availability and prices of other fruits so clearly impact upon the volumes of bananas which any given market will absorb and the prices which bananas can command. Bananas have no doubt some characteristics, for example, bananas are an "industrial fruit" and produced all-the-year-round, which are not shared at least in the same degree by other fruits and even "industrial" fruits. But it is sophistical to dwell upon such differences, and irrelevant in the context, unless as a result other fruits exert substantially no competitive pressures upon bananas, and that is not the case. The only sound rule in delimiting a product market is to include within that market all products which significantly compete for the same use. If that test is applied, the relevant product market is manifestly the fruit market as a whole (and the figure 45% of the banana market alone is therefore irrelevant).

Even if that submission were rejected and bananas were held to be the relevant product market, it still remains that there is an inherent improbability in the view that the applicants have a dominant position in that market. Bananas are an agricultural commodity, and what is more, a perishable one which cannot be stored, and the demand for which cannot be met from a previous surplus. Since the demand for this product is inelastic in the short-term, it does not permit a price policy on the part of the suppliers. With such a commodity it is not possible to secure such product differentiation as will effectively insulate the brand from market pressures. Therefore in principle a dominant position could only be achieved by a supplier to a particular market if either he had "cornered" the greatest part of the available supplies or he had such control of the distribution chain as to deny to other suppliers all but limited access.

It cannot be inferred from any precise figure that there is automatic control of one sector of the supply permitting the

conclusion to be drawn that in fact and without a thorough examination of the situation a dominant position exists.

The applicants are not in any such position. As has been shown, the applicants have under their control only a small proportion of supplies of bananas going to world export markets. In the international trade there are two other major concerns of substantially co-ordinate status, and each supplies large quantities of bananas into the geographical market selected by the Commission, while each of the national markets making up that market is characterized by the presence of other substantial importers shipping to them. In none of the markets (except Belgium, where they have a subsidiary carrying on business as a distributor/ripener) have the applicants any interest in the distributive chain and they have no power to deny any competitor access to it.

Because of the inherent improbability in those circumstances of the applicants having a dominant position as properly understood, and because the Commission cannot deny the existence in fact of effective competition between suppliers of bananas in Community markets, the Commission is forced to define "dominance" in some other way. In effect, it adopts a definition of a dominant position cast solely in terms of a company having the same attributes as the applicants. It then declares that since only the applicants have all those attributes, the applicants are by the Commission's own definition in a dominant position. A company in a dominant position, it declares, is the one that has the largest individual share of the market; that operates in all Member States; that advertises throughout the Community; that is vertically integrated; that conducts research activities; and is a conglomerate. In other words, the Commission defines a dominant position by describing the applicants, asserts that no other competitor meets that description and, therefore, concludes that the applicants have a dominant position. This kind of reasoning is especially in evidence in the case of the argument concerning advertising in which all the competitors engage ... and which in any event, *a priori*, benefits the entire banana trade; it is equally in evidence in the case of the argument concerning vertical integration which clearly in this matter cannot cover the ownership of the means of production, transport, ripening and distribution but is a necessity arising solely out of the perishability of the product which is the subject-matter of the trade in question; it is also in evidence in the case of the so-called control of sources of supply in a situation of world over-production ... The technical examples could be multiplied in this way:

— UBC's "large fleet" only represents 7% of the world isothermal fleet;

— UBC's best return on its knowhow would not necessarily be greater than that of its competitors;

— the difficulties of access to the market — owing to technical reasons — have been overcome by enterprising competitors;

— UBC's financial performance either on the world market or on the market under consideration does not appear to be anything other than a normal return on its investments.

Apart from the peculiarity of the Commission's reasoning, the fact remains that a firm may have competitive advantages and a market share higher than that of any other competitor, without the market being other than intensely competitive and thus providing its own regulation against any significant anti-competitive behaviour. To establish dominance it is necessary to go further and to show that the firm in question can determine

its policies substantially free from competitive restraint, that is, that it is free to act without taking into account, to any substantial extent, its competitors, purchasers or suppliers.

The Commission does not show, or even seek to establish, that the market is not competitive. It contents itself with the simple assertion that the applicants would be the only undertaking in the banana market to enjoy all the competitive advantages to which it points, and that the applicants therefore are in a position to obstruct the effective competition of their existing competitors to a substantial degree. The Commission does not condescend to any particulars of how that obstruction is to be achieved by the applicants. The Commission's assertion does not proceed from any analysis; it is no more than *ipse dixit*. In truth and in fact the applicants are in no position to "obstruct" the competition of other suppliers to the market otherwise than by themselves offering effective competition in terms of price, quality and service.

Since the Commission has not established, as a matter of fact, in accordance with the proper legal criteria, that the applicants are in a dominant position, the decision under review should be set aside. But the applicants submit that even if they are held to occupy a dominant position, the Commission has failed to establish that they have committed any abuse of that position.

The *Commission* in its rejoinder believes that it can point to certain contradictions in the conception which UBC has formed of its dominant position. The Commission stresses that a monopoly does not presuppose absolute market power and that Article 86 moreover only mentions a dominant position; it refers to "a competitive position so much stronger than that of any competitors that it gives the holder a market position of which it can take substantial advantage without losing business to its competitors in a way or to an extent which would not be possible in conditions of effective competition". What has to be done is to determine whether there is a certain degree of market power and how seriously the free play of the market is fettered under Article 85 and also under Article 86.

The effect of and the degree of resistance to the influence exerted by the dominant position everywhere or on everybody may not be the same having regard to the opportunities available to the interested parties to react or to their capacity to do so.

If the criteria for determining a dominant position are added together it may often be found that when taken by themselves they are not necessarily determinative; as was done in the *Continental Can* decision the existence of a dominant position can be deduced from a combination of the various market factors (market share, technical knowledge, availability of raw materials and of capital). A specific form of behaviour, whatever its nature may be, only has effect in a particular context.

That is why it can be said that a dominant position is a question of degree.

The application of Article 86 and also of Article 85, the two instruments which the authors of the Treaty have given the Commission in the field of competition, makes it possible, by the application of such criteria when making an evaluation, to see to it that the general objective laid down by Article 3 (f) of the EEC Treaty is attained.

In order to achieve such a result the Commission considers it necessary:

— to take into account, when defining the degree of power which gives rise to a dominant position, the seriousness of the hindrance on the

normal market play that the enterprise is capable of producing;

— to include in the concept of a dominant position such scope that a dominant position is disclosed when an enterprise through the exercise of its power creates a substantial hindrance to the free play of the market;

— to detect the existence of a dominant position not only on *a priori* consideration of the characteristics of the market but also through the manifestations of the enterprise's market power and the anticompetitive effects of such manifestations".

This approach which enables a general and coherent idea to be formed of the amount of competition which has to be generated is set out clearly in Paragraph 25 of the *Continental Can* judgment. Therefore, bearing in mind these objectives which have first to be attained, one can proceed to consider the particular features of this case.

(a) The degree of competition and the elasticity of the market

UBC's arguments in favour of the existence of a competitive market are the seasonal variations in price — which have been mentioned under I (a) — and low banana prices. The Commission acknowledges that prices remained the same, fell and then recovered to some extent. This situation is due to UBC's long-term policy of seeking to expand the total consumption of bananas, endeavouring in the long term to maximize profits by maximizing sales. By keeping prices low UBC has been able to discourage competitors from expanding or entering the market, or make it impossible for them to enter the market in a big way by discouraging them from attempting any high degree of vertical integration, which would be a costly investment, with the object of selling a relatively cheap product. UBC's behaviour, whatever the level of its prices, is the behaviour of an undertaking in a dominant position: discriminatory and unfairly high prices, refusal to sell/penalty; and as a complement of that the negative behaviour — the absence of any reaction — of the ripener/distributors who have to accept different and sometimes excessive prices and prove to be incapable of finding alternative solutions.

This latter point deserves to be considered. The distributor/ripeners are under the influence of a dominant position having wide-ranging effects:

— they must see that they have continuous supplies of bananas in the quantities which they need for resale;

— they must obtain supplies of high quality bananas;

— they must have "Chiquita" bananas.

The effects of this dominant position are all the more serious because the national markets are sealed off by the prohibition on the resale of green bananas.

The Commission then proceeds to refute the applicants' arguments. It makes first of all a number of detailed observations:

— the transportation even under refrigeration of ripe bananas is impossible over long distances;

— it is not only UBC which introduces unlabelled bananas onto the relevant market;

— the channels of distribution for bananas only have a distributive process comparable to that of the fruit trade in general downstream of importation; the function of the ripener and the process of ripening are typical of this particular trade;

— UBC does not reduce its price according to the requirement of the market;

— the risks of the banana trade are not incurred by the importer;

— UBC only defines its position — which in its view is not a dominant one — with reference to the world market.

The Commission then mentions some more important points which relate to the actual concept of a dominant position:

— the fact that there is still a certain degree of competition on the market does not mean that there can be no dominant position;

— a dominant position is the power to prevent effective competition or (and not "and") to control prices;

— comparative law allows dominant positions of 25 to 40% to be taken into consideration;

— the dominant position may not be uniform on the market which has to be taken into consideration; moreover it may decrease for a time without ceasing to exist from the moment when the principal competitors do not benefit therefrom.

With regard to the banana market it states:

— the banana is produced all the year round in sufficient quantities to meet demand;

— the elasticity of demand and the perishability of the product were taken into consideration;

— UBC's production accounts for only 10 to 12% of the economic value of its banana interests;

— the risk of having to make purchases in an emergency to alleviate a production shortage is offset by the geographic spread of the sources of supply;

— the remaining banana growers produce bananas but do not engage in marketing which is organized rationally by UBC and can produce short-term forecasts, followed up — if that is necessary — by immediate action by UBC which unloads its products three times each week.

— a supplier who only has 45% of the market may have a dominant position if the remaining 55% share thereof is divided up among a number of suppliers whose operations are widely spread over that market;

— the graph showing elasticity of demand is meaningless unless it covers a long period; and the inelasticity of demand has been proved by FAO;

— the fact that prices fluctuate is not proof that there is no dominant position if the dominant undertaking fixes these prices and if all the participators in the market have to accept the fall in such prices;

— there must be included in UBC's 45% share of the market sales by UBC to Scipio, even if UBC does not abuse its power *vis-à-vis* this group, and unlabelled bananas, because labelled and unlabelled bananas are interchangeable since the difference between them is not one of quality but of presentation and because the prohibition on the resale of green bananas applies to bananas whether a brand name is affixed to them or not (the difference in the percentage of the market share would moreover be minimal);

— the impact of advertising the "Chiquita" brand name would admit of a very sharp and computable difference in price between bananas bearing the label Chiquita, on the one hand, and bananas to which other brand names have been affixed and unlabelled bananas on the other hand.

This publicity which is summed up very well by the slogan "Never say simply banana for a Chiquita" gave Chiquita the leadership on the market although it had the same quality as the other bananas.

(b) UBC's vertical integration

The Commission then considers UBC's vertical integration which controls the quality and development of its product from growing to final distribution and forces its customers to submit to this control.

— In the first instance UBC controls its own sources of supply either because it owns very large plantations or because production is greater than market requirements, that is to say the volume of exports.

— UBC owns packaging factories and railways in the growing areas and also an infrastructure which even includes the manufacture of fertilizer.

— UBC has a large fleet of refrigerated vessels, a good number of which are modern; UBC owns some of them and charters others; UBC's 1971 annual report mentions the fact that it has built up for itself a very competitive transportation cost structure.

— UBC has developed banana varieties which are resistant to wind and disease and give a high yield.

— The fact that UBC is a conglomerate — which is not peculiar to this firm — means that it can have recourse to financial power which enables it, according to the commercial policy it has adopted, to offset the results of operations in certain sectors.

— All this has enabled UBC to dominate the market without blocking access to it; it is content to secure for itself a return based on optimum scale.

— Since this is accepted, the evidence, which attempts have been made to produce, of a level of profit which is sometimes low has no effect on the existence of a dominant position, because the level of the return obtained therefrom cannot be taken as a test for assessing the existence of such a position; as the *Continental Can* case held, what matters is that it is possible to eliminate competition on the market under consideration.

— Such vertical integration could only be called in question by the conversion of customers into competitors; the only customer of UBC large enough to play such a part is the Scipio group, which does not seem too keen to do so, as it benefits from the use of the "Chiquita" brand name; since UBC's customers derive benefit themselves from the integrated system already described they in any case have in practice to sell their bananas at a higher price than that of the competing suppliers.

3. The alleged behaviour amounting to an abuse in relation to excessive prices

The *applicants* by way of a preliminary observation give the substance of the argument which they are endeavouring to prove: since their prices are determined by market forces they can neither be unfair and excessive, nor moreover discriminatory (see Paragraph 4 below).

They lay emphasis first of all on the very low banana prices at all the levels forming the chain of distributors; this is illustrated by the example of a metric ton of bananas, which could be imported into Germany in 1956 for DM 697, the price whereof fell to DM 458

in 1973, the difference corresponding to a 50% reduction in real terms. The logical conclusion to be drawn from this is that the whole of the Commission's argument culminating in the conclusion that the applicants have abused a dominant position is wrong, because it is based on a letter of 10 December 1974 from UBC pointing out "that it sold bananas to Irish ripeners at prices allowing us a considerably smaller margin than in some other Member States" ... whereas this wording of this letter which was written before the end of the financial year had been denied on two different occasions by the applicants, and a document annexed to the application shows that the prices charged in Ireland produced a loss.

It follows from this that the Commission has based its decision on wrong assumptions although the correct facts were comunicated to it in time and that the extrapolation of the applicants' cost structure from the situation in Ireland (which only represents 1.6 % of the total volume of bananas imported during 1974), is arbitrary and reckless; there is therefore no justification for the Commission's conclusion (page 15 of the decision) that "the prices c.i.f. Dublin charged to Irish customers reflect ... UBC's costs for the bananas in question", just as it is unreasonable to take the prices and profits calculated for one year alone, without any measure of inquiry, and deduce from them the calculation for the following year.

Nor is it reasonable to decide that prices charged to customers of the market in question (other than the Scipio group) are considerably higher, sometimes by as much as 100 %, than the prices charged to customers in Ireland and accordingly produce a very substantial profit, because this conclusion wholly ignores the volatile character of banana prices and the fact that such a difference in price is not permanent.

Thus assuming — for the sake of argument — that the average Irish price in 1974 was equal to the applicants' cost price, their average profits in 1974 would have been in the order of:

— 14.42% in Germany and Denmark

— 21.60% in the Netherlands

— 23.55% in the BLEU

The same method of calculation applied to the year 1975 would give the following figures:

— 2.3% in Germany

— 6.9% in Denmark

— 1.5% in the Netherlands

— 8.4% in the BLEU

Yet, these figures, as reasonable as they may appear, are "still well above reality", since the prices which the applicants obtained on the market did not allow it to make any profit during the last five years, except for 1975 (see Annex I, annexed to the application).

The applicants protest again against that part of the Commission's decision (p. 16) which concludes that the price of Chiquita bananas compared with that of bananas to which no brand name has been affixed (the difference being on average of 30 to 40% amounts to an abuse and they show in detail that the precautions taken from cutting to sale to the consumer more than justify this difference since unbranded bananas are bananas being short of waste.

They do not either accept the Commission's assertion that the competing brand names are "of a quality comparable with Chiquita bananas". With reference to the applicants' Quality Control Manual which contains a listing of all possible quality factors, they show that there are real differences in quality between

"Chiquita" and the other brand names and that the price difference, averaging 7.4% between 1970 and 1974, is proportionate to these quality differences.

Finally to end this chapter on "excessive prices" UBC takes the view that "the order to reduce its prices by 15% (pages 16 and 19 of the decision) is unintelligible, unworkable and contradictory".

UBC does not understand why the Commission has taken German and Danish prices, especially as these prices vary from one week to another; there does not exist such a thing as a price for these two countries; it points out that compliance with the reduction order would cause it to sell below the prices of its competitors, that the reduction order to an average level is inconsistent with the order to reduce current prices, and moreover does not give a reference date fore the implementation of this decision and that it must be borne in mind that prices vary from one week to another.

Furthermore it calls attention to the fact that at the time when the decision was adopted, in December 1975, the Commission was unaware of the applicants' prices during the whole of 1975.

Moreover UBC takes the view that this order is outside the scope of Article 86, because, since the reduction by 15% far exceeds the difference in price between Chiquita bananas and bananas to which competing brand names have been affixed, it is no longer a decision which is individual in character but a decision affecting the whole banana trade.

Furthermore, the basic objective of competition policy being the preservation of the latter, price roll-backs and the interventionism which they entail should be resorted to only in exceptional cases and be reserved to markets where competition has totally ceased to function.

Monitoring the applicants' prices as provided for in the Commission's decision appears to be also unwarranted and contrary to Article 3 (1) of Regulation No 17/62 which certainly does not create an obligation to inform the Commission of particulars of the prices to be charged in the future. Moreover UBC does not understand why it is asked to give information of its prices without being required to submit its costs as well.

Finally, the applicants are unable to take seriously the Commissions's assertion, on page 17 of the decision, that "the imposition of unfair prices on customers in certain Member States may affect the quantities of Chiquita bananas traded between Member States since it encourages exports from Member States where such unfair prices are not imposed and vice versa". However in view of the sheer distance separating Ireland (the only country which would derive any benefit from fair prices) from the other countries, and the high perishability of bananas, such trading is inconceivable.

According to the *Commission* the tables giving the prices charged each week for sales at Rotterdam and Bremerhaven on the one hand, and in the different Member States concerned, on the other hand, show price differences of 20 and sometimes 30%. Now these figures have all come form UBC itself. That is proof of discriminatory and excessive prices.

The allegation of excessive prices is challenged by UBC's argument that it makes losses; it is only necessary, in this connexion, to show from UBC's annual reports, either that these "losses" do not exist and that profits are merely lower, or that they are small, although real and due to extraordinary items. At all events in 1975 the profits were again large after the unfavourable trend of 1974. The losses which UBC claims it made in Europe are clearly contradicted by the

letter of 10 December 1974 in which UBC informs the Commission that sales in Ireland in conditions which were more unfavourable than elsewhere had enabled it to make a "considerably smaller" profit margin. UBC's inconsistency is due to the fear of an investigation into allegations of dumping in Ireland and of a possible vague or dubious breakdown of UBC's losses, profits and internal transfers. In any event production costs as set out by UBC and in the FAO's studies disclose that the average prices of the product were inflated at the outset. The Commission infers from its study that UBC only made a small local loss in Germany in 1971 and in the rest of Europe made substantial profits.

The sequel was what UBC calls the "order to reduce prices" by 15% and which it regards as merely an indication — and not a mathematical formula — of the way of satisfying the requirements of the Treaty; in this sense the grounds of the contested decision on page 19 do not belong to the operative part thereof and are not intended to fix a uniform price. The approach of the Commission is therefore in accordance with the principle of minimum intervention in the exercise by undertakings of their normal commercial discretion. The Commission has not fixed a maximum "fair" price but has reserved the right, by giving an indication of this price, to initiate another administrative procedure in the future, if it thought it appropriate. UBC remains free to reduce its prices as it likes choosing the times and places.

Adjustments are possible; a rapid examination of costs on the Irish market which are particularly revealing, seems to prove this, because certain basic data for calculating production costs are not in keeping with those relating to the raw material for other markets. Now there is only one "delivered Rotterdam" price, which simplifies the calculation and proves that the different sales disclose in certain cases excessive prices.

As far as the amount of the price reduction suggested is concerned, UBC does not deny that the bananas which are not labelled Chiquita are sold at prices some 30 to 40% less than labelled Chiquita bananas. A difference in the presentation of the product could not justify such a price difference. There is therefore an excess price which has got to be eliminated under the supervision of the Commission in so far as it suggests a reduction of the price of branded bananas.

In this connexion UBC argues that the Commission's order that it should inform the Commission of its prices is *ultra vires* this institution. Now the Commission's power to order undertakings to give it information in order to ensure that the Treaty is observed is well established by the case-law of the Court (*Transocean Marine Paints Association* v *Commission* [1974] ECR 1063).

With reference to the danger that the Commission might use this information as a means of inducing the applicants to concert its banana prices with the Commission, it is only necessary to state that the Commission does not intend to take over UBC's responsibilities in the matter of fixing prices. In fact UBC remains free to fix its prices in accordance with its costs.

What therefore is the effect of unfair prices on trade between Member States?

UBC rarely charged the same prices for bananas going to two different Member States. These discriminatory and unfair prices charged by UBC encourage exports from Member States, for which it charged the lowest prices, to Member States where it charged the highest prices. This movement was restricted by the prohibition on the sale of green bananas. UBC cannot make use of this

prohibition which it has imposed to argue that the effect of its unfair prices on trade between Member States was not appreciable when in practice the said prices quite obviously had an effect on this trade.

The *applicants* in their reply submit that they are unable to control prices because they do not control their own supply since they are at one and the same time confronted with an "industrial fruit" and subject to the same restrictions as a farmer. The demand, which is relatively inelastic over the long term, is not inelastic in the short term and cannot be controlled.

It is therefore most unusual to impose a price reduction upon them based on data which are out of date or have not been produced by the applicants. And it is strange to continue to base one's argument on a single sentence in the letter of 10 December 1974 relating to prices charged in Ireland; it is a fact that an accountant's breakdown of the costs would prove that UBC's sales in Ireland showed a substantial loss; that an analysis of the annexes to the defence shows that the Commission's calculations are based on mere estimates which, as such, would prove that the order to reduce prices by 15% would in fact convert the profits in certain cases into losses! Moreover the so-called difference of price between bananas to which brand names have been affixed and those which are unlabelled is not from 30 to 40% but was in the final analysis 8% in 1975, owing to an error in selecting the reference price! And these differences are differences of quality relating also to the appearance as well as to the edible nature of the product as has been admitted in Community texts relating to the common organization of the market in fruit and vegetables. The price/quality relationship is therefore reasonable and the Commission's assessment — one looks in vain for the criteria — arbitrary. Finally the price/quality relationship of a by-product is not a good indicator of the economic value of a quality product; in order to understand the truth of this assertion it is only necessary to consider as an example wines.

Finally, in order to understand Article 3 (a) of the contested decision it must be read in the light of the press conference held by the Commissioner who was responsible. This article is indeed an order, and it is useless, for the purpose of a legal defence, to attempt from now on to interpret it otherwise and to insist on treating it as a mere indicator or a suggestion.

In its rejoinder, the *Commission* calls attention to the fact that unlike its principal competitors UBC charges different prices from week to week and gives its distributor/ripeners relatively constant profit margins. But these prices, like the quantities supplied, are imposed upon them. A certain amount is ordered and the quantity delivered is usually lower than the quantity ordered. The "local conditions" referred to do not prevent a weekly price per Member State being fixed. This is the essence of the system which reveals UBC's power and which emerges from the documents on the Court's file, especially from those produced by UBC itself. The Commission calls attention again to the three reasons which led it to adopt the decision:

— f.o.r. prices at the ports of Bremerhaven and Rotterdam are wide and cannot be justified objectively;

— the prices for bananas unloaded at Rotterdam to be sold c.i.f. Dublin reflect UBC's costs;

— the prices charged to ripeners of other Member States are higher, sometimes by as much as 100%, than these prices in Ireland.

The Commission was obliged to work on these data since most of UBC's financial records are outside the Community or have not been produced.

Can Article 86 be applied to agricultural commodities? Article 86 applies from the moment that there is a dominant position (even if this dominant position is not used in such a way that the prices charged cannot be paid). The *Suiker Unie* v *Commission* case, (Joined Cases 40 to 49/73 ERC 1663) proves that Article 86 applies to those products listed in Annex II to the Treaty and which are the subject-matter of an agricultural regulation. Finally the very fact that Regulation No 26/62 of 20 April 1962 (Official Journal, English Special Edition, 1959-1962 p. 129 *et seq.*), only grants partial exemption of agricultural matters from Article 85 indicates that Article 86 applies to all agricultural products. UBC, appreciating the objective nature of the criticisms made of its price system, prefers to state that the tests of competition law do not apply to bananas or to any other agricultural commodity. However there may be a situation in the field of agriculture amounting to a monopoly just as there may be in any field where prices fluctuate.

The Commission then answers three objections made by UBC:

— if the prices used are unweighted the reason in that the figures supplied by UBC were unweighted;

— the prices used are not peak prices but weekly prices which were supplied by UBC (Annex V);

— UBC's exhibit No 20 giving its prices from 1969 to 1974 adjusted by reference to cost of living indices does not take into account the very substantial costs savings during the same period from which customers have never derived any benefit.

The Commission has never attempted to impose or justify a uniform price either for a time or at the place of final distribution. When all the customers benefit from the same f.o.r. price and from the right to resell green bananas, there will in fact be differences between them which however will be objectively justified.

The Commission then repeats that UBC occupies a dominant position on a non-competitive market, yet is not subject to any price control, even if the unfair prices are taken as evidence that it has exploited its dominant position. A "fair" price does not mean a "fixed" price; if the prices had been fair it is difficult to se why UBC went out of its way to prevent diversion of trade and this can only be explained by the wish to retain the benefit of prices which are too high. And it is the difference between the prices charged which has drawn attention to the excessive nature, first of some and later of all of them.

The evidence based on the prices in Ireland which from now on are presumed to have produced a loss remains valid. It is clear from several documents that this price covers not only the purchase price but "an allocation of general administrative expenses" and "reflects" in addition transport costs. And the argument based on a possible loss in 1974 reflects exceptional freight costs. The use made of the Irish prices therefore remains valid.

The profits made by UBC and the profit margins disclosed by Annex VII, which are in addition to the profits made in Latin America, are revealing — but only revealing — because the Court does not have in its possession all the relevant information in this field; it is for UBC to supply the data. The difference between the price of branded and unbranded bananas (30 to 40% of the price of the former), even though, as

UBC itself admits, the difference between them is due to their presentation and not to their quality, is evidence of an unfair price. The figures for 1974 are now known and enable the following table to be compiled, which completes Annex V to the defence:

Price in dollars per box	BLEU	The Netherlands	Germany (f.o.r.)	Denmark
Chiquita	5.14	5.06	4.77	4.76
Unbranded	4.16	3.82	3.86	3.78
% difference (% of the price of unbranded bananas)	23.5%	32.5%	23.5%	26%

These are price differences which consumers are charged without any justification. And the criteria for quality cover just the non-edible part of the banana. This explains why the economic value of the Chiquita banana to which a brand name is attached has been exaggerated.

4. The alleged behaviour amounting to an abuse in relation to discriminatory prices

The *applicants* do not admit that they have abused an alleged dominant position "by charging differing prices for equivalent transactions without objective justification". They show with the help of graphs that on average prices between the various markets do not differ to any great extent, since the average difference in the prices for "Chiquita" bananas between the markets concerned only amounted to 5% in 1975; whereas the Commission based its price comparisons on the highest and lowest prices.

Now even these slightly differing prices are objectively justified, because unlike manufactured products the prices of agricultural products are determined by market forces. If a farmer puts his products on a market, to which regulations do not yet apply, and which is therefore wholly governed by the law of supply and demand, he has no other option, in so far his product is perishable and subject to seasonal variations and fluctuations of supply and demand, but to sell the latter at the price which he can get from a purchaser without taking into account the relation which this price bears to his costs; in other words, prices at every level of the distribution chain are worked back from the anticipated price the consumer is willing to pay at a given moment of time, and in the banana trade the prices of green bananas are similarly worked back from the market (see graphs on p. 125 and 126 of the application).

The pricing policy developed by UBC is governed by the special features of the banana market: prices in any given week are calculated so as to reflect as much as possible the anticipated yellow market price in the following week.

Thanks to its organization, to that of most of its important customers on a national scale with branches throughout the country, UBC quotes a single weekly price — not for each local wholesale market — but for each national market.

These prices are certainly not fixed as a result of a capricious and unilateral decision but are quoted by Rotterdam management after discussions and negotiations between the applicants' local representatives and the ripener/distributors concerned.

These prices are not discriminatory — as the Commission maintains — since they take into account — which they must do — the different competitive context in which ripener/distributors in the different countries are operating; they find their "objective justification" in the average anticipated market price.

If the applicants were to quote uniform weekly prices for all the ripener/distributors in Germany, Belgium/Luxembourg, the Netherlands, Denmark and Ireland, as the Commission has ordered them to do, such prices would be bound to be discriminatory and arbitrary being unrelated to the market, whereas price differences are in fact due to fluctuating market factors: weather, different availability of seasonal competing fruit, consumer behaviour, holidays, strikes, Government measures, currency denominations, etc. . . .

And when the Commission maintains that the applicants' pricing in fact puts distributor/ripeners at a competitive disadvantage, since they cannot sell their bananas while still green, it totally fails to understand the function of the ripener/distributor which is primarily to use his ripening rooms to satisfy a local demand and overlooks the perishable nature of bananas which do not lend themselves to speculative transnational trading.

According to the *Commission's* defence the prices are not only unfair *in globo* but the impact of their geographic application is also inequitable, that is to say they are discriminatory.

The Commission asserts that the price differences between the various national markets are sufficient to constitute a violation of Article 86 (c), because any discrimination which is sufficient to cause a competitive disadvantage is a violation of the Treaty.

It is in fact clear that UBC was, in substance, selling the same product in the same places, on the same terms and in the same circumstances, and charging different prices according to the destination of the goods and the nationality of the purchasers. The fact that UBC charged distributor/ripeners of each Member State the highest price which the market of that State could bear is not a reason justifying the application of different prices.

This price discrimination puts distributor/ripeners at a competitive disadvantage compared with other ripeners and UBC. A dominant undertaking is not free to charge discriminatory prices while prohibiting the resale of green bananas, because this distorts competition. These two courses of conduct to which exception is taken cannot therefore be severed for the purpose of determining their scope.

The *applicants* in their reply submit that the abuse referred to by the Commission is that UBC, both at Rotterdam and Bremerhaven, charges its ripener/distributors in the Member States concerned different prices for Chiquita bananas for equivalent transactions without any objective justification (p. 14 of the decision). The Commission's view in this connexion is clearly stated on page 99 of its defence.

"The Commission considers that UBC is obliged to regard as 'equivalent transactions' (Article 86) the sales which it makes in Rotterdam and Bremerhaven and that UBC is *not* 'entitled to avail itself' of the differing levels of retail prices in the different national markets from time to time".

All the consumers on the various markets have therefore been discriminated against including the Irish.

It is important to understand what is really involved in the Commission's argument that the applicants have committed an abuse in this respect. What it amounts to is that it is the duty of an undertaking in a dominant position to create a single market out of the existing national markets and that if it fails to act accordingly it is guilty of an abuse. That cannot be right. If the Commission objects to the fact that bananas command different prices in different countries, that the markets for bananas remain national in scope or even regional and respond to their own internal characteristics and supply/demand situations it is for the Commission itself to take the measures which are necessary and appropriate to create a single market. Geography has not been harmonized by the mere fact that there is a Community and this is shown by the appearance of certain seasonal fruits or fruits which are particularly sensitive to climate. The applicants did not create partitioned national markets for bananas and it could not seriously be contended that its green banana clause is responsible for their continuing partitioning. Even if the applicants had a dominant position they would not abuse it by taking those markets as they find them, setting, as they do, their prices for each by reference to prices settled by unrestricted competition in the market for the ripened product; each of the different levels of the banana trade is moreover affected, to a certain extent, by the volume of the demand and choices offered by the supply. Expressions such as "equivalent transactions" or "without objective justification" cannot obscure this position. Either the transactions having regard to their total economic context (see application pages 133 and 134) are not "equivalent transactions", or the differing supply/demand situations in the various countries concerned, and the other characteristics of their markets, supply an objective justification for different prices. It would certainly be too narrow a view in the case of a product such as bananas, to treat transactions, as the Commission contends, as equivalent merely because the purchasers are in the same category and that the supplier's costs of supplying are the same, or to regard the supplier's costs as determinative of an objective justification. This is particularly so in view of the fact that with respect to an agricultural product like bananas, prices have to be taken from the market regardless of whether costs are covered or not.

In connexion with the allegation of discriminatory prices, it is important to observe that the Commission now disclaims in its defence any intention of requiring the applicants to lay down a uniform price.

"The Commission, as already explained (p. 90) did not require UBC to lay down a 'uniform' ... price, nor to prohibit UBC from charging different prices if there is objective justification for doing so, e.g. reducing its price in any area where it was subject to price competition." (p. 100)

This statement in the defence is important from two points of view. In the first place it is one of many recognitions in the defence that the market in bananas is competitive. Secondly it completely destroys the Commission's case on discriminatory prices. Let it be supposed that the supply/demand situation in Denmark becomes unbalanced, while the market in Germany, in the BLEU and in the Netherlands remain relatively firm. The consequence will be that wholesale prices for bananas in Denmark will fall. That will reflect back on green banana prices and the applicants' competitors, free to charge different prices, will

follow the market down. The applicants also will be free to do so in order to meet that competition. There will therefore be different prices for the applicants' bananas sold in Denmark and those sold in the other national markets, but there will be "objective justification" for the difference. Precisely the same situation will obtain in every national market at any given time except in that which happens to be the highest priced one. In each market the applicants' competitors will price according to market conditions and the applicants will be entitled to reduce their prices below those they charge in the highest price market because of the price competition of their competitors. Accordingly the situation will be precisely as now obtains. The applicants will be charging different prices in each market to the same extent as they do now — and with objective justification. There is no difference in the objective justification in a case where the applicants are meeting the price competition of competitors who are responding to market conditions and in a case where the applicants are themselves directly responding to those conditions.

Accordingly it follows from the Commission's statement at page 100 of the defence:

(1) that the applicants are not abusing a dominant position by charging different prices to different national markets;

(2) that the Commission's decision would do nothing to alter or terminate the situation. The Commission's decision would only do so if it required the applicants to charge a uniform price, an intention which the Commission has disclaimed.

The fact of the matter is that if and when the various countries constitute a single market for bananas (but only then) different prices will disappear. But so long as the various markets remain national or regional in scope and character and respond to their individual supply/demand situations, differences in prices between them cannot avoid emerging. In such a situation, as the Commission now recognizes, it would be wholly unrealistic and impracticable to require the applicants to charge a uniform price. If it were to remain competitive in all the national markets, that uniform price would necessarily have to be set at the level which would enable sales to be made in whichever of the national markets happened to be for the time being the lowest priced. This situation could only be ruinous for the applicants. But failure to adopt the lowest price as the uniform price would have consequences equally or more disastrous. In those markets where the competitive price was below the uniform price, the applicants would be bound to lose sales; the could never effectively plan the volume of their shipment for a particular market and they would be likely to incur substantial wastage of their perishable product.

The *Commission* in its rejoinder repeats that according to the facts of this case which it has already stated the discriminatory nature of the prices has been the evidence which has made it possible for them to be regarded as excessive. F.o.r. prices from the ports are different according to the destination of the bananas; UBC is aware of this discrimination and is determined to ward off the danger of a reaction by the wholesalers by means of the clause prohibiting the resale of green bananas (see paragraph 5 below). The search for a uniform price is unnecessary if objective cirumstances explain the price differences. However in a common market the *a priori* distinction according to the Member State, which is the destination, is not an objective

circumstance. A local price war could be one, and so could holidays, weather, strikes, availability of other fruits. But this kind of circumstance is entirely different from a permanent general policy based on unit prices fixed according to each Member State and strengthened by the partitioning brought about by the clause prohibiting the resale of green bananas.

UBC states that it takes what the market "can bear". The market price is a combination of forces only one of which is controlled by UBC; moreover discrimination can only be unilateral. It is not clear in such a case why UBC should partition the market ... except for the purposes of obtaining a maximum price in each of the domestic markets thus constituted or reconstituted.

Finally UBC stated that the price differences are not large. The figures supplied in the defence (pages 76 to 77 and the annexes) and by UBC itself show that the differences sometimes exceeded 30%. The case-law of the Court *(Suiker Unie* [1975] ECR 1663, paragraphs 499-528) accepted much smaller differences as being discriminatory. The Commission explains its method of calculation and its conversions of prices designed to enable comparable things to be compared.

5. The alleged behaviour amounting to an abuse in relation to sales conditions for green bananas

The *applicants* repeat that the Commission has ordered them to "inform all their distributor/ripeners in Germany, Denmark, Ireland, the Netherlands and the BLEU 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".

The applicants take the view that they are unable to comply with this order "because it is unreasonable and unwarranted", since the contract which they concluded with the ripener/distributors is that they ripen the bananas first and then distribute the ripened product.

Furthermore the clause only applies to green bananas bearing the trade name "Chiquita" and not to unlabelled green bananas. In addition they told the Commission that they were willing to exempt sales between the "Chiquita" banana ripeners from the prohibition on sales.

However that is as far as the applicants can go, because, if the restrictive clause were deleted, they would no longer be able to guarantee the quality of the bananas to the consumer.

The green banana is a semi-finished product. It must be ripened in accordance with rules of an advanced technicality so that it becomes a quality product for the consumer.

The applicants do not have their own ripening installations (except Spiers in Belgium representing 3% of the ripening capacity in the relevant market) and depend on outsiders to maintain top quality throughout the all important ripening stage.

Since the boxing of fruits takes place in the tropics, the selection and labelling is also done there and the quality of the "Chiquita" fruit is determined overseas. Hence the applicants' legitimate interest in making sure that their bananas are properly ripened by expert ripeners complying with UBC's high quality standards.

The Commission's statement (p. 4 of the decision) that bananas can be stored temporarily is wrong. The fact that they are highly perishable means that they must be despatched as quickly as possible by the best available means of

transportation to a ripening installation as soon as they are taken out of the refrigerated holds of a vessel, and the ripening installation must be as close as possible to the consumers. This explains why the ripening installations are spread throughout the whole of the relevant market and why their capacity is proportionate to the population of the area which they cover.

Virtually all ripeners are fruit wholesalers and bananas account for 10 to 20% of the total volume of their sales and their job is to supply a local market having a radius not exceeding 30 to 50 kilometres.

Trade in green bananas, if any, is marginal at best.

Trading in green bananas is not financially worthwhile. It is in fact difficult to predict the price differences between the countries concerned since prices fluctuate from one week to another; furthermore, the market mechanisms generally make this impossible, as potential customers want a continuous supply and the speculator by definition only sells when prices are sufficiently attractive.

Accordingly this clause is necessary to make sure that the high quality of the green fruit will not be lost during the various and in particular the last stages of the long road from plantation to consumer, but — in the mind of the applicants and having regard to the way they apply it in practice — was never intended to prevent or restrict competition and never had that effect.

Furthermore, assuming, *without making any admission to that effect*, that the clause at issue did affect competition, it has been duly notified to the Commission which should have considered whether it met the conditions of exemption under Article 85 (3). Now this is what it should have done, since a practice qualifying for exemption under Article 85 (3) cannot be regarded as an abuse within the meaning of Article 86.

The *Commission* in its defence develops two arguments. On the one hand it alleges behaviour amounting to an abuse within the meaning of Article 86 of the EEC Treaty and, on the other hand, it endeavours to reject the parallel procedural objection based on the possible application of Article 85.

As far as concerns the behaviour amounting to an abuse it points out that this prohibition on the sale of green bananas forms the basis on which and the framework within which the three other abuses were committed by UBC.

This prohibition made it possible for UBC to charge discriminatory and excessive prices on the different national markets by keeping the national markets securely partitioned and, for example, caused the refusal to supply Th. Olesen to be more serious than if Olesen had been able to buy "Chiquita" bananas while still green from other UBC ripeners.

The prohibition on the resale of green bananas, as worded, applied both to labelled and unlabelled bananas and to sales to ripeners of Chiquita bananas.

UBC does not deny that it sent out a circular letter modifying the wording of the said clause authorizing Chiquita ripeners to sell green bananas to other Chiquita ripeners only after the Commission's decision had been notified to it.

It is perfectly natural for a ripener to ripen bananas. But it is a restraint on competition for him to contract that he will not resell them until he has ripened them and that he will confine himself to selling only to retailers. This is true even though the perishable nature of bananas limits the extent to which they can be resold in practice.

In general a supplier of goods may not limit the freedom of a purchaser to do as he may think best with goods which he has bought.

Any restriction on that freedom is a restriction on competition which, if it otherwise falls under the Treaty rules, must be justified by special reasons. [1] Trade in UBC bananas could therefore only be carried on through UBC's distributive network, and this is regarded as a restriction of competition. [2]

Furthermore this clause prevented intra-Community sales of green bananas, thereby partitioning the market and maintaining between the various domestic markets price differences of which UBC took advantage.

UBC is entitled to have a system which reasonably ensures the quality of its labelled bananas, provided that it does not thereby restrict competition more than is necessary for the attainment of this objective.

Such a prohibition prevents ripeners from expanding their "rôle (which) is to supply the local market"; moreover they could easily expand this rôle since they all buy in the same two ports.

The fact that UBC's sales conditions originally included an export prohibition can be explained only by its intention to forbid ripeners to resell across the frontiers of the Member States where UBC from time to time was charging higher prices.

With regard to the possible exemption of the clause under Article 85 (3) of the EEC Treaty the Commission repeats that UBC pointed out that, since the clause at issue was notified to the Commission, the latter should have examined it to see whether it complied with the conditions of exemption in Article 85 (3). The Commission, however, calls attention to the fact that the clause as worded prohibited all resale of green bananas, even to "Chiquita" ripeners, and even if the bananas were unlabelled (except the Danish clause). Therefore as worded the clause could not be regarded as "indispensable" within the meaning of Article 85 (3) to ensure the quality standards of "Chiquita" bananas.

The fact that after the Commission's decision the clause was modified by UBC does not of course affect the validity of the Commission's ruling that the clause as it was in fact worded infringed Article 86.

If UBC wishes to seek a negative clearance or an exemption under Article 85 (3) for the clause as modified no doubt it will so inform the Commission, which alone has power to give a clearance, as this question does not have to be decided in those proceedings.

The *applicants* in their reply stress that the Commission maintains that it is the clause relating to green bananas which proves the use which the applicants have made of their monopoly power and, consequently, proves that the applicants have this monopoly power.

This argument is "absurd". It has never been argued in economic theory that a clause in conditions of sale can be regarded as an indication of monopoly power. Furthermore a condition of sale aiming solely at ensuring the quality of the ripening, which has never been applied and has never been the subject-matter of any complaint, can scarcely prove that monopoly power has been used.

Similarly, the Commission refers to the recommendation not to export made by the applicants in 1967; this was a temporary measure adopted because the two varieties which were then on the market require different ripening techniques. This clause never amounted to an absolute prohibition and has never been put into writing with reference to the two typical markets: Germany

1 — "Suiker Unie" and Others v Commission [1975] ECR 1663 (paragraph 173).

2 — Frubo v Commission [1975] ECR 563.

(because of its volume and low prices) and Ireland (because of the low level of prices). This clause was not printed on the invoices. When the applicants on 30 January 1974 by a circular letter gave notice that the prohibition did not apply to Chiquita ripeners nobody was surprised ... any more than the Commission had been during the preceding seven years. This "prohibition", aiming at a high standard of ripening, has moreover never had any effect on the competitive position of such a fruit which must be ripened quickly and the ripening whereof is the consideration for the profit margin of the ripener/purchaser of UBC before he becomes a distributor of ripened fruits outside the UBC block. Some speculation on low priced fruits would not justify the existence of a market — between ripeners — for green bananas in the economic context of the market for this fruit. Moreover there would be no effect on trade between Member States because the Commission — upon which the onus of proof lies — does not offer to adduce evidence proving that there had in fact been trade in green bananas between Member States at this stage of the commercial cycle; transit or transportation do not amount to a sale.

Finally, if the Commission, which had been duly notified pursuant to Article 85 of the clause relating to the resale of green bananas had to act, it has made UBC's situation worse by its failure to act since 1968 (the date when the clause was notified by UBC) and especially since 1971 (the date it was examined by the Commission). All the consequences of this examination — which turned out to be negative — have to be considered of its own by the Commission.

The language used in the Belgian, Dutch and Danish conditions (which are the only written conditions) is such that, according to the ordinary use of language, the requirement imposed relates only to vertical sales down the distributive chain. If there were any doubt about the meaning of the word, it would be resolved by a consideration of the context.

The Commission therefore is not basing itself on the clause "as worded" but upon attributing to the clause a meaning which, as a matter of language, it is not capable of bearing. If the Commission wishes to establish that the clause has such a meaning that can only be done by producing evidence that the clause, notwithstanding its terms, was understood by Chiquita ripeners to have the meaning attributed to it. The Commission has produced no such evidence: it has merely asserted the fact (p. 62).

The whole superstructure of the Commission's case on the green banana clause, upon which it relies as the foundation of all the applicants' alleged abuses, can then be seen to rest upon the simple assertion by the Commission of a meaning for the clause which neither its language will bear nor which has the support of evidence. The Commission accepts (p. 70) that the applicants "are in principle entitled to have a system which reasonably ensures the quality of their labelled bananas provided it does not restrict competition more than is necessary in order to do so." The Commission has not shown that the applicants' sales conditions exceed that limitation.

The *Commission* repeats and develops in its rejoinder the arguments put forward in its defence and points out that the prohibition was aimed at horizontal as well as vertical sales; the only proof of this is the express wording of the contracts and the way it was understood or explained by UBC (letter of 11 December 1974, Annex III (i) and of 13 February 1975, Annex III (i) to the defence); it appears that this clause has been strictly complied with. The prohibition of horizontal sales clearly prevented exports, even if the prohibition of resale was not strictly a prohibition on exports.

If the clause had only been drafted because UBC was anxious to maintain a high ripening standard, it is difficult to see why this quality standard has varied so much from one country to another that it was necessary to prevent bananas circulating. The control which UBC exercises over all its ripeners destroys this argument.

The reason why the Commission did not act earlier, although it had known of this clause for some time, is that it did not make up its mind until after it had considered the combined effect of the prohibition of the said clause and the discriminatory prices.

The Commission draws attention to various facts:

— there could be some horizontal trading in green bananas more especially as there are some horizontal sales of yellow bananas;

— the prohibition on sale applied to unlabelled as well as to labelled bananas;

— a comparison with the systems introduced by UBC's competitors is scarcely relevant since the organization of sales is entirely different;

— UBC's reticence with regard to trading in green bananas, supposedly out of respect for the interests of local retailers, can only be justified in a market where the quantities offered are intentionally limited;

— the argument cannot be put forward that it is in the interests of ripeners to resell their ripened bananas at a profit of 40% of the f.o.r. price if there are differences which are sometimes much higher between the f.o.r. prices of green bananas according to the Member States to which they are consigned; moreover how could these ripeners who only receive limited quantities dream of speculating in green bananas which they are not free to dispose of?

— any speculation in green bananas could be carried out before they are delivered to the ripeners' installations and would therefore be more profitable than one imagines;

— the possible resale of green bananas would undermine UBC's dominant position all the more successfully because it is easier to carry and conserve them than yellow bananas, the horizontal sale of which is not prohibited and for a very good reason.

The Commission then mentions again the interferences with intra-Community trade: trade between ripeners of the different Member States, the opportunity which ripeners have to build new installations abroad, the transportation of the product are called in question. These interferences are all the easier to bring about because UBC only supplies limited quantities of its product. There is not only interference with the transit trade; there is a restriction on the destination of consumer products and on the choice of wholesalers.

The Commission emphasizes that it first considered the possible application of Article 85 (3) when it took account of the clause as worded and then as amended. The clause in its original version was not satisfactory having regard to Article 85 (1) & (2). The disputed decision refers to this clause in its original from. Since then UBC has "clarified" its prohibition on resale. The clause in its new form cannot be severed from the other parts of the file; since it applies to 40% of the bananas sold in the whole of the Community, it unquestionably relates to "a substantial part of the products in question", and comes within Community competition law.

6. UBC's refusal to supply alleged to be conduct amounting to an abuse of its dominant position

The *applicants* claim that in so far as the Commission held that UBC had abused its alleged dominant position by

stopping supplies of "Chiquita" bananas to Th. Olesen, a Danish ripener/distributor, its decision is vitiated by errors of fact and law.

The applicants maintain that their distribution policy is more liberal than that of their competitors some of whom work in the relevant market through exclusive distributors.

The applicants' ripeners are not only free to sell products bearing competing brand names but also to advertise these products. If they happen to disagree with the price quoted they may reduce or cancel their orders and obtain supplies elsewhere. They can determine their relationship with UBC at any time.

Even in the very limited number of cases where the applicants have lent money to ripeners, such loans had "no strings attached" in that none of the stipulations prevented the ripener from changing supplier if he thought it advisable to do so.

It is in this general context that supplies to Th. Olesen were terminated subject to this observation that the said termination was the first and only time that the applicants ever severed a business relationship in Europe over a period of operations of more than 50 years. Early in 1967 the "Chiquita" brand name was introduced on the Danish market. In the spring of 1967 Th. Olesen merged with another "Chiquita" ripener: A. W. Kirkebye, turning it into Chiquita's most important ripener in Denmark. UBC however continued to treat its eight Danish ripeners alike notwithstanding strong pressure by Th. Olesen insisting on receiving special conditions (a discount, credit) and on a reduction of the number of ripeners.

This may explain why Th. Olesen's attitude towards the applicants has from the start given rise to more problems than the applicants experienced with other ripeners, for example in connexion with the use of a brand name or late payments.

It is probable that the same facts also explain why in October 1969 Th. Olesen became Standard Fruit's exclusive importer/distributor, thus regaining the importer's preponderant status which the applicants had refused to endorse.

In 1973 Standard Fruit declared war against UBC at its press conference in Hamburg by announcing that the "Dole" banana was going to replace the "Chiquita" banana in all the countries of the world.

Consequently Th. Olesen sold less and less Chiquita bananas deliberately pushing the sale of "Dole" bananas. Further Th. Olesen did not take the same amount of trouble when ripening the applicants' bananas as it did when ripening bananas bearing other brand names.

The economic realities point to the fact that Th. Olesen and Standard Fruit were in the same boat working happily together towards the success of the "Dole" brand to the detriment of the "Chiquita" brand. It appears to have been proved that Th. Olesen had chosen for a greater loyalty commitment to Dole, not just for financial reasons but also because it was discontented with the commercial policy adopted by UBC which had opened up the market to the disadvantage of Olesen. The dispute which had slowly developed, and was punctuated by very many conversations and discussions, ended in relations being broken off in a way which was anything but sudden and unexpected. Therefore UBC takes the view that its decision not to supply Olesen any longer was fully justified by this conflict of interests.

The applicants are of the opinion that the damages allegedly suffered by Th. Olesen, are minimal. In fact Olesen could replace "Chiquita" bananas by all the "Dole" bananas it wanted. Further it has been proved that after the termin-

ation of supplies by UBC Olesen increased its staff.

This measure which was justified in the circumstances is not an abuse, since the refusal to supply does not affect effective competition on the Danish market. In fact Olesen is only one among a large number of Danish ripeners; furthermore in Denmark (as in other countries) several important ripeners — their names can be mentioned — are not customers of UBC, which goes to show that competitors did have adequate access to the essential ripening facilities.

In fact in Denmark a substantial overcapacity exists. In fact the effect of UBC's decision to terminate supplies to Th. Olesen combined with the loss — which the latter suffered at that time — of København Frugtauktioner as a customer, far from being the distortion of competitions was that the Danish market experienced fierce competition which brought about a fall of 40% in two weeks at the end of 1974 in the retail price of Chiquita bananas.

Finally the refusal to sell to Th. Olesen did not have an appreciable effect on trade between Member States, since the "Dole" bananas only pass through Germany ex Hamburg, just as the "Chiquita" bananas do ex Bremerhaven; in fact this is not intra-Community trade but in fact trade between Denmark and the third countries where the bananas come from.

Finally on 11 February 1975 — before the Commission had officially initiated its procedure — a compromise was agreed between Th. Olesen, which withdrew its complaint, and UBC, which resumed the delivery of supplies to it.

According to the *Commission* the fourth abuse of the dominant position is the refusal to supply bananas to Th. Olesen. Neither the fact that Olesen took part in an advertising campaign for a competitor of UBC, nor any of the other arguments put forward justify UBC's refusal to supply Th. Olesen, a long standing regular customer. In fact it is essential, in order to guarantee the independence of small and medium sized undertakings engaging in distribution in their dealings with undertakings in a dominant position, that they are shielded from the threat of a cutting off of supplies which amounts to an abuse. That independence involves the right to give preference to the products of competitors of the undertaking in the dominant position. It is this right which UBC violated by refusing Olesen further supplies. Consequently this violation is an infringement of Article 86.

The refusal to supply Olesen has affected trade between Member States, since Olesen has been forced to purchase bananas from another supplier, and this has interfered with the natural flow of trade and moreover has prevented Olesen from developing its business in the other Member States.

UBC replies that the Commission's argument on this aspect is vitiated from the start by a fundamental error in its reasoning. In its defence (p. 105) does it not say that "The question is whether there was sufficient legal justification for *an otherwise illegal act*"? Now there is nothing in Article 86 which raises any presumption that a refusal by an undertaking in a dominant position to supply a particular customer is an abuse of that dominant position. The most that can be said is that a refusal to supply may be tantamount to an abuse. It is for the Commission to establish affirmatively that, in the particular circumstances of a specific case, the refusal to supply does amount to an abuse and has the further quality of effecting trade between Member States to a perceptible extent.

The applicants submit that it is only in exceptional cases, where the refusal to supply has a clear anti-competitive effect, that a refusal to supply should be

characterized as an abuse of a dominant position. Moreover, as between a supplier and a distributor very great caution should be exercised in stigmatizing a refusal to supply as an abuse. It is in the interest of a supplier such as the applicants to obtain the reasonable co-operation of the ripener/distributors to whom it sells so as to maintain or increase the volume of its supplies to the ultimate consumers and to secure that they reach these consumers in the best possible condition. The existence of a dominant position cannot disentitle an undertaking in that position from having its own *reasonable* commercial interests taken into account when its conduct is under scrutiny, and it must be accorded reasonable latitude to take such steps as it deems appropriate to protect them. The applicants did not act arbitrarily or unreasonably in all the circumstances in withdrawing supplies from Th. Olesen.

It must be noted that in law the refusal to supply as such is only punished under French law and that in the Commercial Solvents case (Joined Cases 6-7/73) the Court did not find that this was an abuse. Only the effect on competition must be taken into account. Moreover the Commission has not proved that Th. Olesen suffered loss and has not found that it showed special loyalty to other brand names, whereas UBC allows all its customers to have other suppliers. Olesen, a customer who was moreover difficult, sacrificed the sale of Chiquita bananas to other sales and, it is curious to note, the refusal to supply by UBC was able to open up the Danish market to competition. Olesen in this matter has only lost one customer and has not experienced any decline in its business activity. If the destination of the goods and not the nationality of the vendor are taken into consideration then interstate trade did not suffer as a result of the withdrawal. Thus the Commission has not protected competition but a competitor ... and indirectly its new ... temporary supplier.

The *Commission* in its rejoinder submits that the refusal to supply by an undertaking in a dominant position is normally an abuse. In this case no "strong objective justification" has been put forward to justify the refusal to supply Olesen; moreover, under Article 86 (a), (c) and (d), such a requirement is usual in order to justify the termination of commercial relations on the assumption that this provision applies; in fact, since mere discrimination is prohibited under the Treaty, *a fortiori*, refusal to supply is also forbidden.

Moreover if Olesen had not complained to the Commission UBC would have possibly been able to interfere with the freedom of other ripeners to advertise other brand names; UBC's acts *vis-à-vis* Olesen have been compared by the Danish Monopoly Authority with an incident which occurred in 1973 when UBC terminated its supplies to another Danish ripener/distributor København Frugtauktioner which had taken part in a publicity campaign for the brand name Onkel Tuka belonging to the Alba group. This shows that such a refusal of supplies was in fact UBC's policy and Olesen was not singled out specially because of the other acts for which it was blamed and in particular for having made its ripening facilities available to competitors. Moreover it was after the termination of supplies that UBC endeavoured to justify in this way the punishment meted out to Olesen. In any case it is not for UBC to deny its competitors access to ripening facilities; and it is not the fact that these acts have not been given the force of law by being incorporated in contractual clauses which changes their nature and effect. The example of Olesen's treatment could have deterred undertakings over and obove the undertaking concerned. All the ripeners knew that from then on UBC was to be treated at least in the same way as its

competitors and that it would therefore protect its dominant position. This situation can be compared with the finding of the Court in the Suiker Unie case that the practice of loyalty rebates restricting competition and denying new or other producers access to the market is incompatible with Article 86 (b) ([1975] ECR pp. 1663 and 2004, paragraphs 526 and 527). In this case UBC, which has a dominant position, is preventing its distributors from advertising for its competitors and therefore can in fact prevent the sale of the latters' products. This does not mean that UBC had to open up its own ripening facilities to competitors; what it had to do was not to prevent them from using those which were available.

There remains the argument relating to the decline in sales of Chiquita bananas sold by Olesen which took part in the promotion of Dole bananas. Olesen did not sacrifice one of the public's interests by paying special attention to the ripening of Dole bananas and participating in their advertising campaign; it could at best sacrifice UBC's interests but without ever failing to fulfil any of its legal obligations to UBC and therefore without contravening the law. Is Olesen so far integrated into Castle and Cooke, the proprietor of the brand name Dole, that UBC could ask whether it was not at the mercy of its competitors? This is not the case because Olesen has been the sole agent of Castle and Cooke since 1969 and the refusal to supply only goes back to October 1973; and Olsen has never been UBC's sole distributor in Denmark, which means that the provisions of Regulation 67/67 relating to sole distributors cannot be applied to this case. In any event the refusal to supply is not justified "in the interest of competition".

But could UBC insist on a "loyal selling effort"?

Regulation 67/67 does not apply because:

— Olesen is not UBC's sole distributor in Denmark (cf. above);

— Olesen is not merely a distributor but an industrial processor;

— If Olesen had agreed not to work for competitors it would have infringed Article 85 (1) and sacrificed itself to a dominant position, and the said regulation does not apply in such hypothetical circumstances.

In accordance with the opinion of Mr Advocate General Mayras in the *Suiker Unie* case ([1975] ECR 2089) there is here the threat of a weak undertaking being placed under an economic disadvantage — an abuse of a dominant position. The proof of this in this case is that UBC "insists" even when dealing with such powerful ripeners as Olesen, who seems since then to have reassured UBC . . .

Finally it is necessary, having regard to the charge of "bad faith" made formerly against Olesen, to point out that the possible charge of bad faith could fall within the jurisdiction of the Danish courts . . . and that selling competitors' products sometimes with more success does not constitute bad faith even after having advertised these products, and this remains UBC's fundamental complaint (see UBC's telex message which is at issue).

How much damage has Olesen suffered?

— It is considerable, because Olesen, since the resumption of the delivery of supplies, has been selling at least 1 000 boxes per week; in any case when supplies were cut off UBC could not quantify the damage which its conduct was going to make Olesen suffer;

— The assessment of the extent of the damage may be relevant in determining the amount of the fine but has no relevance to the definition of the infringement of

Article 86 and the consideration of the objectionable conduct (*Commercial Solvents* v *Commission*, Joined Cases 6-7/73, [1974] ECR, paragraph 26, p. 251);

— At all events an investigation by officials of the Commission helped by their Danish colleagues made it possible to confirm that Olesen lost completely its customer FDB which purchased 50% of its bananas, a very substantial amount of business and its position as the principal supplier to a number of its customers (see the annexes on this point). Olesen was short of bananas in general and obviously of Chiquita bananas in particular; furthermore, at the present time, the purchases of its two principal buyers have not caught up with their previous level (UBC's document 39) in spite of the resumption of deliveries by UBC. The investigation by the Danish authorities is revealing in this connexion.

The Commission takes the view that refusal to supply has an effect on intra-Community trade. UBC submits the opposite argument that all the bananas come from Latin America and simply pass through the countries of the Common Market before they arrive in the State where they are to be consumed. The products of third countries, according to this argument, do not participate in intra-Community trade; the mere transit itself would not be enough according to Waelbroeck (Droit de la concurrence CEE (EEC Competition Law), Vol. 4, No 35, p. 33). But Professor Waelbroeck's theory is not confirmed in this case because:

"When Olesen was deprived of supplies, it was unable to purchase Chiquita bananas in Bremerhaven and to expand its business in other Member States and was unable to import the same quantities of bananas as before into Denmark. Olesen was also compelled to buy bananas other than Chiquita bananas outside Denmark from sources other than UBC and import them into Denmark". (Rejoinder, page 158)

If UBC's argument was valid, none of its European business dealings in goods from third countries would be governed by Community law. In the case of a concertation the Frubo judgment held that Article 85 applies to anti-competitive agreements relating to products imported into the Community ([1975] ECR paragraphs 35 and 38, p. 584). A number of other cases provide consistent rulings on this point (*EMI* in 1976, *Commercial Solvents* in 1974, *Beguelin* in 1971, *ICI* in 1972). Article 36 of the Treaty certainly includes goods in transit in intra-Community trade.

To sum up, the Commission concludes that:

"UBC's refusal to supply Olesen, a regular customer, cannot be objectively justified by the reasons which UBC gave for the refusal at the time. It was an unjustified interference with the running of Olesen's business, which damaged Olesen and tended to discourage UBC's ripeners from selling or at least from advertising competing brands. The decision therefore was fully justified in concluding that UBC had infringed Article 86 by refusing to supply Olesen".

7. Fine

The *applicants* point out that — in the light of all the comments which they have made — it cannot be held that they knew or even should have known that they were in a dominant position and that in any case they have abused this position intentionally or through negligence. In fact the way the Commission has already applied Article 86 cannot be forgotten.

All the companies which thus far have been held to be in breach of Article 86 were either pure monopolies or

controlled an overwhelming share of the market, while in numerous decisions of the Commission firms with market shares comparable to UBC's share were said to be unable to prevent effective competition.

The applicants also point to their continuously low prices, their own sizable losses and the entry of new competitors into, and their aggressiveness on, the market.

As far as concerns the conditions of sale of green bananas the applicants point out that under Article 15 (5) of Regulation No 17 a fine cannot be imposed for acts taking place after notification to the Commission and before the decision by which it applies or refuses to apply Article 85 (3) ot the Treaty. The applicants' conditions of sale were notified to the Commission on 15 November 1968 and the Commission never adopted the decision provided for by Article 15 (6). [1]

As far as concerns the amount of the fine, the applicants compare it to the fine which the Commission imposed on other companies (in the cases of *International Quinine Cartel, Commercial Solvents, Dyestuff Manufacturers, Pittsburgh Corning Europe, Formica Belgium — Hertel)* and they place on record — although the field (that of prices) in which the fines are imposed is uncharted territory — that it is more than five times higher even though all international organizations competent in the banana sector agree that the constant rise in quality has gone together with a decrease in prices.

According to the Commission this is the first case in which an enterprise has been found to have committed four separate abuses, each contrary to Article 86. UBC tries to ignore the fact that these abuses were inter-connected and cumulative in their effects: the prohibition on the resale of green bananas provides the basis for the two serious pricing abuses, and the refusal to supply Th. Olesen. The fine imposed by the Commission is therefore fully justified.

The amount of the fine must be considered having regard to UBC's world turnover amounting to $2 000 million and of its turnover on the relevant market which is $50 million. The amount of the fine must be compared with the excessive profit margins obtained as a result of the infringements of the Treaty.

The *applicants* in their reply refer to comparative law and the ways in which an economic fine may be calculated. They stress that unquestionably part of this fine relates to the application of a clause (the prohibition on the resale of green bananas) which had been duly notified to the Commission. Moreover how can a fine be fixed on the basis of profits which are supposed to be illegal and which it turns out cannot be computed and when the administration proved to be incapable of advising and warning the undertakings concerned in good time? In any event the publicity given to the case by the authority which imposes the fine should finally induce it to show moderation when fixing the amount of the fine.

The *Commission* replies that UBC cannot argue that its acts are lawful under Article 86 because it claims that it was unaware that it was in a dominant position; such a defence would allow every anti-competitive act to be forgiven if there was no intention to infringe. Fines are imposed for intentional or negligent infringements under the case-law of the Court and the provisions in force (Article 15 (2) of Regulation No 17). Neither can UBC plead that it is ignorant of Community competition law and that the issue is complicated; although it was made acquainted with the situation from the very beginning of 1975, it was not until

1 — On this point the Commission draws attention to the fact that its decision clearly indicates that it did not impose a fine.

the decision imposing a fine was adopted that it reacted, and this is very unusual, (even if UBC during this period communicated from time to time with departments of the Commission other than those responsible for this matter). With regard to the fixing of the fine UBC should not rely on all the facts alleged to be incorrect which have been found by the Commission and are dealt with elsewhere. The Commission states that it has given a sufficient explanation of its views on the question of excessive prices and repeats that the reduction of 15% of the prices which it recommended is not an order but an indication of the attitude which it is likely to adopt in the future.

8. Denial of due process

The *applicans* end their applications with arguments in which they point out that the Commission did not take into account the observations relating to material errors in the Statement of Objections, that they were denied the opportunity to comment on essential issues and that the Commission's approach to this proceeding is permeated with bias.

UBC was rushed through the various administrative procedural stages which turned the safeguards laid down in the rules governing this procedure into a mockery.

UBC's conclusion is that the cumulative effect of these matters is such that the proceedings before the Commission were irregular and it asks the Court to award it damages, by way of compensation for the moral damage it has suffered, in the amount of one unit of account.

It emerges from all the documents which are now on the Court's file and have been produced, that the absence of proof should have encouraged the Commission to take no action. The carefree way in which mention was made of substantial profits, of the unfortunate letter of 10 December 1974 on profit margins in Ireland, and of the "present" prices in connexion with price scales which had been exceeded, proves that the Commission's attitude was permeated with bias! The presentation of several facts or documents has been distorted or exaggerated.

Above all attention must be drawn to the fact that the applicants have been deprived of their right to be heard. Thus the charges and the criteria applied have changed since the four short paragraphs devoted to the question of unfair prices in the Statement of Objections and accordingly there has been a switch from the straightforward difference in relation to the Irish price to an examination of the economic value of the banana based in particular on the price difference between branded and unbranded bananas.

Finally the Commission has broken the elementary rules which must be observed by every administration, by changing — an example of this has just been given — criteria in its evaluations, has been under pressure to comply with time-limits and has been endeavouring to adapt itself to the case-law of the Court. It has even had to admit that the clause relating to the resale of green bananas, as explained in the circular of 30 January 1976, was satisfactory, which should mean that any charge of conduct amounting to abuse in this matter should be dropped. Therefore the Commission has not exercised the judicial functions which devolve upon it in such proceedings impartially: "the prosecutor has prevailed over the judge".

The *Commission* takes the view that such allegations cannot be accepted. It considers that it has acted properly throughout this case. The documents annexed prove this in the absence of more precise allegations. At the time of the hearing UBC raised no objection concerning the procedure adopted until then.

The Commission claims that the submissions put forward by UBC in this connexion are arguments which go to the substance of the case. Thus, for example, the fact that its hearing is said to have been invalidated because it failed to understand an essential phrase is tantamount to reopening the discussion on the price of branded bananas compared with the price of unbranded bananas. If there has been a misunderstanding it is of no consequence.

9. The applicants' claim for damages

The *applicants,* on the ground of the irregular administrative procedure referred to in paragraph 8 above, ask the Court to award them damages, by way of compensation for the moral damage which they have suffered, in the amount of one unit of account.

Furthermore there is to be added to the carefree attitude of the Commission the inadequate publicity given to this matter and the damage in the press to the applicants' commercial reputation ... etc. ... which amply justify the award of nominal damages; such an award will remind the Commission that it must always act in the public interest.

The *Commission* denies that it is guilty of any administrative irregularity (see paragraph 8 of the draft) and answers the applicants' second argument by saying that, if there was any defamation in the newspapers, that must be dealt with in separate proceedings and is within the jurisdiction of another court.

III — Questions raised by the Court

By a letter of the Registrar of 20 May 1977 the Court requested a reply in writing, before 20 June 1977, to the questions, and observations on the documents, mentioned below following the order in which the headings are set out in the pleadings:

"1. The relevant market

(a) The product market

The Commission is requested to specify the current state of development of any draft regulation concerning the banana sector, such a draft being mentioned on page 120 of "Marché Commun de la banane" ("The Common Market in Bananas"), a French Government document of 1973 which appears as Annex Va to the application.

(b) The geographic market

(i) The parties are requested, *jointly if possible,* to have drawn up in relation to the market in question a map of ripeners indicating their location and, with the assistance of suitable graphs, their ripening capacity and their degree of dependence on UBC.

(ii) The Commission is requested to produce the complaint lodged on 27 May 1974 by Tropical Fruit Co., Jack Dolan Ltd and Banana Importers of Ireland Ltd. (see the reference on page 125 of the reply).

2. Dominant position

(i) The parties are requested to produce sub-Annexes XVI, XVII, XVIII and XIX, which should be joined to Annex III g to the defence (replies of 13 September 1974 from the applicant to the letters of 5 and 12 August 1974 from the Commission).

(ii) The parties are requested to clarify the situation of UBC (itself implicated in 1972) and of its predecessor the United Fruit Company which have both had to appear before the courts in the USA.

(iii) The Commission is requested:

(a) To produce the document mentioned in Note (1) on page 9 of the Rejoinder *(IRCA* v *United Brands,* 358 F Supp. 1363 66-68 (1973)).

(b) To specify the percentage share in the market of all the major groups including those classified as "various", so that the total of those percentages amounts to 100.

(c) To supply, if it has them, the general conditions of sale of the groups in competition with UBC to ripener/distributors.

3. Excessive prices

The applicant is requested:

(i) To produce the agreement with Scipio which is mentioned on page 43 of the application;

(ii) With regard to the letter of 10 December 1974 relating to the Irish market, to specify the closing date of the corresponding financial year.

4. Discriminatory prices

The applicant is requested to produce the different versions of its general conditions of sale (if necessary with supplementary explanations) for each Member State and for those European countries which are not members, from 1 August 1966 to 1 August 1976, and, if there are any, copies of the standard form contracts with ripener/distributors.

5. The clause prohibiting the resale of green bananas

(a) Are the parties aware that, by virtue of the fact that certain ripeners are established near the frontiers, the clause in question could possibly have been avoided?

(b) The applicant is requested:

(i) To add to the Court's file the different chronological versions of the clause in question for each Member State, from 1966 to 1976.

(ii) To state what is the longest period of time between the cutting and sale of green bananas. Is it 20 days as in stated in the file?

(iii) To state who provides the transport for the bananas from the ports to the ripeners' premises; the ripeners themselves, UBC or independent transport companies?

6. The refusal to supply Olesen

The applicant is requested to add to the Court's file page 2 of Annex 36 to the application.

7. The fine

The Commission is requested to state whether any action has been taken on the procedure under Article 85 concerning the clause prohibiting the resale of bananas.

What stage has any such procedure reached?

Has UBC applied for an exemption for the new version of its conditions of sale?

8. Denial of due process

(i) The applicant is requested to produce the letter of 21 October 1975 from Thompson to the applicant (cf. application, p. 209).

(ii) The applicant is requested to produce their letter of 30 October 1975 to the Commission."

The parties supplied the particulars and produced the documents requested to the best of their ability.

IV — Summary of the arguments submitted during the oral procedure

The oral procedure took place during the hearing on 12 July 1977.

UBC puts forward its arguments in the same order in which the Commission presented its detailed reasoning in its decision.

UBC repeated the main arguments developed during the written procedure and stressed certain points.

On the subject of the relevant market it emphasized that the value of the FAO reports used by the Commission had been called into question by one of the officials of that organization.

With regard to the dominant position UBC first of all produced a diagram according to which it does not occupy a dominant position at the production and supply stages. As far as sales in the relevant market are concerned UBC lays stress on the fact that it is unable to control the number of offers, since more than half the bananas sold are offered for sale by third parties; the proof that the supply is sensitive lies in the fact that small changes in this field bring about large price variations because of surplus production capacity. As for the distribution chains UBC stated that most of the distributor/ripeners which are its customers also obtain supplies from its competitors; the Commission's answers on this point are too wide; the opportunity which new competitors have of access to the market shows that there is strong competition and this is proved by the figures produced to the Court. Now these competitors also have — or very nearly also have — as much power on a global level as UBC and they showed how strong their competition was during the price war, when UBC sometimes came off badly the existence of this competition rules out the possibility of any dominant position according to the definition of such a position in the judgment in Case 51/75 *E.M.I. Records Limited* v *C.B.S. United Kingdom Limited* [1976] ECR 849. Furthermore certain customers like Scipio, or others operating on a smaller scale, are of such a size that the dominant position of the vendor would inevitably be called into question. The effect of this, if the documents of the FAO and UNCTAD and of certain governments, which are mentioned in the Court's file, are to be relied on, is that UCB's market share is declining: at the same time a graph produced by UBC shows that there has been a fall in the price of the Chiquita banana. Other graphs show that there very definitely are fluctuations in the prices of the different brands of bananas compared with the other fresh fruits offered for sale on the market and prove that the sales of products which do in fact compete with each other are interconnected. Taking into account these factors as well as the rise in the prices of petroleum products required for transportation this situation caused UBC to make a particularly serious loss in 1974 and it is to some extent paradoxical that the Commission has taken 1974 as the reference year for the purpose of giving notice of exceptional profits, when even the short term economic policy adopted during that year gave rise to very low prices; in any case this example alone proves that there is no dominant position.

In connexion with its market share UBC repeats the arguments which it put forward during the written procedure but submits new arguments based on the Commission's answers to the questions put by the Court and compares them with the assertions of the said Commission. There is strong and unrestricted competition and it is clearly impossible to maintain any dominant position whatsoever on such a competitive market.

As for the abuses for which it is blamed UBC concentrates on the argument put forward by the Commission that it discriminated; this argument is based on a comparison of the f.o.r. prices ex Bremerhaven and Rotterdam; UBC's first observation consists in pointing out that 53% of its sales on the relevant market are to Scipio which buys f.o.b. and whose customers should be excluded from the calculation; in the case of the remaining sales the prices charged were those permitted by the market and therefore by the actual demand.

UBC produced a document setting out a long list of the price reductions during the preceding five years which had been applied when the market supply made them necessary. There can be no question of any discrimination when the fact is that the vendor has to adapt itself to the prices due to the demand.

The complaint that UBC charged excessive prices must be examined in the light of documents proving that it suffered serious losses at certain times. How can the price of highly perishable goods sold at a relatively low price be excessive when the price alleged to be excessive is not exactly comparable everywhere? UBC puts forward three specific arguments in answer to the Commission's reasoning: the contents of the letter relating to the Irish market have been contradicted by the final consolidated accounts and in this connexion the confidential annexes to the application relating to the deficit recorded for this marked must be read after a thorough examination of the situation; the difference between the prices of Chiquita and unbranded bananas is due to a difference in their quality and unbranded bananas are only a by-product of branded bananas, accounting for 15% of production (5% can be regarded as wastage) and this conforms to the market pattern for all fresh fruits where differences of "grade" or "category" are accepted; the difference between the prices of Chiquita and other bananas is according to the period of time between 5 and 10% is due to a difference in quality.

The higher prices charged in certain sectors of the relevant market are caused by the operation of the law of supply and demand which is all the more free because the banana market has not been regulated "by a common organization of the market". UBC has already made an attempt at rationalization by fixing a single price for each country and it endeavours to prove that this policy has already led to losses being suffered on the banana market by the supplier and not by the intermediaries. In any case the price reductions which the Commission wishes UBC to effect would force it to sell bananas below competitors' prices which is unreasonable, since on a free market the price must be fixed having regard to the market situation; the Commission has so fully grasped how difficult it is to define the position which it has taken up that on this point it has only made suggestions.

As far as the clause prohibiting the resale of green bananas is concerned UBC develops the arguments put forward during the written procedure and stresses that there can be no connexion between this clause and any excessive prices since it has shown that its prices are the outcome of market forces.

Finally, in connexion with its refusal to sell to Olesen. UBC emphasizes that the Olesen affair cannot be compared with the monopoly the existence of which it was possible to establish in the *Commercial Solvents* case; furthermore it points out that it was not bound by any long term contracts, that it experienced difficulties in its relations with Olesen and that its last dealings with this firm before the breach were correct. Olesen moreover was not faced with insuperable difficulties.

UBC gives further support to its claim for damages based on the fact that the Commission has exceeded the limits of "the normal and reasonable exercise of its discretionary powers especially when carrying out a "quasi-judicial task".

The *Commission* developed most of the arguments which it has stated in writing.

It can be noted that on the question of the dominant position the Commission has rejected the argument put forward by UBC relating to the personal view of an official of the FAO on the relevant market. Relying on comparative law it then laid stress on the fact that the

figures which may show that there is a dominant position do not necessarily have to prove that there is a monopoly; as far as the dominant position is concerned it is not seriously disputed that UBC controls 40% of the market. Furthermore the existence of a dominant position does not necessarily have to be established by a particular price level but rather by showing how effective the occupier of this position is on the market.

The Commission reiterates its arguments relating to discriminatory prices and considers that it has proved that there is discrimination since the same product is sold at the same place at different prices.

UBC's refusal to supply Olesen has already been described but the Commission stresses the fact that UBC grants itself the right to "insist" in this strange way on taking advantage of publicity which is a least as important as that which its competitors turn to account.

In connexion with the clause prohibiting the resale of green bananas the Commission points out that it must be considered in the form in which it was applied before the decision adopted by the Commission and that it must be given the meaning which gave it efficacy.

As far as discriminatory prices are concerned the Commission finds that price differences have been admitted, even if they were only temporary, of a ratio of 10 to 30% during certain weeks which is sufficient to amount to a breach of the rules laid down by Article 86. The Commission's requirements are in no way connected with the control of prices and the Commission has not asked for harmonization of the prices of all sales. It repeats however that the same product must be sold at the same price at the same place.

Unfair prices must be considered at the consumer level. Although Irish prices generally speaking cover UBC's costs, even if there have been some small losses, the discrimination already notified nevertheless proves that unfair prices have been charged; that is sufficient with reference to the requirements of the Treaty which makes no mention of unfair profits.

Finally the Commission considers UBC's answers to the questions put by the Court and draws attention to the source of the figures produced by certain international organizations. It emphasizes that the recent reference to rebates and retroactive price reductions was not made at the appropriate time.

UBC and the *Commission* answered questions put by the judges and the Advocate General.

The Advocate General delivered his opinion at the hearing on 8 November 1977.

Decision

1 United Brands Company (hereinafter referred to as "UBC") of New York and its representative United Brands Continental B.V. (hereinafter referred to as "UBCBV" by an application registered at the Court on 15 March

1976 petitioned the Court to set aside the Commission Decision of 17 December 1975 which was later published in Official Journal L 95 of 9 April 1976 to which the quotations in this judgment refer.

2 For practical reasons in the argumentation which follows the single expression UBC will be used to refer to the applicants.

3 Article 1 of the decision declares that UBC 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.

4 Under Article 2 a fine of one million units of account is imposed on UBC in respect of the infringement referred to in Article 1.

5 Article 3 orders UBC:

(a) to 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) (i) to 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) to 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.

6 UBC's main claims in its application are that the Court should set aside the Decision of 17 December 1975 and order the Commission to pay UBC moral damages in the amount of one unit of account and, in the alternative, should, if the Decision be upheld, cancel or at least reduce the fine.

7 It puts forward eight submissions in support of its conclusions:

(1) It challenges the analysis made by the Commission of the relevant market, and also of the product market and the geographic market;

(2) It denies that it is in a dominant position on the relevant market within the meaning of Article 86 of the Treaty;

(3) It considers that the clause relating to the conditions of sale of green bananas is justified by the need to safeguard the quality of the product sold to the consumer;

(4) It intends to show that the refusal to continue to supply the Danish firm Th. Olesen was justified;

(5) It takes the view that it has not charged discriminatory prices;

(6) It takes the view that it has not charged unfair prices;

(7) It complains that the administrative procedure was irregular;

(8) It disputes the imposition of the fine and, in the alternative, asks the Court to reduce it.

8 UBC, after bringing this action, by a separate document made an application dated 18 March 1976 for the adoption of an interim measure under Article 185 of the Treaty requesting the President of the Court to suspend the enforcement of Article 3 (a) and (b), paragraph 1 of the Decision until a decision on the application for annulment pending before the Court has been made.

9 By an Order of 5 April 1976 the President took note of the parties' statements concerning the amendment of the clause relating to the resale of bananas while still green and made the following order:

"The suspension of the operation of Article 3 (a) and the first indent of Article 3 (b) of the Decision of the Commission of 17 December 1975 (IV/26699) is granted until judgment is given on the substance of Case 27/76, in so far as the applicants have not already of their own accord brought to an end the infringements referred to by the Commission in Article 1 of the said decision".

Chapter I — The existence of a dominant position

Section 1 — The relevant market

10 In order to determine whether UBC has a dominant position on the banana market it is necessary to define this market both from the standpoint of the product and from the geographic point of view.

11 The opportunities for competition under Article 86 of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.

Paragraph 1. The Product Market

12 As far as the product market is concerned it is first of all necessary to ascertain whether, as the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit.

13 The applicant submits in support of its argument that bananas compete with other fresh fruit in the same shops, on the same shelves, at prices which can be compared, satisfying the same needs: consumption as a dessert or between meals.

14 The statistics produced show that consumer expenditure on the purchase of bananas is at its lowest between June and December when there is a plentiful supply of domestic fresh fruit on the market.

15 Studies carried out by the Food and Agriculture Organization (FAO) (especially in 1975) confirm that banana prices are relatively weak during the summer months and that the price of apples for example has a statistically appreciable impact on the consumption of bananas in the Federal Republic of Germany.

16 Again according to these studies some easing of prices is noticeable at the end of the year during the "orange season".

17 The seasonal peak periods when there is a plentiful supply of other fresh fruit exert an influence not only on the prices but also on the volume of sales of bananas and consequently on the volume of imports thereof.

18 The applicant concludes from these findings that bananas and other fresh fruit form only one market and that UBC's operations should have been examined in this context for the purpose of any application of Article 86 of the Treaty.

19 The Commission maintains that there is a demand for bananas which is distinct from the demand for other fresh fruit especially as the banana is a very important part of the diet of certain sections of the community.

20 The specific qualities of the banana influence customer preference and induce him not to readily accept other fruits as a substitute.

21 The Commission draws the conclusion from the studies quoted by the applicant that the influence of the prices and availabilities of other types of fruit on the prices and availabilities of bananas on the relevant market is very ineffective and that these effects are too brief and too spasmodic for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefor.

22 For the banana to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.

23 The ripening of bananas takes place the whole year round without any season having to be taken into account.

24 Throughout the year production exceeds demand and can satisfy it at any time.

25 Owing to this particular feature the banana is a privileged fruit and its production and marketing can be adapted to the seasonal fluctuations of other fresh fruit which are known and can be computed.

26 There is no unavoidable seasonal substitution since the consumer can obtain this fruit all the year round.

27 Since the banana is a fruit which is always available in sufficient quantities the question whether it can be replaced by other fruits must be determined over the whole of the year for the purpose of ascertaining the degree of competition between it and other fresh fruit.

28 The studies of the banana market on the Court's file show that on the latter market there is no significant long term cross-elasticity any more than — as has been mentioned — there is any seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and table grapes) in one of the countries (West Germany) of the relevant geographic market.

29 As far as concerns the two fruits available throughout the year (oranges and apples) the first are not interchangeable and in the case of the second there is only a relative degree of substitutability.

30 This small degree of substitutability is accounted for by the specific features of the banana and all the factors which influence consumer choice.

31 The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick.

32 As far as prices are concerned two FAO studies show that the banana is only affected by the prices — falling prices — of other fruits (and only of peaches and table grapes) during the summer months and mainly in July and then by an amount not exceeding 20%.

33 Although it cannot be denied that during these months and some weeks at the end of the year this product is exposed to competition from other fruits, the flexible way in which the volume of imports and their marketing on the relevant geographic market is adjusted means that the conditions of competition are extremely limited and that its price adapts without any serious difficulties to this situation where supplies of fruit are plentiful.

34 It follows from all these considerations that a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of other fresh fruit on the market and that even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability.

35 Consequently the banana market is a market which is sufficiently distinct from the other fresh fruit markets.

Paragraph 2. The geographic market

36 The Commission has taken the Federal Republic of Germany, Denmark, Ireland, the Netherlands and the BLEU as the geographic market and it is in respect of this market that it is necessary to consider whether UBC has the power to hinder effective competition.

37 It takes the view that the economic conditions in this part of the Community allow importer/distributors of bananas to market their products there in the ordinary course without there being any significant economic barriers for UBC to overcome compared with other importer/distributors.

38 The other Member States of the Community (France, Italy, the United Kingdom) must however be excluded from this geographic definition of the market notwithstanding the significant presence of UBC in these States, because of the special circumstances relating to import arrangements and trading conditions and the fact that bananas of various types and origin are sold there.

39 The applicant points out that the geographic market where an undertaking's economic and commercial power is taken into consideration should only comprise areas where the conditions of competition are homogeneous.

40 Although the Commission had good reason to exclude France, Italy and the United Kingdom from the said market it failed to take account of the differences in the conditions of competition in the other Member States which should have led it to come to the same conclusions with regard to the latter as it came to in the case of the three countries referred to above.

41 In fact three substantially different systems of customs duty apply in the Member States concerned: a zero tariff in Germany covering a banana quota which meets most of this country's requirements, a transitional tariff in Ireland and Denmark and the Common Customs Tariff of 20% for imports into Benelux.

42 The Commission has not either taken account of the consumer habits of the Member States concerned the annual consumption of fresh fruits *per capita* in Germany is equal to 2.5 times that of Ireland and twice that of Denmark), differing commercial patterns, concentrations and monetary points of view.

43 The applicant draws the conclusion from all these findings that the geographic market taken by the Commission includes areas in which the conditions of competition are so different that they cannot be considered as constituting a single market.

44 The conditions for the application of Article 86 to an undertaking in a dominant position presuppose the clear delimitation of the substantial part of the Common Market in which it may be able to engage in abuses which hinder effective competition and this is an area where the objective conditions of competition applying to the product in question must be the same for all traders.

45 The Community has not established a common organization of the agricultural market in bananas.

46 Consequently import arrangements vary considerably from one Member State to another and reflect a specific commercial policy peculiar to the States concerned.

47 This explains why for example the French market owing to its national organization is restricted upstream by a particular import arrangement and obstructed downstream by a retail price monitored by the Administration.

48 This market, in addition to adopting certain measures relating to a "target price" ("prix objectif") fixed each year and to packaging and grading standards and the minimum qualities required, reserves about two thirds of the market for the production of the overseas departments and one third to that of certain countries enjoying preferential relations with France (Ivory Coast, Madagascar, Cameroon) the bananas whereof are imported duty-free, and it includes a system the running of which is entrusted to the "Comité interprofessionnel bananier" ("C.I.B.").

49 The United Kingdom market enjoys "Commonwealth preferences", a system of which the main feature is the maintenance of a level of production favouring the developing countries of the Commonwealth and of a price paid to the associations of producers directly linked to the selling price of the green banana charged in the United Kingdom.

50 On the Italian market, since the abolition in 1965 of the State Monopoly responsible for marketing bananas, a national system of quota restrictions has been introduced, the Ministry for Shipping and the Exchange Control Office supervising the imports and the charterparties relating to the foreign ships which carry the bananas.

51 The effect of the national organization of these three markets is that the applicant's bananas do not compete on equal terms with the other bananas sold in these States which benefit from a preferential system and the Commission was right to exclude these three national markets from the geographic market under consideration.

52 On the other hand the six other States are markets which are completely free, although the applicable tariff provisions and transport costs are of necessity different but not discriminatory, and in which the conditions of competition are the same for all.

53 From the standpoint of being able to engage in free competition these six States form an area which is sufficiently homogeneous to be considered in its entirety.

54 UBC has arranged for its subsidiary in Rotterdam — UBCBV — to market its products. UBCBV is for this purpose a single centre for the whole of this part of the Community.

55 Transport costs do not in fact stand in the way of the distribution policy chosen by UBC which consists in selling f.o.r. Rotterdam and Bremerhaven, the two ports where the bananas are unloaded.

56 These are factors which go to make relevant market a single market.

57 It follows from all these considerations that the geographic market as determined by the Commission which constitutes a substantial part of the common market must be regarded as the relevant market for the purpose of determining whether the applicant may be in a dominant position.

Section 2 — UBC's position on the relevant market

58 The Commission bases its view that UBC has a dominant position on the relevant market on a series of factors which, when taken together, give UBC unchallengeable ascendancy over all its competitors: its market share compared with that of its competitors, the diversity of its sources of supply, the homogeneous nature of its product, the organization of its production and transport, its marketing system and publicity campaigns, the diversified nature of its operations and finally its vertical integration.

59 Having regard to all these factors the Commission takes the view that UBC is an undertaking in a dominant position enjoying a degree of general independence in its behaviour on the relevant market which enables it to hinder to a large extent any effective competition from competitors who can

only if need be secure the same advantages after great exertions spread over several years, a prospect which does not encourage them to embark upon such a course, especially after failing several times to obtain these advantages.

60 UBC does not accept this conclusion and states that it stems from an assertion unsupported by any evidence.

61 It states that it only engages in fair competition in terms of price, quality and services.

62 According to UBC an objective evaluation of its market share, the opportunities for procuring supplies, the "aggressive" competition of other undertakings, their resources, their methods and degree of integration, the relative freedom of distributor/ripeners, the appearance of new competitors on the market, the strength and size of certain customers, the low price and indeed the fall in the price of the banana, the losses which it has made for the last five years, would have permitted the conclusion to be drawn that, on the basis of a proper analysis, neither the set up nor the behaviour of its undertaking present the particular features of a firm in a dominant position on the relevant market.

63 Article 86 is an application of the general objective of the activities of the Community laid down by Article 3 (f) of the Treaty: the institution of a system ensuring that competition in the common market is not distorted.

64 This article prohibits any abuse by an undertaking of a dominant position in a substantial part of the common market in so far as it may affect trade between Member States.

65 The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

66 In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.

67 In order to find out whether UBC is an undertaking in a dominant position on the relevant market it is necessary first of all to examine its structure and then the situation on the said market as far as competition is concerned.

68 In doing so it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses.

Paragraph 1. The structure of UBC

69 It is advisable to examine in turn UBC's resources for and methods of producing, packaging, transporting, selling and displaying its product.

70 UBC is an undertaking vertically integrated to a high degree.

71 This integration is evident at each of the stages from the plantation to the loading on wagons or lorries in the ports of delivery and after those stages, as far as ripening and sale prices are concerned, UBC even extends its control to ripener/distributors and wholesalers by setting up a complete network of agents.

72 At the production stage UBC owns large plantations in Central and South America.

73 In so far as UBC's own production does not meet its requirements it can obtain supplies without any difficulty from independent planters since it is an established fact that unless circumstances are exceptional there is a production surplus.

74 Furthermore several independent producers have links with UBC through contracts for the growing of bananas which have caused them to grow the varieties of bananas which UBC has advised them to adopt.

75 The effects of natural disasters which could jeopardize supplies are greatly reduced by the fact that the plantations are spread over a wide geographic area and by the selection of varieties not very susceptible to diseases.

76 This situation was born out by the way in which UBC was able to react to the consequences of hurricane "Fifi" in 1974.

77 At the production stage UBC therefore knows that it can comply with all the requests which it receives.

78 At the stage of packaging and presentation on its premises UBC has at its disposal factories, manpower, plant and material which enable it to handle the goods independently.

79 The bananas are carried from the place of production to the port of shipment by its own means of transport including railways.

80 At the carriage by sea stage it has been acknowledged that UBC is the only undertaking of its kind which is capable of carrying two thirds of its exports by means of its own banana fleet.

81 Thus UBC knows that it is able to transport regularly, without running the risk of its own ships not being used and whatever the market situation may be, two thirds of its average volume of sales and is alone able to ensure that three regular consignments reach Europe each week, and all this guarantees it commercial stability and well being.

82 In the field of technical knowledge and as a result of continual research UBC keeps on improving the productivity and yield of its plantations by improving the draining system, making good soil deficiencies and combating effectively plant disease.

83 It has perfected new ripening methods in which its technicians instruct the distributor/ripeners of the Chiquita banana.

84 That is another factor to be borne in mind when considering UBC's position since competing firms cannot develop research at a comparable level and are in this respect at a disadvantage compared with the applicant.

85 It is acknowledged that at the stage where the goods are given the final finish and undergo quality control UBC not only controls the distributor/ripeners which are direct customers but also those who work for the account of its important customers such as the Scipio group.

86 Even if the object of the clause prohibiting the sale of green bananas was only strict quality control, it in fact gives UBC absolute control of all trade in its goods so long as they are marketabale wholesale, that is to say before the ripening process begins which makes an immediate sale unavoidable.

87 This general quality control of a homogeneous product makes the advertising of the brand name effective.

88 Since 1967 UBC has based its general policy in the relevant market on the quality of its Chiquita brand banana.

89 There is no doubt that this policy gives UBC control over the transformation of the product into bananas for consumption even though most of this product no longer belongs to it.

90 This policy has been based on a thorough reorganization of the arrangements for production, packaging, carriage, ripening (new plant with ventilation and a cooling system) and sale (a network of agents).

91 UBC has made this product distinctive by large-scale repeated advertising and promotion campaigns which have induced the consumer to show a preference for it in spite of the difference between the price of labelled and unlabelled bananas (in the region of 30 to 40 %) and also of Chiquita bananas and those wich have been labelled with another brand name (in the region of 7 to 10%).

92 It was the first to take full advantage of the opportunities presented by labelling in the tropics for the purpose of large-scale advertising and this, to use UBC's own words, has "revolutionized the commercial exploitation of the banana" (Annex II a to the application, p. 10).

93 It has thus attained a privileged position by making Chiquita the premier banana brand name on the relevant market with the result that the distributor cannot afford not to offer it to the consumer.

94 At the selling stage this distinguishing factor — justified by the unchanging quality of the banana bearing this label — ensures that it has regular customers and consolidates its economic strength.

95 The effect of its sales networks only covering a limited number of customers, large groups or distributor/ripeners, is a simplification of its supply policy and economies of scale.

96 Since UBC's supply policy consists — in spite of the production surplus — in only meeting the requests for Chiquita bananas parsimoniously and sometimes incompletely UBC is in a position of strength at the selling stage.

Paragraph 2. The situation with regard to competition

97 UBC is the largest banana group having accounted in 1974 for 35% of all banana exports on the world market.

98 In this case however account must only be taken of its operations on the relevant market.

99 As far as this market is concerned the parties disagree as to the extent of UBC's market share in the Federal Republic of Germany and as to the applicant's entire share of the whole of the relevant market.

100 In the first place UBC does not include in its entire share of the whole of the relevant market the percentage attributed to the Scipio undertaking which buys its bananas f.o.b. in Central America.

101 However it must be included, because almost all the bananas ripened by Scipio are "Chiquita" bananas the shipment of which to Europe is coordinated by the Sven Salène company, because Scipio submits to UBC's technical supervision, because these two groups have entered into supply

and price agreements with each other, because Scipio abides by the obligation not to resell "Chiquita bananas" while still green and because for the last 30 years it has never attempted to act independently of UBC.

102 There are working arrangements between Scipio and UBC and there is joint action on prices and also on making points of sale attractive and in connexion with advertising campaigns.

103 It must furthermore be recorded that the sale prices charged by Scipio are the same as those of the other suppliers supplied by UBC.

104 Consequently UBC and Scipio are not in competition with each other.

105 In the second place the Commission states that it estimates UBC's market share at 45%.

106 However UBC points out that this share dropped to 41% in 1975.

107 A trader can only be in a dominant position on the market for a product if he has succeeded in winning a large part of this market.

108 Without going into a discussion about percentages, which when fixed are bound to be to some extent approximations, it can be considered to be an established fact that UBC's share of the relevant market is always more than 40% and nearly 45%.

109 This percentage does not however permit the conclusion that UBC automatically controls the market.

110 It must be determined having regard to the strength and number of the competitors.

111 It is necessary first of all to establish that on the whole of the relevant market the said percentage represents *grosso modo* a share several times

greater than that of its competitor Castle and Cooke which is the best placed of all the competitors, the others coming far behind.

112 This fact together with the others to which attention has already been drawn may be regarded as a factor which affords evidence of UBC's preponderant strength.

113 However an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position.

114 In this case there was in fact a very lively competitive struggle on several occasions in 1973 as Castle and Cooke had mounted a large-scale advertising and promotion campaign with price rebates on the Danish and German markets.

115 At the same time Alba cut prices and offered promotional material.

116 Recently the competition of the Villeman et Tas firm on the Netherlands market has been so lively that prices have dropped below those on the German market which are traditionally the lowest.

117 It must however be recorded that in spite of their exertions these firms have not succeeded in increasing their market share appreciable on the national markets where they launched their attacks.

118 It must be noted that these periods of competition limited in time and space did not cover the whole of the relevant market.

119 Even if the local attacks of some competitors can be described as "fierce" it can only be placed on record that UBC held out against them successfully either by adapting its prices for the time being (in the Netherlands in answer to the challenge from Villeman et Tas) or by bringing indirect pressure to bear on the intermediaries.

120 Furthermore if UBC's position on each of the national markets concerned is considered it emerges that, except in Ireland, it sells direct and also, as far as concerns Germany, indirectly through Scipio, almost twice as many bananas as the best placed competitor and that there is no appreciable fall in its sales figures even when new competitors appear on these markets.

121 UBC's economic strength has thus enabled it to adopt a flexible overall strategy directed against new competitors establishing themselves on the whole of the relevant market.

122 The particular barriers to competitors entering the market are the exceptionally large capital investments required for the creation and running of banana plantations, the need to increase sources of supply in order to avoid the effects of fruit diseases and bad weather (hurricanes, floods), the introduction of an essential system of logistics which the distribution of a very perishable product makes necessary, economies of scale from which newcomers to the market cannot derive any immediate benefit and the actual cost of entry made up *inter alia* of all the general expenses incurred in penetrating the market such as the setting up of an adequate commercial network, the mounting of very large-scale advertising campaigns, all those financial risks, the costs of which are irrecoverable if the attempt fails.

123 Thus, although, as UBC has pointed out, it is true that competitors are able to use the same methods of production and distribution as the applicant, they come up against almost insuperable practical and financial obstacles.

124 That is another factor peculiar to a dominant position.

125 However UBC takes into account the losses which its banana division made from 1971 to 1976 — whereas during this period its competitors made profits — for the purpose of inferring that, since dominance is in essence the power to fix prices, making losses is inconsistent with the existence of a dominant position.

126 An undertaking's economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not incompatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition.

127 The fact that UBC's profitability is for a time moderate or non-existent must be considered in the light of the whole of its operations.

128 The finding that, whatever losses UBC may make, the customers continue to buy more goods from UBC which is the dearest vendor, is more significant and this fact is a particular feature of the dominant position and its verification is determinative in this case.

129 The cumulative effect of all the advantages enjoyed by UBC thus ensures that is has a dominant position on the relevant market.

Chapter II — Abuse of this dominant position

Section 1 Conduct vis-à-vis the ripeners

Paragraph 1. The clause prohibiting the resale of bananas while still green

130 The Commission takes the view that the applicant has abused its dominant position *vis-à-vis* ripener/distributors in the first place by using a clause incorporated in its general conditions of sale forbidding its distributor/ripeners to resell its bananas while still green, to sell bananas other than those supplied by UBC while they were distributors of UBC's bananas and to resell UBC's bananas to competing ripeners.

131 The Commission in the second place blames UBC for having insisted that its ripener/distributors should not sell bananas to dealers from other countries and giving them an assurance that it had imposed the same requirement on its distributor/ripeners in other countries.

132 This abuse was brought into practice in January 1967 when UBC was endeavouring to launch in Europe the new "Cavendish Valery" banana under the "Chiquita" brand name which was taking the place of the Gros Michel variety known under the "Fyffes" label.

133 The prohibition on reselling of bananas while still green has been applied strictly since 1967, although it does not always appear in a written document, in all the Member States forming the relevant market to UBC's importer/ripener/distributors including the Scipio group.

134 There was an example of this prohibition in December 1973 when UBC refused to sell to the Danish firm Olesen which found that all the distributors (including the Scipio group) whom it had requested to supply it with green bananas turned down its requests because they were prevented from doing so under their contracts.

135 Apart from the fact that this obligation indirectly helps to strengthen and consolidate UBC's dominant position, it makes any trade in UBC's green bananas whether branded or not, either within a single State or between Member States, almost impossible. Thus this clause has a similar effect as a prohibition of exports.

136 The effect of this clause is further increased by the policy adopted by UBC of only supplying its customers with smaller quantities of bananas than those which they have ordered and this makes it impossible for them to take any competitive action against the difference in prices from one Member State to another and forces them to confine themselves to their role of ripeners.

137 According to the Commission these prohibitions and practices are both the essential constituent of an overall system enabling the applicant to control the entire marketing of its product and to restrict competition and also form the basis of the three other abuses for which UBC is blamed.

138 It was not until the month (31 January 1976) following the Decision of 17 December 1975, which found that the applicant had infringed Article 86 of the Treaty, (and therefore before 1 February 1976, the last date fixed by the Commission by which the applicant had to inform it that it had ceased to apply the prohibition on the resale of green bananas) that the applicant sent a circular letter to all its established customers on the relevant market to the effect that the object of the clause had never been to forbid the sale by a duly appointed ripener to another Chiquita ripener of green Chiquita bananas or the resale of unbranded green bananas.

139 The applicant points out in answer to these complaints that the clause at issue was worded as follows for Belgium, Denmark and the Netherlands: "bananas can only be resold when they are ripe" (the Danish clause states that only bananas of picture No 3 can be resold).

140 The clause relating to the Netherlands was notified to the Commission on 15 November 1968 as follows: "the sale of bananas supplied by us to competing ripeners is not allowed".

141 The applicant is surprised that the Commission did not request it to give the wording of the conditions of sale and if necessary amend it for the purpose of considering whether the applicant could be exempted under Article 85/3 and that it took the Commission seven years to prepare and finalize its decision finding that there had been an infringement.

142 The only purpose of this clause was to protect the brand name and therefore ultimately the consumers by ensuring that the quality of the products — selected and labelled in the tropics — is exemplary, by reserving them for experienced ripeners who have adequate ripening installations, apply advanced technical methods perfected by UBC's engineers and accept their supervision, and to bring "Chiquita" bananas on to the market when their quality is at its peak.

143 This clause has never been understood as being a prohibition of exports and has never been applied nor enforced as such.

144 The applicant never intended to impose sanctions in the event of non-compliance.

145 Furthermore dealers in bananas sell an extremely perishable semi-finished product which owing to its nature must be ripened immediately rather than dealt in horizontally and trade in ripe bananas — if there was any — could only be marginal.

146 The ripener's function is only to ripen the bananas and distribute them to the retailers.

147 Moreover the ripener's gross profit margin is greater than the profits which he could make by speculating on the average price differences between the various markets except for some weeks each year and it is not therefore in his interest to effect horizontal sales of green bananas.

148 The Olesen case is the only one in which it would appear that the clause was invoked.

149 This was an exceptional case which arose out of a dispute between UBC and this Danish ripener in circumstances different from those in which the prohibition of the sale of green bananas is applied.

150 In any case the order to delete the clause, which was imposed on the applicant, appears to it to be "unreasonable and unjustified", because, since it does not have any ripening installation of its own — except Spiers in Belgium representing. 3.3% of the ripening capacity of the "relevant market" — it would be unable to guarantee the quality of its bananas to the consumer and this would lead to the collapse of its entire commercial policy.

151 The Court's examination must be limited to the clause relating to the prohibition of the resale of green bananas in the form in which it was notified to the Commission on 15 November 1968 without it being necessary to consider the clause as drawn up by UBC on 31 January 1976, that is to say at a date subsequent to the Commission's decision.

152 The clause applied in Belgium, Denmark and the Netherlands, in so far as it has been drawn up in writing, prohibited the resale of bananas while still green whether branded or unbranded and even between ripeners of Chiquita bananas.

153 Since UBC thought it should state in the circular letter of 31 January 1976, which it sent to all ripener/distributors including those established in Germany, that the clause had not been put in writing for Germany, it thereby impliedly acknowledges that the said clause was in force on the German market, since it had clearly been implied or mentioned orally.

154 Under the terms of the clause UBC "required their customers to ensure forthwith that the bananas in their possession are not resold to foreign dealers; it had imposed the same requirement on its foreign customers as far as the Netherlands are concerned. It would not hesitate to take such steps as it deems to be necessary if the foregoing is not complied with in some way or other".

155 This wording implies that UBC, far from rejecting the idea of imposing sanctions on duly appointed ripener/distributors which do not comply with its directions, held out this possibility as a threat.

156 Moreover Olesen unquestionably experienced the harsh effects of this clause after UBC refused to supply it and it wanted to obtain supplies of Chiquita bananas from Scipio and the duly appointed Danish distributors.

157 To impose on the ripener the obligation not to resell bananas so long as he has not had them ripened and to cut down the operations of such a ripener to contacts only with retailers is a restriction of competition.

158 Although it is commendable and lawful to pursue a policy of quality, especially by choosing sellers according to objective criteria relating to the qualifications of the seller, his staff and his facilities, such a practice can only be justified if it does not raise obstacles, the effect of which goes beyond the objective to be attained.

159 In this case, although these conditions for selection have been laid down in a way which is objective and not discriminatory, the prohibition on resale imposed upon duly appointed Chiquita ripeners and the prohibition of the resale of unbranded bananas — even if the perishable nature of the banana in practice restricted the opportunities of reselling to the duration of a specific period of time — when without any doubt an abuse of the dominant position since they limit markets to the prejudice of consumers and affects trade between Member States, in particular by partitioning national markets.

160 Thus UBC's organization of the market confined the ripeners to the role of suppliers of the local market and prevented them from developing their capacity to trade *vis-à-vis* UBC, which moreover tightened its economic hold on them by supplying less goods than they ordered.

161 It follows from all these considerations that the clause at issue forbidding the sale of green bananas infringes Article 86 of the Treaty.

162 On this point the contested decision is therefore justified.

Paragraph 2. The refusal to continue supplies to Olesen

163 The Commission is of the opinion that UBC has infringed Article 86 of the Treaty by refusing to continue supplies of Chiquita bananas to Olesen from 10 October 1973 to 11 February 1975

164 According to a telex message of 11 October 1973 from UBC to Olesen these supplies were discontinued because the ripener/distributor took part in an advertising campaign mounted during October 1973 in Denmark for Dole bananas.

165 Following this discontinuance of supplies Olesen applied in vain to UBC's seven other ripener/distributors in Denmark and also to a company of the Scipio group in Hamburg for green Chiquita bananas.

166 It has suffered considerable damage as a result of this situation due to losses of sales and several important customers including l'Association des Coopérateurs (F.D.B.) which bought 50% of its bananas.

167 On 11 February 1975 UBC and Olesen entered into an agreement under which UBC undertook to resume supplies of bananas to Olesen and the latter withdrew the complaint which it had lodged with the Commission.

168 The Commission regards this refusal to continue supplies to Olesen, which cannot be justified objectively, as an arbitrary interference in the management of the Olesen business which has caused it to suffer damage and was designed to dissuade UBC's ripeners from selling bananas bearing competing brand names or at least from advertising them and these are facts which amount to an infringement of Article 86 of the Treaty.

169 The applicant claims that the marketing policy it pursues is more liberal than that of its competitors.

170 Its ripeners are free to sell products bearing competing brand names, to advertise these products, to reduce their orders, to cancel them and to terminate their relations when they think fit.

171 The Olesen incident must be seen in this setting.

172 In 1967, since the latter had become the largest importer of "Chiquita" bananas in Denmark, it put pressure on UBC to give it preferential treatment compared with the seven other Danish ripeners duly appointed by the applicant.

173 When UBC refused to do so, Olesen became in 1969 the exclusive importer/distributor of the Standard Fruit Company.

174 In 1973 Standard Fruit announced at a press conference that the Dole banana was going to oust the "Chiquita" banana throughout the world.

175 Olesen then sold less and less Chiquita bananas and deliberately pushed the sale of Dole bananas. It did not take the same amount of trouble when ripening Chiquita bananas as it did when ripening bananas bearing other brand names.

176 The breach, which was not unexpected and unforeseeable, arose in these circumstances, punctuated by discussions spread over a long period.

177 This breach was therefore fully justified by the fact that if a firm is directly attacked by its main competitor who has succeeded in making one of that firm's most important long standing customers his exclusive distributor for the whole of the country, that firm in its own interest and that of competition has no option but to fight back or else disappear from this national market.

178 The applicant goes on to say that this refusal to sell to Olesen, which was justified, was not an abuse, because it did not affect the actual competition on the Danish market which recorded a fall of 40% in two weeks at the end of 1974 in the retail price of Chiquita bananas as a result of the competition between competitors which was generated by these circumstances.

179 Finally the refusal to sell to Olesen did not affect trade between Member States, because Dole bananas only pass through Germany from Hamburg and Chiquita bananas from Bremerhaven.

180 These transactions are not therefore intra-Community trade but are in fact trade between Denmark and the third countries where the bananas come from.

181 For all these reasons, since the refusal to sell to Olesen is not in itself a specific breach, the applicant takes the view that the finding of an infringement under this head is unjustified.

182 In view of these conflicting arguments it is advisable to assert positively from the outset that an undertaking in a dominant position for the purpose of marketing a product — which cashes in on the reputation of a brand name known to and valued by the consumers — cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.

183 Such conduct is inconsistent with the objectives laid down in Article 3 (f) of the Treaty, which are set out in detail in Article 86, especially in paragraphs (b) and (c), since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market.

184 It is therefore necessary to ascertain whether the discontinuance of supplies by UBC in October 1973 was justified.

185 The reason given is in the applicant's letter of 11 October 1973 in which it upbraided Olesen in no uncertain manner for having participated in an advertising campaign for one of its competitors.

186 Later on UBC added to this reason a number of complaints, for example, that Olesen was the exclusive representative of its main competitor on the Danish market.

187 This was not a new situation since it goes back to 1969 and was not in any case inconsistent with fair trade practices.

188 Finally UBC has not put forward any relevant argument to justify the refusal of supplies.

189 Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.

190 Even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.

191 The sanction consisting of a refusal to supply by an undertaking in a dominant position was in excess of what might, if such a situation were to arise, reasonably be contemplated as a sanction for conduct similar to that for which UBC blamed Olesen.

192 In fact UBC could not be unaware of that fact that by acting in this way it would discourage its other ripener/distributors from supporting the advertising of other brand names and that the deterrent effect of the sanction imposed upon one of them would make its position of strength on the relevant market that much more effective.

193 Such a course of conduct amounts therefore to a serious interference with the independence of small and medium sized firms in their commercial relations with the undertaking in a dominant position and this independence implies the right to give preference to competitors' goods.

194 In this case the adoption of such a course of conduct is designed to have a serious adverse effect on competition on the relevant banana market by only allowing firms dependant upon the dominant undertaking to stay in business.

195 The applicant's argument that in its view the 40% fall in the price of bananas on the Danish market shows that competition has not been affected by the refusal to supply Olesen cannot be upheld.

196 In fact this fall in prices was only due to the very lively competition — called at the time the "banana war" — in which the two transnational companies UBC and Castle and Cooke engaged.

197 The applicant submits that the refusal to supply Olesen could not have any effect on intra-Community trade because in its view all those bananas coming from third countries (Latin America) and merely transiting the Common Market countries before they reach the Member State where they are consumed are not part of intra-Community trade.

198 If this argument was valid the whole of UBC's European trade in goods of third countries would not be governed by Community law.

199 In fact when Olesen's supplies were cut off it was unable to buy Chiquita bananas at Bremerhaven and therefore had to import into Denmark the same quantities of bananas as it did before this step was taken.

200 It was forced to buy bananas bearing other brand namens outside Denmark and to import them into Denmark.

201 Furthermore, if the occupier of a dominant position, established in the common market, aims at eliminating a competitor who is also established in the Common market, it is immaterial whether this behaviour relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market.

202 Consequently the refusal to supply a long standing regular customer who buys with a view to reselling in another Member State has an influence on the normal movement of trade and an appreciable effect on trade between Member States.

203 The finding in the decision that UBC has infringed Article 86 of the Treaty by refusing to supply Olesen is therefore justified.

Section 2 — The Pricing Practice

Paragraph 1. Discriminatory prices

204 All the bananas marketed by UBC under the brand name "Chiquita" on the relevant market have the same geogrophic origin, belong to the same variety (Cavendish Valery) and are of almost the same quality.

205 They are unloaded in two ports, Rotterdam and Bremerhaven, where unloading costs only differ by a few cents in the dollar per box of 20 kilogrammes, and are resold, except to Scipio and in Ireland, subject to the same conditions of sale and terms of payment after they have been loaded on the buyers' wagons or lorries, the price of a box amounting on average to between 3 and 4 dollars and going up to 5 dollars in 1974.

206 The costs of carriage from the unloading ports to the ripening installations and the amount of any duty payable under the Common Customs Tariff are borne by the purchaser except in Ireland.

207 This being so all those customers going to Rotterdam and Bremerhaven to obtain their supplies might be expected to find that UBC offers them all the same selling price for "Chiquita" bananas.

208 The Commission blames the applicant for charging each week for the sale of its branded bananas — without objective justification — a selling price which differs appreciably according to the Member State where its customers are established.

209 This policy of charging differing prices according to the Member States for which the bananas are intended has been applied at least since 1971 in the case of customers of the Federal Republic of Germany, the Netherlands and the BLEU and was extended in January 1973 to customers in Denmark and in November 1973 to customers in Ireland.

210 The maximum weekly differences recorded between two destinations were on average during the whole of 1971, 17.6% — in 1972, 11.3% — in 1973, 14.5% — in 1974, 13.5%.

211 The highest weekly differences (per box) were respectively between customers in Germany on the one hand and Belgo-Luxembourg and Netherlands customers on the other hand:

— in 1971: 32% and 37%

— in 1972: 21% and 30%

— in 1973: 18% and 43%

— in 1974: 25% and 54%

and between customers in Denmark on the one hand and Belgo-Luxembourg and Netherlands customers on the other hand:

— in 1973: 24% and 54%

— in 1974: 16% and 12%

212 The price customers in Belgium are asked to pay is on average 80% higher than that paid by customers in Ireland.

213 The greatest difference in price is 138% between the delivered Rotterdam price charged by UBC to its customers in Ireland and the f.o.r. Bremerhaven price charged by UBC to its customers in Denmark, that is to say the price paid by Danish customers is 2.38 times the price paid by Irish customers.

214 The Commission treats these facts as an abuse of a dominant position in that UBC has applied dissimilar conditions to equivalent transactions with the other trading parties, thereby placing them at a competitive disadvantage.

215 The applicant states that its prices are determined by market forces and cannot therefore be discriminatory.

216 Further the average difference in the price of "Chiquita" bananas between the national markets in question was only 5% in 1975.

217 The price in any given week is calculated so as to reflect as much as possible the anticipated yellow market price in the following week for each national market.

218 This price is fixed by the Rotterdam management after discussions and negotiations between the applicant's local representatives and the ripener/

distributors must perforce take into account the different competitive context in which ripener/distributors in the different countries are operating.

219 It finds its objective justification in the average anticipated market price.

220 These price differences are in fact due to fluctuating market factors such as the weather, different availability of seasonal competing fruit, holidays, strikes, Government measures, currency denominations.

221 In short the applicant has been asked by the Commission to take appropriate steps to establish a single banana market at a time when it has in fact been unable to do so.

222 According to the applicant as long as the Community institutions have not set up the machinery for a single banana market and the various markets remain national and respond to their individual supply/demand situations differences in prices between them cannot be provented.

223 UBC's answers to the Commission's requests for particulars (the letters of 14 May, 13 September, 10 and 11 December 1974 and 13 February 1975) show that UBC charges its customers each week for its bananas sold under the Chiquita brand name a different selling price depending on the Member State where the latter carry on their business as ripener/distributors according to the ratios to which the Commission has drawn attention.

224 These price differences can reach 30 to 50% in some weeks, even though products supplied under the transactions are equivalent (with the exeption of the Scipio group, subject to this observation that the bananas from Scipio's ripening installations are sold at the same price as those sold by independent ripeners)

225 In fact the bananas sold by UBC are all freighted in the same ships, are unloaded at the same cost in Rotterdam or Bremerhaven and the price differences relate to substantially similar quantities of bananas of the same variety, which have been brought to the same degree of ripening, are of similar quality and sold under the same "Chiquita" brand name under the same conditions of sale and payment for loading on to the purchaser's own

means of transport and the latter have to pay customs duties, taxes and transport costs from these ports.

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

227 Although the responsibility for establishing the single banana market does not lie with the applicant, it can only endeavour to take "what the market can bear" provided that it complies with the rules for the regulation and coordination of the market laid down by the Treaty.

228 Once it can be grasped that differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price levels according to the Member States, then it follows those differences are factors which UBC only has to take into account to a limited extent since it sells a product which is always the same and at the same place to ripener/distributors who — alone — bear the risks of the consumers' market.

229 The interplay of supply and demand should, owing to its nature, only be applied to each stage where it is really manifest.

230 The mechanisms of the market are adversely affected if the price is calculated by leaving out one stage of the market and taking into account the law of supply and demand as between the vendor and the ultimate consumer and not as between the vendor (UBC) and the purchaser (the ripener/distributors).

231 Thus, by reason of its dominant position UBC, fed with information by its local reprensentatives, was in fact able to impose its selling price on the intermediate purchaser. This price and also the "weekly quota allocated" is only fixed and notified to the customer four days before the vessel carrying the bananas berths.

232 These discriminatory prices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered.

233 A rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been competition had thereby been distorted.

234 Consequently the policy of differing prices enabling UBC to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, was an abuse of a dominant position.

Paragraph 2. Unfair prices

235 The Commission is of the opinion that UBC has also abused its dominant position by charging its customers in Germany (other than the Scipio group), Denmark, the Netherlands and the BLEU unfair prices, which in the circumstances it considers are "excessive in relation to the economic value of the product supplied".

236 The policy of partitioning the relevant market has enabled UBC to charge pirces for Chiquita bananas which are sheltered from effective competition and which, bearing in mind that bananas are a food product that is widely consumed, often amount to wide differences in price which cannot be justified objectively.

237 These price differences show that the highest prices are excessive compared with the lowest prices, more especially as the latter yield a profit.

238 Following a letter from UBC of 10 December 1974 it appeared to the Commission to be justifiable, without analysing UBC's costs structure, to treat the prices charged to Irish customers as representative and the differences between the prices c.i.f. Dublin delivered Rotterdam and the other prices charged by UBC for its sales f.o.r. Rotterdam or Bremerhaven show profits of the same order of magnitude as these differences.

239 The prices charged by UBC to its 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 produce for it a substantial and excessive profit in relation to the economic value of the product supplied.

240 The significance of these observations is accentuated by the fact that there is a 20 to 40% difference between the price of Chiquita and unbranded bananas, even though the quality of the latter is only sligthly lower than that of labelled bananas and by the fact that the price of unbranded bananas of similar quality sold by its principal competitors is lower even though their undertakings are running at a profit.

241 Having regard to this situation the Commission considers a reduction by UBC of its price levels to prices at least 15% below the prices it charges its customers in the relevant market, except in Ireland, to be appropriate, since the unfair prices charged currently are an abuse by UBC of its dominant position.

242 The applicant, which does not accept the Commission's argument, lays stress on the very low price of bananas at all stages of the banana chain and illustrates this by the example of a metric ton of bananas which could be imported into Germany in 1956 for DM 697, the price whereof fell in 1973 to DM 458, the difference corresponding to a 50% reduction in real terms.

243 The argument put forward by the Commission to prove that UBC charges excessive prices is wrong because it is based on the letter of 10 December 1974 pointing out "that UBC sold bananas to Irish ripeners at prices allowing it a considerably smaller margin than in some other Member States", the wording of which, settled before 31 December 1974, the date of the end of the financial year, has been retracted on two different occasions by the applicant and it appears from a document annexed to the application that the prices charged in Ireland produced a loss for UBC.

244 It is therefore arbitrary for the Commission to proceed on the basis of the prices charged in Ireland for a few months for the purpose of access to the Irish market, which only represented 1.6% of the total volume of bananas imported during 1974 into the whole of the relevant market, in order to calculate the profits which have been made on the remainder of the relevant market and during the previous years when the prices charged did not allow any profits to be made from 1970 to 1974 inclusive on the relevant market.

245 The applicant takes the view that the difference in the price of branded and unlabelled bananas is justified, because the precautions taken between cutting and sale to the consumer fully explain this difference.

246 It endeavours to prove by another way that there are genuine differences in the quality of Chiquita bananas and those bearing other brand names and that the price difference — averaging 7.4% between 1970 and 1974 — is justified.

247 It submits that the order to reduce its prices by 15% is unintelligible, since the prices in question vary each week on the whole of the relevant market, and unworkable, because a reduction of this size would cause it to sell a banana of a higher quality than its competitors below the prices which they charge for theirs.

248 The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86 of the Treaty.

249 It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

250 In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.

251 This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which whould disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's costs structure.

252 The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, it the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.

253 Other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair.

254 While appreciating the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other, the production costs of the banana do not seem to present any insuperable problems.

255 In this case it emerges from a study by the United Nations Conference on trade and development of 10 February 1975 that the pattern of the production, packaging, transportation, marketing and distribution of bananas could have made it possible to compute the approximate production cost of this fruit and accordingly to calculate whether its selling price to ripener/distributors was excessive.

256 The Commission was at least under a duty to require UBC to produce particulars of all the constituent elements of its production costs.

257 The accuracy of the contents of the documents produced by UBC could have been challenged but that would have been a question of proof.

258 The Commission bases its view that prices are excessive on an analysis of the differences — in its view excessive — between the prices charged in the different Member States and on the policy of discriminatory prices which has been considered above.

259 The foundation of its argument has been the applicant's letter of 10 December 1974 which acknowledged that the margin allowed by the sale of bananas to Irish ripeners was much smaller than in some other Member States and it concluded from this that the amount by which the actual prices f.o.r. Bremerhaven and Rotterdam exceed the delivered Rotterdam prices for bananas to be sold to Irish customers c.i.f. Dublin must represent a profit of the same order of magnitude.

260 Having found that the prices charged to ripeners of the other Member States were considerably higher, sometimes by as much as 100%, than the prices charged to customers in Ireland it concluded that UBC was making a very substantial profit.

261 Nevertheless the Commission has not taken into account in its reasoning several of UBC's letters in which were enclosed a confidential document retracting what is said in its letter of 10 December 1974 and pointing out that the prices charged in Ireland had produced a loss.

262 The applicant also states that the prices charged on the relevant market did not allow it to make any profits during the last five years, except in 1975.

263 These assertions by the applicant are not supported by any accounting documents which prove the consolidated accounts of the UBC group or even by the consolidated accounts for the relevant market.

264 However unreliable the particulars supplied by UBC may be (and in particular the document mentioned previously which works out the "losses" on the Irish market in 1974 without any supporting evidence), the fact remains that it is for the Commission to prove that the applicant charged unfair prices.

265 UBC's retractation, which the Commission has not effectively refuted, establishes beyond doubt that the basis for the calculation adopted by the latter to prove that UBC's prices are excessive is open to criticism and on this particular point there is doubt which must benefit the applicant, especially as for nearly 20 years banana prices, in real terms, have not risen on the relevant market.

266 Although it is also true that the price of Chiquita bananas and those of its principal competitors is different, that difference is about 7%, a percentage which has not been challenged and which cannot automatically be regarded as excessive and consequently unfair.

267 In these circumstances it appears that the Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding that UBC had infringed Article 86 of the Treaty by directly and indirectly imposing unfair selling prices for bananas.

268 Article 1 (c) of the decision must therefore be annulled.

Chapter III — Procedural validity

Section 1 — Complaints relating to denial of due process

269 The applicant complains of the speed with which the administrative procedure took place, of material errors in the Statement of Objections to which it drew the Commission's attention and which have not been rectified — for example the profits it was alleged to have made in Ireland —, of the brevity or ambiguity of the statement of the reasons on which some of the objections such as that relating to unfair prices were based and takes the view that this conduct on the part of the Commission amounts to a breach of the principle of due process.

270 Article 11 of Regulation No 99/63/EEC of the Commission of 25 July 1963 states that the latter "shall have regard ... to the time required for preparation of comments", "The time limits shall be not less than two weeks".

271 Following a preliminary investigation lasting about one year the administrative procedure was initiated on 19 March 1975.

272 UBC had two months (from 11 April 1975 to 12 June 1975) within which to submit its observations and it is UBC which asked for the hearing which took place on 24 June 1975 as provided for in Article 19 (2) of Regulation No 17 of the Council (First Regulation implementing Articles 85 & 86 of the Treaty) of 6 February 1962.

273 It is evident from these dates that the procedure was carried out within normal time periods and cannot be criticized on the ground that it was rushed.

274 As far as concerns the allegation that the statement of the reasons upon which the objections were based was inadequate Article 4 of the said Regulation No 99/63 provides that the Commission in its decisions shall deal only with those objections raised undertakings in respect of which they have been afforded the opportunity of making known their views.

275 The Statement of Objections satisfies this requirement since it sets out, summarily indeed but clearly, the principal facts upon which the Commission relies.

276 In its communication of 19 March 1975 the latter clearly stated the principal facts upon which it based the objections made and indicated to what extent UBC is in a dominant position and has abused it.

277 It does not therefore seem that during the procedure before the Commission there was any breach of the principle of due process.

278 As far as the other objections are concerned they relate to the substance of the case.

279 Consequently this submission is unfounded.

Section 2 — The applicant's claim for damages

280 The applicant complains that the Commission's approach to this proceeding was permeated with bias.

281 In an endeavour to justify this complaint it mentions: the exaggeration of the differences in price between the States in the Commission's finding, the description, which UBC asserts is incorrect, of UBC's progress on the Irish market, a misleading presentation of an FAO study on competition between bananas and summer fruit, the assertion that "bananas can only be transported while still green", the wrong presentation of the reduction of supplies to Olesen.

282 Consideration of the correctness of these complaints goes to the substance of the case and the parties have developed their views on them at great length.

283 There is no ground for saying that the Commission mentioned these matters tendentiously.

284 The applicant states that it has suffered moral damages owing to the fact that before the Commission adopted the decision, one of its officials made denigrating comment to a newspaper on UBC's commercial conduct which was reproduced by the world press and gave the impression that the alleged

infringements had been proved, when in fact the parties concerned had not yet delivered their defences.

285 For this reason the Commission was no longer able to evaluate impartially the facts of the case and the arguments submitted by the applicant.

286 There is nothing on the Court's file to justify the presumption that the contested decision would not have been adopted or would have been different had it not been for these disputed statements which are in themselves regrettable.

287 However there is nothing to indicate that the Commission's conduct was such as to have an adverse effect on the way the procedure is normally carried out.

288 In these circumstances the claim against the Commission for damages must be rejected.

Chapter IV — The sanctions

289 The Commission, for the purpose of imposing a fine of one million units of account for the four infringements which it found UBC had committed, stating that the latter "were at the very least negligent", had regard to their gravity and duration and to the size of the undertaking.

290 As far as their gravity is concerned the Commission considered them in their economic and legal setting by taking account of their combined effect and of their consequences which are manifestly inconsistent with the Treaty objectives of integrating markets and of the fact that the banana is a product which is widely consumed.

291 As far as the duration of the infringements is concerned the Commission took the view that the prohibition on the sale of bananas while still green only had to be taken into consideration from January 1967 to 15 November 1968 being the date when UBC notified the general conditions of sale for the Netherlands to the Commission.

292 It follows from this that, by reason of UBC's acts after 15 November 1968 which have remained within the scope of the activity described therein, there has accordingly been no negligence on the part of UBC and no fine has been imposed on account of these later acts.

293 Furthermore during the procedure for the adoption of an interim measure on 5 April 1976 the Commission took note of the amendment of the clause at issue while expressing the view that it should have taken action earlier.

294 According to the Commission the refusal by UBC to continue supplies to Olesen lasted from 10 October 1973 to 11 February 1975 and the Commission states that it took account of the fact that UBC put an end to this infringement of its own accord.

295 The pricing policy has been applied since at least 1971 to UBC's customers in Germany, the Netherlands and the BLEU, since January 1973 to customers in Denmark and since November 1973 to customers in Ireland.

296 Finally according to the Commission the amount of the fine was fixed at one million units of account in the light of UBC's total annual turnover of about two thousand million dollars and its annual turnover in bananas of fifty million dollars on the relevant market and also of the high profits made as a result of its pricing policy.

297 Furthermore in order to compel UBC to put an end to these infringements, in so far as it had not done so of its own accord, the Commission ordered UBC, subject to a penalty payment, to inform all its distributor/ripeners in Germany, Denmark, Ireland, the Netherlands and the BLEU that it has ceased to apply the prohibition on the resale of green bananas by not later than 1 February 1976 and to inform the Commission twice yearly for a period of two years of the prices charged during the preceding six months to the same customers.

298 The applicant submits that it did not know that it was in a dominant position, still less that it had abused it, especially as, according to the case-law of the Court to date, only undertakings which were pure monopolies or controlled an overwhelming share of the market have been held to be in a dominant position.

299 UBC is an undertaking which, having engaged for a very long time in international and national trade, has special knowledge of anti-trust laws and has already experienced their severity.

300 UBC, by setting up a commercial system combining the prohibition of the sale of bananas while still green, discriminatory prices, deliveries less than the amounts ordered, all of which was to end in strict partitioning of national markets, adopted measures which it knew or ought to have known contravened the prohibition set out in Article 86 of the Treaty.

301 The Commission therefore had good reason to find that UBC's infringements were at the very least negligent.

302 The amount of the fine imposed does not seem to be out of proportion to the gravity and duration of the infringements (and also to the size of the undertaking).

303 Account must however be taken of the partial annulment of the decision and the amount fixed by the Commission reduced accordingly.

304 A reduction of the fine to 850 000 (eight hundred and fifty thousand) units of account, to be paid in the national currency of the applicant undertaking whose registered office is situate in the Community, that is to say 3 077 000 Netherlands guilders (three million seventy seven thousand Netherlands guilders), appears to be justified.

Costs

305 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

306 Under Paragraph (3) of this Article when each party succeeds on some and fails on other heads or where the circumstances are exceptional the Court may order that the parties bear their own costs in whole or in part.

307 With regard to the costs of the proceedings in the main action the Commission has failed on one of the complaints made against the applicant as a result of the annulment of the corresponding part of the decision.

308 Each party shall bear its own costs.

309 Furthermore an order must be made for payment of the costs of the application for the adoption of an interim measure.

On those grounds,

THE COURT

hereby;

1. **Annuls Article 1 (c) of Commission Decision of 17 December 1975 "IV/26699 — Chiquita", (Official Journal L 95 of 9 April 1976).**

2. **Reduces the amount of the fine imposed on UBC and UBCBV to 850 000 (eight hundred and fifty thousand) units of account, to be paid in the national currency of the applicant undertaking whose registered office is situate in the Community, that is to say 3 077 000 Netherlands guilders (three million seventy seven thousand Netherlands guilders).**

3. **Dismisses the rest of the application.**

4. **Orders each party to bear its own costs including the costs of the application for the adoption of an interim measure.**

Kutscher Sørensen Bosco

Donner Mertens de Wilmars Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 14 February 1978.

A. Van Houtte
Registrar

H. Kutscher
President

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