OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 8 NOVEMBER 1977 [1]

Mr President,
Members of the Court,

I — General Introduction

The banana belongs to the genus "musa" which comprises about a hundred species or varieties grown in the tropics. At the present time the banana trade is the largest branch of the international fruit trade. The bananas which are most commonly offered for sale belong to two main species: Gros Michel and Cavendish (the Valery and Giant varieties).

These varieties are less sensitive to the effects of wind because of their shorter tree trunks. Furthermore their resistance capability when Panama disease breaks out has contributed to extend their primacy to large tracts of the banana belt in Central and South America.

The fact that the Cavendish species is spread over large areas has led to decisive changes: large commercial undertakings which were carrying on business mainly in the new areas under cultivation have based their advertising on Cavendish which for this reason has become the kind in greatest demand. Consequently it has been increasingly difficult to sell Gros Michel and this variety has continued to lose ground.

Cavendish has a predominant position and the other varieties a very small share of the market, not because Cavendish appeals to consumers but because distributors find it is easy to deal with. In practice the distributors find that the other kinds of bananas are fragile and their wastage per cent higher than that of Cavendish bananas. However the latter variety needs more manure and irrigation and its introduction called for larger investment capital both for cultivation and marketing.

Among the different Cavendish varieties, Valery, developed by the United Fruit Co. in Central America, assumes, as we shall see, special importance.

The banana has the advantage of not being a seasonal fruit; it can be sold all the year round. In spite of losses caused by hurricanes the world supply of exportable bananas is always considerably in excess of demand in the principal importing countries of the temperate zone.

A — The relevant product

As far as eating habits are concerned there is no doubt that a mother who gives her young child a fruit yoghurt will not give him a banana as well. But no one would dream of asserting that for this reason milk products are a substitute for bananas.

Most of the experts who have studied consumer habits agree with the finding that the factors accounting for consumption are prices and income. In most of the consumer countries of Europe retail prices are at their highest level in May or June, after which they drop until the end of the year and then go up again until the middle of the following year. Thus the easing of price levels of the wholesale banana market during the summer months may be correlated with the competition with peaches from May to July when there is an abundance of this fruit. Similarly consumption in Italy can be seen to

1 — Translated from the French.

decline a little when the first oranges arrive at the end of the year. Contrary to the findings in the case of other fruits banana prices are high when large quantities of them are sold. That would indicate that with certain exceptions demand has a greater influence on banana prices than supply; they would depend more on the season than on the quantity offered. In the case of regulated markets the quantities rather than the prices are inclined to be the variable factor because the marketing of the banana is kept under control for the purpose of attaining the objectives of fixed prices.

But the prices of each species indicate their own particular trend and do not seem to have any influence on each other whatever their level may be. The arrival on the market of other fruits only has a fairly limited impact; furthermore, the prices of each of these fruits tends to be determined mainly by the amount on offer.

There is however no doubt that ripeners store fruits other than bananas and that wholesalers or retailers who sell bananas also offer other imported or home grown fruits for sale and that bananas almost always form part of an assortment of fresh fruits of varying amounts and this no doubt gave birth to the idea that they might be substituted. But the substitution of other fruit does not, with local and seasonal exceptions, play a decisive role; neither their prices nor the amounts consumed have any effect on the typical patterns of banana consumption.

Although therefore it can be admitted that the "seasonal" factor is not immaterial, and that together with the perishable nature of the product it partially explains the "up and down" price fluctuations, there is none-the-less a specific banana market separate from the general fresh fruit market.

Finally it would be inconsistent to maintain on the one hand, that there is a separate market for branded and unbranded bananas and, on the other hand, that the banana is interchangeable with other fruits.

On the first point — the relevant product — the following finding must therefore be accepted: the effect of the prices and available quantities of other fruits is too brief, too ineffective and too sporadic for these fruits to be regarded as forming part of the same market as bananas or as a substitute therefor. In any case they are not sufficiently interchangeable for such a conclusion to be reached.

B — The "banana chain"

In the producing countries of Central and South America the collection of bananas is generally carried out by the firms which themselves distribute the bananas in the consumer country or are closely connected with the wholesalers. These firms which own their own plantations or have entered into supply contracts with planters therefore often have links with the production sector. Although as a general rule these firms are not responsible for the risks to which the goods are exposed until they leave port they already control the organization of the collection, packaging, forwarding to the port and loading. The importance of efficient harvesting and loading for the purpose of ensuring that a region remains competitive is grasped when it is pointed out that in almost all the countries under consideration these operations represent more than one half of export earnings f.o.b.

In order to be able to export the banana, which is easily bruised when ripe, it has been necessary up to now to cut it while still green (see Application, p. 143, colour pictures 1 and 2) and handle and pack it with some care.

The harvest time of the green banana is not always the same or the same

everywhere. It depends upon the number of days which will elapse between the date when the bananas are harvested and the date when they are placed in the ripening installations (the system of cutting to order) and also on the condition of the fruit which varies according to the region, the seasons or the varieties.

For about the last twelve years there has been a real revolution in the packaging and marketing of the banana and price formation at various stages has for this reason undergone considerable modification.

First of all cardboard boxes were adopted. Instead of exporting the entire stem the "hands" or "bunches" are despatched in cartons. This kind of packaging had to be used because Cavendish, a wide-spread variety, is inclined to suffer damage when transported. Again it was the United Fruit Company which perfected this form of packaging for "hands cut on the stem", the reasons being transport and changing to different varieties in Honduras. This method of packing solves some of the problems connected with purchasing, carriage and especially ripening. Its general application led to more scientific ripening methods and to great changes in the organization of the work at a ripening establishment; it confronted many ripeners with the problem of the depreciation of modern and expensive equipment.

The plantations have their own packing stations. The firm which markets the bananas provides them with the cartons. The cost of the cartons and packaging usually represents about one half of the entire costs from harvesting to loading. This led to higher fixed charges being borne by the producer or exporter. From the time the bananas arrive at the market preparation station to the f.o.b. stage the main factor in the rise in prices from 1971 to the end of 1974 has been the cost of the cartons which went up on average by about 50%.

All things considered the adoption of the carton package is a *fait accompli* which has brought about an improvement in quality; it has enabled new outlets to be opened up and has increased the market's absorption capacity considerably; but as against that it has necessitated an increase of capital investment in production areas and the adoption of additional organizational measures. The effect of these developments has been to shift the complicated, laborious and expensive selection and packaging operations to the producing countries and it may be asked whether they have not been achieved to the detriment of the producer.

There is another aspect of these developments; since ripeners no longer have to unpack the stem and cut the bananas from it, they should have less work to do. The cartons should only pass through their installations; the cost of the operations which they carry out should have turned out to have been thereby reduced. But as often as not, because it is in their commercial interest, they check the entire contents of the cartons when they leave the ripening rooms, repack or even prepack the fruit. The supermarkets in fact very often also insist that bananas are prepacked. Prepacking, which is primarily a means of self-service selling while at the same time it retains the advantages of selling in bulk, has been adopted since the advent of the carton. The product sells itself. Prepacking also plays a part in promoting sales by stimulating further consumption. The system adopted by chain stores consists in making customers pay more for bananas sold at an imposed price because they are of a higher quality. It also allows prices to be kept stable. Prices of "prepacked" bananas fluctuate less than those of other bananas. However, since the bananas have to be unpacked, selected and repacked again, the application of an imposed price means

that most of the profit from packing them in cartons is lost. In short the costs of the ripening installations have not been reduced but on the contrary have gone up; the effect of this widespread use of packaging and presentation was that the changeover from the normal channels to a shorter distribution chain was accomplished with increased costs.

At the same time as the cardboard box came into general use labelling by the affixture of a brand name not only on the cartons but on each banana, so that the latter can be identified when bananas are retailed, was seen to gain ground. The banana is a commonplace fruit; after all most of the bananas produced in the world are consumed without the product being branded. But in the absence of any official quality standards brand names are the main criteria for ripeners and consumers when they purchase. As long as there is no system of grading or any such system is badly applied the brand name guides consumers when they make their choice. The promoters of a brand name, by making it impossible to supply bad products or consignments of doubtful quality, aim not only at improving their reputation and preventing unfair competition between local consignors or exporters or traders who, especially when prices are high, would be tempted to sell their unbranded products on the market, but also at obtaining better prices for their products. A brand name is thus an important aspect of marketing policy, which may in certain circumstances assume as much importance as the price. Branded products sell notwithstanding the attitude of the distributors; the latter can no longer do without the branded product on their shelves. The art of placing bananas on the market has consisted entirely in turning the banana into a branded fruit, worthy of consideration by the distributor as well as the consumer. Again it was United Fruit and Standard Fruit which were the pioneers in this field. Since it is now the practice to pack bananas in cartons and affix a brand label on them, which enables the consumer to identify the product, the quality standards, especially the external appearance of a banana and its good condition when ripe, became increasingly important and led to appreciable differences in retail prices. The importer conveys to the distributors and consumers an idea of the quality of the products sold under the brand name. This image has such a powerful effect that the consumer becomes attached to the product which thus becomes an article with an appeal in the field of both integrated or conventional marketing. The product is sold at a price which is profitable because it is of better quality than the standard grade products of the distributor. This result will be able to be obtained either by a qualitative differentiation of the product (the latter tends to offer a quality higher than that of standard grade bananas) or by inducing the consumer by psychological methods to distinguish the product, but at the price of very high expenditure on promotion and advertising which only a very big undertaking can afford.

In fact the introduction of a brand name must be supported by very large advertising campaigns and presupposes a long term policy. This phenomenon leads to an increasing differentiation between the relatively commonplace presentation by means of trade marks and special distribution systems which sometimes include the retail stage. The trend towards sophistication of the product and its packaging thus conflicts with the concern to keep down consumer prices.

After the bananas are cut they are transported to the port of shipment either by lorries or by narrow gauge railway which are often owned by the firms which market the banana.

The transportation of bananas from the producing to the consuming countries plays a very important part in their marketing. It is carried out almost entirely in ships with holds which can be refrigerated. The percentage of ships used for the carriage of bananas is 60 to 80% of the fleet of refrigerator vessels. Most reefer boats are general multi-purpose reefer vessels with refrigeration and ventilation suitable for all or most reefer cargoes.

The banana boats are intended to operate in accordance with a strict timetable in order to maintain continuity in marketing and they have to sail on the specified date, even if they do not have a full cargo. In order that bananas can be sold at a steady rate during peak periods at the weekends, the arrival is fixed as much as possible at the beginning of the week.

Supplies often take the form of pooled cargoes despatched to different European countries and arranged by associates and affiliates of the largest importers.

There is another factor. The exploitation of the ships depends also on fixing the most favourable dates for sailing, as this, especially in the case of large fleets, may have an appreciable effect on the profitability of the transportation.

The technical need for an integrated infrastructure for handling bananas has led since the early years of the banana trade to a complete integration of sea transport into the distribution chain. In these circumstances it is not surprising that a certain number of banana companies commission their own ships and carry their own fruit; they find that in practice there are technical and economic advantages in total integration: a single administrative centre, centralized supervision of the different operations and in addition the opportunity to make a profit out of each commercial activity.

Six (three of which are in the Federal Republic of Germany and represent 33% of the entire refrigerator capacity of the ECC fleet) of the 27 shipping undertakings operating in the EEC have close links with undertakings exporting or importing bananas, usually on the basis of share participation.

Although most banana companies are very dependent on chartering other ships, integrated fleets play an important role in the banana trade. Even if banana undertakings use chartered ships rather than their own fleet, they do not for all that necessarily exercise any less control over their fitting out and the transportation of the bananas. Their decision not to lock up a large amount of capital in the purchase of refrigerator ships may be due to the fact that they are able to influence the freight market in another way to their advantage.

In certain European ports or elsewhere a large proportion of the goods which arrive are transhipped to other countries by sea, rail or lorry. However the banana must in any case undergo industrial processing known as ripening in ripening installations before being offered to the consumer. The process of ripening bananas cut while still green, which is to a large extent discontinued while they are being transported, must therefore be resumed before the fruit can be offered to the European consumer. The bananas are only taken out of isothermal boats, lorries or cold storage when there is an opportunity of selling them to the consumer within a period of a few days.

The banana which arrives at the ripening installations green or light green (Application, p. 143, pictures 1 and 2) emerges from it turning green (more green than yellow, Application, p. 144, picture 3) or turning yellow (more yellow than green, Application, p. 144, picture 4): it reaches the retailer turning yellow or yellow with green edges (Application, p. 144, picture 5) and is

sold to the consumer in this condition (Application, p. 144, pictures 4 or 5) or completely yellow or spotted (Application, p. 144, pictures 6 and 7) or as a downgraded banana.

The ripener occupies a key position among the various links of the "banana chain". His entire skill lies in ripening the fruit in such a way that, however many intermediaries there are, when the consumer gets it eight days later it is fully ripened.

Ripening requires a period of time which varies according to the type of rooms and the temperatures which are used. The latter are in general multi-purpose so that the plant can be written off in the event of a new commercial policy being adopted. Nowadays the control of ripening has become technical. The ripener starts the ripening by raising the temperature very much more to begin with if the demand must be met urgently. Therefore by adjusting the temperature of the room he can speed up or slow down the ripening according to the essential requirements of sales and marketing. In fact he endeavours to fill his rooms for as short a time as possible and to empty them in one go. Frequently ethylene gas is introduced into the rooms in order to help the ripening process. Ripening takes three to six days. Once the process has been started it must be allowed to continue and can only be slowed down to a very limited extent. The banana soon becomes perishable when it leaves the ripening installation. It has to reach the consumer within a period of one to four days. The period which elapses between the arrival at the port and delivery to the retailer is altogether about twelve days.

As the ripening period can be varied according to the temperature this transformation constitutes to some extent a safety valve in the distribution system.

Undertakings with ripening installations prefer to have their place of business in heavily populated areas.

Only large ripening installations can satisfy the quantitative and qualitative requirements of supermarkets and group purchasing organizations. The ripening installation, which recently was still run by skilled labour, has been converted into a concentrated industrial set up at the cost of considerable capital investment.

Altogether the equipment of the ripening installations is usually more than sufficient and the ripening capacity exceeds the quantity treated.

Part of the amounts of which some ripening installations take delivery are resold in adjacent regions and even in some which by comparison are far away and, at certain periods of the year, ripeners obtain their supplies from fellow ripeners in areas which are sometimes a long way away. It is very difficult to ascertain a ripening installation's sphere of influence. If, as sometimes happens, a ripener, who is one of an importer's customers, had been unable to obtain the stocks which he had asked his regular supplier for, he can apply to another importer who will however only supply him with the consent of the regular supplier and at the price which the latter quotes to him. Therefore the organization with which one is confronted is solidly constructed leaving little freedom to purchasers.

Once the banana has been ripened its marketing must be co-ordinated and carried out comparatively quickly, except when it is carried over very short distances or by fast means of transport.

As the ripener undertakes distribution as well, the cost of ripening which is included in the net wholesale margin cannot be separated with sufficient accuracy from the other costs. This cost item is very difficult to work out because the services provided by the ripener can vary considerably. However the ripener's margin depends primarily on his equipment; the wholesaler's margin depends primarily on the

territory which he supplies and on the services which he provides. Sometimes he merely ripens the bananas and sells them to a "demi-grossiste" (a middleman between wholesaler and retailer) or to a retailer who comes and fetches them from him; sometimes he supplies the retailer and acts as the wholesaler. Sometimes he sells bananas in cartons but he is also able to offer them prepacked. The ex-ripening installation price can therefore vary considerably; this explains the importance of the f.o.r. price or the delivered price to the ripening installation.

It should neither be the role nor the function of importers to engage in ripening the products which they import. The ripening installations, of which they are the absolute owners, should only play the part of a valve which can be turned on to ensure that consignments, which they have not sold and wish to prevent from perishing, are ripened. It might even happen that under such a system they compete with their own customers.

In fact there is a different situation in Europe; most of the ripening installations are owned by importing companies or have close links with them; competition only begins when the bananas leave the ripening installation or at the wholesale or retail stage. This is understandable from a purely commercial point of view: close co-operation between importer and wholesaler decreases the risks involved in selling. Moreover completely independent undertakings which only provide the service of "ripening" are now only of small importance. The enlargement of the supply network of the principal wholesale undertakings, which moreover has appreciably improved the quality of the bananas offered for sale during the last few years and has enabled a ripe product to be bought without incurring any risk, has caused more and more small businesses to discontinue ripening.

The technical and economic problems presented by the procurement of supplies, ripening and distribution have made some ripeners draw nearer to the producers. Although it is difficult to determine the interrelationship of the interests which link up the companies carrying out these different operations, the ripeners can be divided into two groups:

— Those which are dependent upon an integrated chain in which planting and importation are carried out by the same company; the ripener who is completely integrated into production obtains his supplies by drawing on the quantity which he receives. It is the same company which plants, exports, imports and ripens the fruit, selling it to itself at each stage;

— Those which are dependent upon a semi-integrated chain in which planter and exporter are at best shareholders in the ripening installation which thus belongs to a company legally distinct from the importing company. Their interests are nevertheless interdependent and their relationship is founded on loyalty and trust. It is in the interest of the ripener to sell at the highest price in order to keep the custom of his supplier; since it is in the supplier's interest that the ripener sells at a high price, he aims at providing the best quality.

These two types have captured most of the market and own the largest number of ripening installations called "industrial installations". Even independent ripeners often bind themselves contractually to several importers in order to make certain in times of shortage of a certain quantity or, if they are in a strong position, to play off one importer against the other.

The United States do not fit into this description. United Brands (known as

United Fruit Company in 1958) formerly had certain interests in ripening in that country but had to divest itself of them, as Standard Fruit and Del Monte also had to do following a legal decision of 1958. A system of conditional selling ("vente par réservation") was introduced by United Brands in 1965 and afterwards adopted by Standard Fruit: contracts were drawn up three weeks in advance at fixed prices with a guarantee that the prices would be altered if the f.o.r. selling price was lower at the date of delivery. This method permitted the importer to provide for his deliveries in advance and was meant in theory to have a stabilizing effect on the market. However most of the sales in the United States are always f.o.r. or just before the goods arrive in port. Both United Brands and Standard Fruit have created a national network of sales bureaux and local representatives who are in close contact with the ripeners in the trade, chain stores and independent retailers in order to secure the best service for their customers and to advise them as to the quality of the bananas and their sales promotion.

The United States have also during the last few years witnessed a new concentration of distribution due to the development of chain stores and supermarkets which take an increasingly large share of retail banana sales. These stores themselves ripen most of the bananas which they require. Consequently the chain stores can to some extent fix their own prices and conditions of purchase provided that they are not under the control of or associated with groups of importers or that they do not concert with them to exploit the market.

In Europe also integration between wholesalers and retailers gains ground and the trade, once it is integrated, tends to set up its own ripening installations and to create in this way a kind of countervailing power *vis-à-vis* the importing companies. As the ripening stage also makes the wholesale banana trade possible, the degree of vertical integration of the ripening installation, for financial, contractual and technical reasons, has important effects on the actual marketing of bananas. Ripeners/wholesalers are thus a constituent part of the power and position of banana companies according to the extent to which their selling agencies are integrated.

To sum up the conditions under which bananas are purchased, transported and handled are very special. Economies of scale linked to the size of the business are particularly marked at the stage of the cultivation of and the trade in this fruit. This tendency to increase the size of the business is accompanied by increased injections of capital, the use of modern methods of production as well as a rational organization of the business. Since the product in question, the banana, is grown in the tropics but sold in the importing countries of the temperate zone, a high degree of integration has become the special feature of its production and distributive operations. The commercial organizations and firms which forward the product to the ports of shipment generally also engage wholly or partly in the ripening and sale of the fruit. It is only the large import firms which have the opportunity of selling bananas at a profit by intervening at the various stages of the chain of production and distribution. Therefore it is not at all surprising that production and distribution have been carried out by undertakings which not only command a large amount of capital but also have at their disposal advanced technology and up to date management techniques. Most of them own their own fleet or have entered into firm contracts to charter vessels. Their factories and installations are located in many different places; they or their subsidiaries are the largest importers. To sum up they are trans- or multi-national companies.

Naturally these companies turn to account their completely integrated systems of marketing and the control under which they can keep their sources of supplies. Although they are forced to plan their loading and selling programmes a long time ahead, they are in a position to alter the destination of their consignments quickly in order to avoid selling on a depressed market and to take advantage of a more active market; they can also set off part of a temporary fall in the production of a specific area by utilizing the supplies of another region.

The part these companies play in the actual production of bananas has diminished but their share of the trade is still about 70% in value. The shipping of bananas is mainly controlled by interests unconnected with the exporting countries, which do not in practice engage in this activity. In the banana republics more than 80% of the banana marketing chain remains under the actual control of undertakings whose registered office is in the developed countries where there is a free market economy. These countries account for more than 9/10ths of total imports. The main feature of the world banana trade is oligopolistic competition between trans-national companies. The pattern of the retail banana trade in the countries of Western Europe has been transformed: the small, independent businesses selling on a competitive market at prices determined by supply and demand on a short term basis have given way to businesses dominated by large "conglomerates" selling at prices arrived at by means of mechanisms such as the differentiation of the brand name, the conditioning (pre-selling) of the consumer, long term quotations or supply contracts. However the process of concentrating the trade, which has brought about a reduction in the numbers of retail shops, has also in fact intensified competition ("the banana war"). In the distribution sector of fruit and vegetables the effect of this development has been that sales take place in food shops having a large assortment of these products. The wholesale trade has less and less access to these shops, because their orders are increasingly given to group purchasing organizations which perform the customary functions of the wholesale trade in relation to all the goods which are sold. Bananas, the ripening of which calls for additional requirements, have been less affected by this development. Although some group purchasing organizations already have ripening rooms they nevertheless only have the bananas ripened there which are needed for their basic requirements and buy the rest from other suppliers in order to be able to take advantage of the future market trend. However, because of the large quantities for which these group purchasing organizations ask, they can only be supplied by the very large wholesale undertakings.

Unlike almost all other fruit, general quality standards have not been able to be applied to bananas; that is in particular due to the fact that bananas are not marketed separately but attached to a stem which often includes bananas in different stages of ripening. This accounts for the existence of "private" brand names side by side with standard national labels.

C — The geographic market

Similarly, although bananas are among the agricultural products enumerated in the list in Annex II to the Treaty, and are subject to the provisions of Articles 39 to 46, they are not covered by the common organization of the markets in fruits. The advocates of a system which guarantees free access to the consumer and takes differences in price and quality into consideration and the advocates of an organization of the market also designed to provide producers with guarantees have been

unable to reach agreement. Consequently, side by side with the provisions of the Treaty of Rome, various import arrangements, which represent a specific commercial policy peculiar to a particular Member State, continue to co-exist.

Even within the system organized by the Treaty a distinction must be drawn between the general rules, account being taken of the dates of accession of Member States to the Treaty of Rome, of the system applicable to the bananas of the French overseas departments and territories and of Associated States referred to in Article 131 and listed in Annex IV (African and Malagasian States) and the states which, before they acceded in February 1975 to the ACP-EEC Convention of Lomé were members of the Commonwealth and, finally, of the system applicable in the Federal Republic of Germany under the Protocol on the tariff quota for imports of bananas annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community. This Protocol has been and continues to be applicable since 1 January 1958. As provided for in Article 239 of the Treaty it forms an integral part of the latter and this moreover is confirmed by Article 2 (3) of the First Association Convention signed at Lomé on 28 July 1963 which came after the Implementing Convention annexed to the Treaty.

If the system based on the source of the bananas and the system based on the geographic area where they are consumed are compared, the following mosaic emerges:

The Common Customs Tariff of 20%, *ad valorem*, is payable on bananas imported into the Benelux countries which come from the free markets of third countries (mainly Latin-American countries). In fact, 98% of imports into Benelux come from these countries.

Imports into the Netherlands and Luxembourg bear VAT at 4%; in Belgium they bear a transference tax of 14%.

Imports from Associated Territories are free of duty.

Nor are there any quantitative restrictions on imports into the Federal Republic of Germany either, and bananas coming from overseas departments or territories and from Associated States can enter free of customs duty.

Imports from third countries are in general subject to a Common Customs Tariff of 20%. However as provided for in the above-mentioned Protocol the Federal Republic of Germany shall enjoy an annual duty-free import quota equal to 75% of the imports which came from third countries in 1956, to which must be added an amount equal to 50% of the difference between the aggregate of imports from all sources during each preceding year and this basic quantity (290 000 metric tons).

According to the third paragraph of Article 4 of the Protocol on the tariff quota for imports of bananas any decision to abolish or amend this quota shall be taken by the Council acting by a qualified majority on a proposal of the Commission. In fact the Federal Republic of Germany is allowed each year by its partners an additional tariff quota which, when added to the basic quota, covers the entire consumption in Germany.

If the countries and territories referred to in Article 131 cannot supply the quantities required by the Federal Republic of Germany the latter can obtain an increase of the quota which it can import free of duty.

When this Protocol was signed the Federal Republic of Germany, through its plenipotentiary, stated that it was prepared to encourage the adoption of measures which might be taken by German private interests with a view to furthering the sale in the Federal

Republic of Germany of bananas coming from Associated Countries and territories overseas. Similarly according to Annex XI to the Final Act of the Second Convention signed at Yaoundé on 29 July 1969: "If the quantities required by the Federal Republic of Germany exceed the tariff quota granted to her by virtue of the Protocol ... of 25 March 1957, the exporting Associated States will be consulted as to their ability to furnish on appropriate terms, all or part of the quantities required by the Federal Republic of Germany".

In fact nothing has occurred which might have modified the traditionally Latin American supply pattern of this country except that Central America's share has increased in comparison with that of South America.

Moreover in general the share of the world trade held by banana producers protected by preferential treatment has continued to decline and it may be assumed that in order to obtain access to markets thought to be free, they will still have to contend with agreements relating to navigation or distribution and with traditional marketing channels.

VAT at 5.5% is charged at various marketing stages.

A large part of the French market is reserved to the overseas departments (about two-thirds) and to the African countries of the franc area (about one-third) the bananas from which are imported free of duty.

Imports coming from other countries are, in addition to the duty of 20%, controlled by quotas and licences. The quotas are fixed at the beginning of each season and modified during the current year in accordance with the situation of the country in question.

Further an organization, or at least some parts of a national organization of the market, have been added to this system and superimposed on it. Packaging and grading standards have been laid down by orders; under such standardization, which attaches great importance to the external appearance, the minimum qualities of the bananas from the overseas departments are defined and three categories are distinguished: extra, category I and category II, made conspicuous by labels. The result is that brand names are hardly ever used in France. The consumer is protected by the "service de la répression des fraudes".

The implementation of the national banana policy is entrusted to a "Comité Interprofessionnel Bananier",("C.I.B."), which is composed of representatives of producer/exporters of the Overseas Departments and African countries of the franc area, the shipping companies, importers, wholesaler-ripeners, the retail trade and the relevant ministers and semi-official departments.

A target price ("prix d'objectif") f.o.r. ("wagon-départ") is fixed each year by the administration; the retail price is limited by law. The aggregate amount of imports are computed so that the import price is at the desired level.

The C.I.B., in agreement with the public authorities, determines each month the tonnage of bananas to be imported in accordance with the quotas of each producing country and makes forecasts for the forthcoming months or quarters taking into account seasonal consumption in France and production prospects. Its rôle is to rationalize the market and to prevent sudden price variations due to an excess or shortfall of supplies, while taking account of the interests of the producers and the trade.

In addition, a groupement d'intérêt économique bananier (G.I.E.B.) (equivalent to a consortium but not identical) is responsible for adjusting supply and demand on a permanent basis in accordance with the provisions of an agreement entered into with "le directeur général du commerce intérieur

et des prix" ("the Director General of Internal Trade and Prices"). G.I.E.B. purchases from the Compagnie des Bananas, a subsidiary of United Fruit, the fruits which the latter imports, *inter alia*, from Central America.

In the case of their most important transactions the importers do not have to bear any risk referable to prices and sales, since the sales are effected on commission for the account of the producer. Each importing agent of the franc area is allowed to import additional supplies of bananas from third countries, through G.I.E.B., the amount whereof varying in accordance with his respective share on the market; he then distributes them to each of his ripeners in proportion to their priorities.

There is no doubt that since the end of the transitional period France cannot in any way discriminate against the bananas imported from other Member States coming from third countries (South America for example) and which are in free circulation there, that is to say, which have paid the Common Customs Tariff of 20%; it cannot either prevent its own importers from obtaining their supplies direct from third countries, provided always that they pay the Common Customs Tariff, nor, according to the judgment of 10 December in Case 48/74, *Charmasson* v *Minister for Economic Affairs and Finance (Paris)*, [1974], ECR 1383, discriminate in relation either to quantities or prices between bananas imported from associated countries according to whether they maintain special relationships with it or not. But there was and still is a national organization of the banana market which precludes the view that the marketing of this fruit is carried out there under conditions of unrestricted competition.

In Italy, since the abolition in 1965 of the State Banana Monopoly responsible for marketing bananas, imports from Associated Countries have been liberalized but imports from third countries remain subject to a system of global quotas fixed by circulars issued by the administration, which are available on application by the importers concerned.

The duty payable on bananas from third countries is the 20% Common Customs Tariff; VAT at 6% was reduced in 1973 to 3% for a period of three years. But a tax on consumption of Lit 110 per kilogramme (that is more than 100% of the c.i.f. value) is imposed on bananas from all sources.

Furthermore the charterparties relating to foreign ships for the carriage of bananas are subject to the scrutiny of the Ministry for Shipping and the Exchange Control Office. This arrangement is designed to secure a stable balance of payments and to control transfers relating to invisible transactions. In that country there can be no question either of a system of unrestricted competition.

As far as the new Member States are concerned their accession to the European Economic Community as from 1 January 1973 has led to a progressive adjustment between 1 January 1974 and 1 July 1977 of customs duty on imports coming from third countries under the Common Customs Tariff. This rate was 8% in 1974 and 12% in 1975.

This has been the case in Denmark which only consumes South American bananas, whereas formerly it obtained its supplies from the Canaries, and in Ireland which in the past imported mainly from the Caribbean and the Commonwealth but has in recent years turned to Central and South America bananas.

Finally in the United Kingdom bananas coming from Commonwealth countries have continued to arrive on the market free of duty; since the entrance into force of the ACP-EEC Convention of Lomé they also have access on the same

terms to the market of the other Member States.

In that country the market is shared between Jamaica and the Windward Islands. The main feature of the import arrangements is the maintenance of a level of production in the developing countries of the Commonwealth. The price paid to the associations of producers of the Windward Islands is directly connected with the selling price of the unripe fruit (green market price) applied in the United Kingdom; the property in the bananas despatched f.o.b. the port of shipment passes to the export/import company. The revenue ultimately received by the Jamaica Banana Board depends upon the price paid by the UK ripeners for the unripe fruit (green boat price), but the producers receive a minimum guaranteed price which is supported, if necessary, by the Jamaican Government.

Imports coming from the dollar area subject to a licence and there is a basic annual dollar quota; supplementary licences are issued if warranted by market conditions. Although Commonwealth bananas are allowed to enter duty free, a duty of £7.50 per long ton, that is about 10% *ad valorem*, is levied on imports from other sources.

Consequently France, Italy and the United Kingdom must be disregarded because of their special situations with regard to import arrangements, marketing conditions and the particular features of the bananas which are sold in those countries. For the purpose of applying the rules of competition there remains a region comprising Benelux, Denmark, Ireland and the Federal Republic of Germany, where however the level of the Common Customs Tariff varies, to be taken into consideration as the geographic area. Although it is difficult to apply the rules of free competition prescribed by the Treaty to such a situation, there is nevertheless no need to give up at the first attempt. It is to begin with necessary to ascertain whether the applicant in fact occupies a dominant position on the geographic market thus defined.

II — The existence of a dominant position

Three firms or banana groups operate in at least several of the countries of the area thus described: Castle and Cooke, Del Monte and United Brands Company.

Only the last of these three undertakings is represented in all the EEC countries. It carries on business in those countries through a certain number of subsidiaries, the most important of which is United Brands Continentaal de Rotterdam, a "private company" ("besloten") company incorporated under the law of the Netherlands, directly responsible for co-ordinating its sales in the substantial part of the Common Market which I have taken into consideration. Moreover United Brands appointed its subsidiary United Brands Continentaal de Rotterdam to represent it during the administrative procedure.

The parent company was incorporated in the State of New Jersey in 1889 under the name United Fruit Company. It assumed its present name United Brands Company in 1970 after merging with the AMK Corporation. It is mainly engaged in the production, processing and distribution of food-stuffs, principally bananas, meat and vegetables. It is also a licensee of restaurants. In fields other than food it produces and sells ornamental plants, plastics etc. Finally its operations include international telecommunications.

It does not fall within the scope of my opinion to recount all the varied experiences of this company which has frequently been in the news in matters of finance, law and even international

politics. What interests me in this case is that the company is the most perfect illustration of the model of which I have described the main features in my general introduction.

In the field of production United Brands farms about 194 000 acres which it owns, most of which are in Costa Rica, Honduras and Panama.

It supplements the acres "in hand" with contracts for growing bananas entered into with producers, in particular in Colombia and Surinam. The bananas of this latter country are sold by a company which runs a group of six State farms under a five year contract concluded with the Netherlands subsidiary of United Brands. In addition to selling its own bananas United Brands has a quasimonopoly of the sale of the bananas of Surinam, which has already been mentioned, British Guyana and Cameroon. It handles part of the shipments from Somaliland and Jamaica. It has about 50 000 employees.

United Brands prefers to market bananas belonging to the species which it grows itself, that is to say Cavendish, more precisely the Valéry variety. We have seen that it had strongly encouraged its suppliers to adopt this variety and by so doing brought about in other firms a marked trend to cultivate it.

The banana fleet which United Brands either owns itself or through its subsidiaries leads the world; it consists of about forty ships having a capacity of 9·5 million cubic feet. Whereas United Brands and its subsidiaries could in theory, even without having to charter other ships, carry about 65% of their own exports, the Del Monte Company, for example, would probably be unable to transport more than one third of its exports. Thus each week a shipment arrives at Rotterdam and several arrive at Bremerhaven not to mention Göteborg. The Swedish shipping company Sven Salén AB has made a careful study of the use of all the vessels commissioned for United Brands for North West Europe.

On the marketing level, and confining myself to the Member States concerned, United Brands imports, ripens and markets its bananas in the following manner.

Most of the bananas marketed in l'Union Economique Belgo-Luxembourgeoise (BLEU) are either imported through Antwerp or forwarded by train from Rotterdam. United Brands markets its bananas through two firms: B. M. Spiers and Son, Antwerp (acquired by United Brands in 1962) and Banacopera. There are about forty ripening installations in Belgium: thirteen belong to Spiers, thirteen others form the co-operative society Banacopera, which is bound to United Brands by distribution agreements. It is not without interest to note that Spiers with three other importers of fruit and vegetables was found guilty of abuse of its economic power under a Royal Decree of 7 November 1973.

Although United Brands' share of imports on to the Belgo-Luxembourg market can be estimated at 47%.

United Brands' answer to the question put to it concerning the extent to which the Benelux ripeners depend on it is beside the point. However, even the average weekly volume bought during the first four months of the year 1977 shows that the effective utilization rate of the theoretical capacity of "Chiquita" ripening is much higher than that available in theory exclusively to United Brand's competitors and that this capacity is moreover much lower in absolute terms than the "Chiquita" capacity.

In the Netherlands the largest banana importer is of course United Brands Continentaal which uses the installations run by Müller and Co. in Rotterdam. This company re-exports half of its supplies in transit to Belgium,

the Federal Republic of Germany, Ireland and also Switzerland.

A certain number of other firms import bananas other than those of United Brands, which pass through Hamburg or Antwerp.

Altogether United Brands' estimated share of imports on to the Netherlands market is in the region of 41%.

There are about a hundred ripening installations in the Netherlands, 75% of which are closely connected with United Brands Continentaal and only distribute United Brands bananas.

In Denmark United Brands' estimated share of bananas sold on the market is in the region of 47%. Denmark only imports bananas from Central and South America which pass through Rotterdam and Bremerhaven and sometimes Göteborg.

In Ireland since December 1973 the market has been supplied by United Brands through Rotterdam and Bremerhaven. The bananas are sold c.i.f. Dublin. Some of the South American bananas imported through these ports are re-exported to the United Kingdom. United Brand's share of the Irish market has increased from 3% at the end of 1973 to nearly 30% since the second quarter of 1974.

It is in the Federal Republic of Germany that this trend in the wholesale and retail sales of bananas to concentrate has been most in evidence during the last few years, since the group purchasing organizations have gained ground. Importers and ripener/wholesalers have made arrangements for integration and this process has sometimes included the retail trade. The large multiple stores' share of wholesale and retail sales of bananas is estimated at approximately 60 to 70%.

In several cases these stores have dispensed with the traditional importers and ripeners. German importers do not normally have a direct interest in the plantations; they buy f.o.b., either directly from producers or through agents who act on their behalf but in their own name in the producing country. They are better able to venture to do so since under the Protocol on the tariff quota they do not pay any customs duty on their purchases.

The import companies themselves engage in the carriage of bananas by sea, either by using their own ships or by "chartering".

An outstanding example of this is the Scipio-Atlanta group. The structure of this group and the nature of its links with United Brands are shrouded in mystery in spite of the questions which the Court put to United Brands.

It appears that the Scipio-Fruchtvertrieb KG Company of Bremen financed by Scipio and Co. KG Company, also of Bremen, under a limited partnership, has acquired the rights vested in the "Atlanta" Handelsgesellschaft Harder and Co. of Bremen which explains the name "Scipio-Atlanta".

Its principal subsidiaries are the firms Harder, Meiser and Co. (Hameico) of Bremen and Olff, Köpke and Co. of Hamburg (Olfko); they are companies which engage in ripening and have multiple stores.

The last two firms share between them one-third of the ripening installations in the whole of the Federal territory (approximately 80). Almost all the bananas which they ripen are bananas which United Brands imports through the Scipio-Atlanta group. It can be verified from the maps produced that almost all the ripening installations located near the frontiers belong to this group.

Scipio-Atlanta continually uses under time charters the nine refrigerator vessels (having a capacity of 2.5 million cubic feet) of the shipping company Union Partenreedereien Scipio and Co. of Bremen, the shareholders of which

are practically the same as those of Scipio-Atlanta, for transporting the bananas purchased from United Brands to the ports of North-West Europe.

The Swedish group Sven Salén AB is responsible for drawing up of the lists of sailing dates of these ships.

The bananas are transhipped at Bremerhaven by means of equipment operated by the Bananalösch-Anlage GmbH. This company, together with the Schiffahrts- und Speditionsgesellschaft Meyer and Co., has carried on the activities of the former Union Handels- und Schiffahrtsgesellschaft mbH which had preferential links with the former United Fruit Company. United Brands also uses the Speditionsgesellschaft (forwarding company) to deliver bananas unloaded at Bremerhaven and sold to ripeners other than Scipio-Atlanta.

If it is borne in mind that Sven Salén also co-ordinates United Brands' shipments to Europe and if the importance of carriage by sea in the "banana chain" is recalled, the relationship between United Brands and Scipio-Atlanta must for this reason alone be thought to be of a special kind.

But, in addition, most of the bananas ripened and sold by the Scipio-Atlanta group come from United Brands. It is true, as I have already mentioned, that these bananas are purchased f.o.b. because of exchange rates, thanks to the Protocol on the tariff quota, and then sold in the Federal Republic of Germany or Austria but it is also true that they belong to the Valéry variety and that most of them have the label Chiquita affixed to them. United Brand's reply to the question put to it shows that these two groups have entered into agreements on prices and supplies with each other. Although Scipio-Atlanta has been formed as a company legally independent of United Brands, it is United Brand's most important German customer and depends on that company in the last resort for its supplies.

Furthermore United Brands' technical control over the ripening of its bananas by the Scipio group is as tight as if it was itself the owner of the entire ripening capacity of this group.

Scipio like all the other distributor-ripeners connected with United Brands abides by the obligation not to resell Chiquita bananas while still green and for the last thirty years has never made any attempt to act independently *vis-à-vis* United Brands.

Finally there are "working arrangements" concluded between Scipio and United Brands in the field of "co-operation in advertising" which in fact covers marketing expenses, financed in whole or in part by the manufacturer/ producer (pricing, making shops attractive, advertising campaigns) at the request of the ripener/ distributor.

The information produced by United Brands in answer to the question put to it, although incomplete, permits the finding that, as is the case in Benelux, the utilization rate of the theoretical exclusive or preferential "Chiquita" capacity through property rights or contracts (Van Wylick, Scipio, Hameico, Olfko) was much higher than the utilization rate of the theoretical capacity of ripeners who do not deal exclusively in Chiquita bananas, which moreover is much lower than the Chiquita capacity. The Scipio-Atlanta group's share of the banana market in the Federal Republic of Germany amounts to approximately 41.5%.

United Brands also sells its bananas to independent ripeners, for example P. Van Wylick of Düsseldorf, which it alone supplies. These sales amount to about 10.2% of the market. However United Brands' chief customer in the Federal Republic of Germany is the Scipio-Atlanta group.

In this Member State United Brands' bananas (Chiquita brand name or unbranded United Brands' bananas) have a share of the market either directly attributable to United Brands or through Atlanta Scipio amounting to approximately 51.7%.

United Brands' share of the entire geographic market defined by the Commission in the contested decision is about 45%.

The applicant company submits that, even if it is assumed that it has an estimated share of the market of 45%, — in fact this percentage is said to have fallen to some 41% in 1975 — that share is in any case much smaller than the market share of undertakings, and especially of Continentaal Can, which the Commission had previously found to have infringed Article 86 of the Treaty.

I am quite willing to admit that a percentage of 45% alone does not warrant the conclusion that United Brands controls the market and the allegation that it occupies a dominant position. However, independently of other factors to which I will return later in my opinion, it is advisable to bear in mind that such a percentage, which is on the high side, is in its own right an important factor, because it represents a share of the market three times as large as that of United Brands most powerful competitor, namely Castle and Cooke, which only has a share amounting to barely 16% of the market, while the share of Del Monte, the second most important competitor, does not exceed 10% of the market, the share of the other competitors not even reaching that percentage.

The Commission in its defence asserts that this kind of market pattern which indicates clearly the pre-eminent position of United Brands compared with its competitors would by itself be sufficient to justify the conclusion that United Brands occupies a dominant position.

Without going so far as to share this view I consider for my own part that United Brands' share of the market is one of the constituent elements, not to say the principal evidential element, of its economic power taking into account the market pattern.

In any case that certainly does not mean that all competition is found to have been thereby eliminated. Moreover we know that several of United Brands' competitors have endeavoured on several occasions to wrest the lead from it. That explains why Castle and Cooke organized in 1973 on the German and Danish markets large-scale advertising and promotion campaigns with price discounts; why during the same period the Alba group tried to cut prices and offered promotional material; and why, more recently, the Velleman and Tas company engaged in lively competition on the Netherlands market and why the price of bananas fell below those of the German market which are traditionally the lowest.

However it has to be recorded that in spite of these efforts, these undertakings have not attained their objective and have not succeeded either in weakening United Brands' dominant position or in enlarging their own position on the national markets concerned. Moreover these attacks, which were limited in time and space, have never covered the whole of the market in question and this observation justifies the finding that the fact that an undertaking operates in part only of the geographic market in question deprives it of any opportunity of being an effective counterweight to the operations of United Brands, which exerts its influence over the whole of this market and concentrates its marketing operations on a single centre, its subsidiary United Brands Continentaal, thereby enabling it in particular to enjoy the most favourable economies of scale and to have a more flexible system of distribution with a view to adapting itself forthwith to price fluctuations and

the capacities of absorption of the national markets of the Member States concerned.

To make a proper appreciation of United Brands' economic power in the EEC it is advisable furthermore to draw attention briefly to its position in the Member States which are not part of the "relevant market".

In the United Kingdom United Brands' wholly-owned subsidiary, Fyffes Group Ltd., operates on a commission basis for the account of the Banana Board of Jamaica and in this capacity account for 40% of banana imports into the United Kingdom. It ripens 80% of United Brands' imports into the United Kingdom.

In France United Brands' wholly-owned subsidiary Compagnie des Bananes S.A. and Omer-Decugis et Fils, a subsidiary in which it has an 81% shareholding, markets a large share of imports into France.

Finally in Italy United Brands' wholly-owned subsidiary la Compagnia della Fruttà S.p.a. buys bananas f.o.b., especially in Somalia.

Altogether United Brands' share of bananas imported into and sold in the EEC can be estimated at one-third.

The brand name has to be added to all these factors.

I have already said that United Fruit Company was the first company to develop in about 1967 the practice of labelling by the affixture of its brand name "Chiquita". Standard Fruit carried on this practice with "Cabana". "Dole" and other brand names appeared after these two. These companies, especially the United Fruit Company, spent large sums on advertising first in the United States and then in Western Europe. This company, when advertising the Chiquita brand name strongly recommended the advantages of a high quality fruit, carefully selected and labelled in the tropics by stressing the guarantee it gives to retailers of regular deliveries of fruit of uniform quality, good appearance and which keeps in good condition when displayed for sale. In fact United Brands had the advantage of being able to control its sources of supply completely and was the first firm to establish itself on the market for the sale of branded bananas. It took its competitors some time to adapt themselves to this practice; they had to meet considerable expenses due to the introduction of a brand name covering products from different sources and they were not always able to obtain fruits of the same quality in sufficient quantities.

The Executive Vice-President of United Fruit Company explained the importance of and the reasons for these advertising campaigns when he stated at the beginning of the sixties at a shareholder meeting: "One of the reasons that I am so anxious to develop a brand franchise and build up our whole banana business around a branded, advertised, carefully screened and protected product is that I think we can often soften the destructive impact of a few sharp operators from having a disastrous effect on the whole business. If we can put our banana on a separate plane, so that the housewife knows that when she buys a Chiquita banana (which she will know because it will be marked on the banana), she can depend upon the fruit delivering a promise that has been made in our advertising, then we feel that we will have an attraction for the consumer, and the competitive threat will become healthy rather than destructive."

Judging by the degree of penetration of the markets and by the bonus which "Chiquita" obtained in retail sales this campaign appears to have been crowned with success.

Now in the view of the Federal Trade Commission of the United States the

introduction of a successful advertising programme in trade where there is no promotional differentiation is a serious threat to competition.

Again according to the Federal Trade Commission the strategy underlying United Brands' campaigns to launch its brand name was dictated by the company's long-term plans designed to reduce production costs to the point where eventually the cost advantages enjoyed by its competitors were eliminated. However as a short-term measure it was decided to find a way of building up consumer preference for United Brands' bananas. It was thought to be advisable to act in this way because, as far as the consumer was concerned, there was no difference between either the quality or the price of United Brands' bananas and the others. Whenever the quality of the bananas was comparable the consumer preferred the cheaper product. This is how the United Brands' banana to all intents and purposes has become a branded product; Chiquita became a word in current use and United Brands is able to "cash in on its reputation". The distributors can no longer do without its brand name on their shelves: Olesen is a case in point.

In the lettuce case Commissioner Thomson takes the view that making a brand name product out of something which has been previously sold in a low cost commodity market is a practice that is plainly incompatible with the maintenance of an effectively competitive market economy.

For all these reasons United Brands enjoys a high degree of economic power; it has a very large share of the bananas imported into the countries under consideration; it thus has the power to exert a preponderant influence on the supplies, prices and quality of its fruit. Thus it comes within the definition of a dominant position given in the recitals of the Commission's decision which led to Case 6/72, *Continental Can Europemballage Corporation and Continental Can Company Inc.* v *Commision of the European Communities* [1973] ECR 215.

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

This decision was annulled by your judgment of 21 February 1973 in the beforementioned *Continental Can* Case, [1973] ECR 215, because the Commission had not adduced sufficient legal proof of the facts upon which it was based but the general rules in that decision for determining whether there is a dominant position appear to me to be still valid.

Moreover it is no injustice to the applicant to acknowledge the nature of its position because according to the United Brands' historians:

"The exceptionally heavy capital requirements for establishing and maintaining banana acreage, the encroachment of diseases that to date have forced successive shifts in the locale of growing areas, the recurrent blow-down and floods that dictate multiple sources of supply as safety insurance, and the exceptionally demanding logistics of

distribution for an almost uniquely perishable major trade commodity — all of these united to make large-scale, vertically integrated organization a condition of successful operation."

III — The complaints

The contested decision mentions four heads under which United Brands is said to have acted in a manner detrimental to the public interest by adopting practices which distort or restrict normal competition and impede the economic freedom of distributors. Before considering whether each of these "complaints" is well founded it is advisable to describe the *general strategy* which they might exemplify.

The price is only one of the elements of an undertaking's market policy. It determines in the last resort whether sales will in the aggregate be profitable or not. But placing goods on the market involves two other important elements: distribution (supplies and networks) and what might be called promotion (advertising and other means) based on the quality of the product.

The producer endeavours to improve the presentation and selection of his consignments; he is inclined to ration supplies of bananas to the ripener, to sell him the minimum amount in order to obtain the maximum which "the market can bear" avoiding as far as possible parallel or competing imports.

United Brands has attempted to reproduce the complacent image which certain trade organizations exude in such circumstances. If it is to be believed the restrictive conditions in which the trade is carried out make it absolutely impossible to organize the sector in advance and run it on a rational basis and even to be able to analyse the facts after the event. The skill required in the trade lies only in commercial flair and being able to fly without instruments.

Nevertheless the perishable nature of the banana has not prevented United Brands from industrializing its distribution and bringing it to a high degree of perfection.

Together with its plan "to shorten the selling chain" and eliminate certain intermediaries in the wholesale trade United Brands hoped to introduce a system under which the ripener would order his bananas before shipment. By doing so it would have been able to base its offers on its assessment of what the market "could bear" keeping in mind that when the price is being negotiated it relates to bananas in transit which would be placed on the market about two weeks later.

In practice when its customers place their orders United Brands already knows exactly how many bananas will arrive in the vessels "on the way". Furthermore it can change the destination of these vessels. It is true that ripeners who only ripen Chiquita bananas or receive preferential treatment in respect thereof have been relatively better supplied and have therefore been better able to use their ripening facilities than the ripeners of other bananas. Nevertheless they too have been kept systematically short of supplies.

During the hearing United Brands was surprised by this allegation which nevertheless is set out in the Decision (I, (1) (a), 6, Lt. Col p. No L 95/5) and which stems from Annex 39 to the application (reductions of orders from Denmark in 1970/73). While acknowledging that the "imposed" reductions of supplies, apart from cases of *force majeure*, had been effected during about ten weeks each year from 1971 to 1975, that is to say during one-fifth of the period in question, it maintained that the cargoes were never destroyed. I would like to believe this but it was not always the case at the beginning of this period. Shipments from Costa Rica, Panama and

Honduras were stopped on several occasions between April and August 1974 because of disagreements between the governments concerned and the exporting companies in connexion with the entrance into force of the export duties provided for under the Panama Agreement of March 1974. According to a report of the FAO (Food and Agriculture Organization) one transnational company went so far as to destroy in May/June 1974, 145 000 cartons of fruits each week in a certain Central American republic in order to place on record its opposition to this tax on exports.

Let me now embark upon my examination of the complaints made by the Commission.

1. Prohibition on the resale of bananas while still green

The version of United Brands' general conditions for sale of bananas of January 1967, with which its ripeners have to comply, included a clause prohibiting not only the resale while still green of bananas bought from United Brands (Application, p. 143, pictures 1 and 2) but also the sale of bananas other than those supplied by United Brands and the supplying of wholesalers unconnected with United Brands. This is undoubtedly an exclusivity clause.

United Brands asserts that this clause is not part of an agreement within the meaning of Article 85 and that it never intended to resort to penalties in the event of non-compliance.

Furthermore this clause is a measure concerning the organization of the market and imposing it on distributors was justified by the varietal difference between the bananas sold in Benelux (Gros-Michel) and the Federal Republic of Germany (Valery) under the same Chiquita brand name and by the changing of the Fyffes brand name to Chiquita in the Federal Republic of Germany in 1967. The only purpose of the provisional partitioning of the market was to prevent the sale of the Gros-Michel variety of bananas, which still took place in Benelux, from interfering with the effects of the campaign opened in the Federal Republic of Germany to promote Cavendish-Valery bananas. The prohibition was only intended to maintain the quality of the bananas and to protect the brand name and therefore in the last resort the consumers (Article 85 (3)). The application of these sales conditions to the Netherlands made the Commission initiate an investigation. At the Commission's suggestion United Brands notified the clause to it on 15 November 1968 pursuant to Articles 4 and 5 of Regulation No 17 of 6 February 1962.

As far as the absence of any penalties is concerned I simply draw attention to the fact that according to the specific wording of the clause in the version of 25 January 1967 United Brands 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.

But the question arises whether there is or may be a "horizontal" trade in bananas in the geographic market in question.

As far as ripe bananas are concerned the evidence that sales are not impossible appears to me to be derived from Annex 34 to the Application ("some complaints relating to ripe bananas").

In the technical field there is all the more reason why this should apply to unripe bananas. Most of United Brands' distributor/ripeners in the relevant market buy their bananas from this firm

f.o.r. Bremerhaven or Rotterdam. Communications between Benelux, the Federal Republic of Germany and Denmark are so good and the distances so short that the volume of business which is needed for a transit trade to function profitably does not have to be very large. Moreover the commercial range of industrial ripening installations and markets on a nation-wide scale which attract most of the imports can spread over a large area. A little less than half of the 10 000 metric tons of bananas re-exported from Member States of the Community in 1971 resulted from intra-Community trade, while the remainder was re-exported to third countries (mainly Switzerland and Austria). With effect from December 1973 the Irish market was also supplied from Rotterdam and Bremerhaven. The Danish ripener, Olesen, following United Brands' refusal to continue to supply it, appliéd, without, however, any success, to United Brands' other distributor/ripeners in Denmark and to Scipio for unripe United Brands bananas. Finally, if the resale of green bananas was impossible, one is at a loss to understand why resale to foreign dealers was forbidden to United Brands' ripeners.

However the possibility that in general it may be in the interest of ripeners to sell to other ripeners bananas which have already begun to ripen can apparently be ruled out. Similarly it seems doubtful at first sight whether ripeners wish to resell the bananas which they have acquired: bananas are purchased to be ripened. What is of importance to the ripeners is not so much to be able to buy or resell to other ripeners as to be in a position to buy, ripen and sell Chiquita and other bananas to customers of their own choice. Even if the prohibition on the resale of green bananas which have not reached the stage shown in picture No 3, (Application, p. 144), can be explained by United Brands' concern to reserve the ripening and the margin incidental thereto to its own "duly appointed" Chiquita ripeners — the consideration for this being that it can in this way control the distribution of and make relatively reliable forecasts concerning bananas — it seems likely that sales between banana ripeners at stages 1 and 2 remain the exception. Such a resale would only be interesting if it were to produce a more attractive profit than the margin on ripening.

The Commission admits that in fact the price differential of bananas on national markets has only been higher than the ripeners profit margin during a few weeks each year. In the case of other fruits and vegetables "emergency" or "slashed price" sales are phenonema which are not entirely unknown. Before the industrialization of ripening installations there could be sales between ripeners and this may still happen in the case of ancillary ripening installations. Even at the present time there is a considerable surplus of ripening capacity and it could be in the interest of a ripener to exploit his equipment to the full or on the contrary to help a colleague. But this presupposes that ripeners can "engage in competitive operations" at the import stage *vis-à-vis* importer/distributors and that they can immediately resell on the spot. To do that there would have to be a system of "auctions" for bananas as there are for other fruits, under which the ripeners might have free access to the wharves and warehouses under conditions of free competition and would be entitled to examine and handle samples of the goods. However there is no such system for bananas which are in practice sold when in transit before being unloaded.

Apart from the clause prohibiting the resale the main obstacle to the development of horizontal intra-Community trade in United Brands' ripe and unripe, branded and unbranded bananas appears to me to be the disparity of the level of duties under

the "Common Customs Tariff", the presence of brand names and the continuing existence of national organizations of the market. The possibility of such trade with France for instance is ruled out since in that country United Brands does not sell under the Chiquita brand name. The same situation obtains in the United Kingdom and Italy where there are other brand names.

This clause has undoubtedly been a factor in the consolidation and strengthening of United Brands' dominant position. Is it necessary to go further and consider whether it imposed restrictions which were not absolutely necessary for the purpose of attaining the objectives referred to in Article 85 (3) in that it was accompanied by a prohibition on even reselling to Chiquita ripeners?

The fact that after notifying the decision United Brands "clarified" the clause by discontinuing this restriction and permitting the resale of unbranded bananas to any ripener is a strong presumption in favour of doing so. Similarly in so far as United Brands prohibits the sale of bananas which are "unripe" and can let it be understood that only the sale of bananas which are completely yellow is permitted, which is what it did in Belgium and the Federal Republic of Germany, this requirement can be regarded as going further than the generally accepted rules permit: bananas can be sold to retailers when they are "turning green" (picture No 3, Application, p. 144) and not only when they are "turning yellow" (picture No 4, Application, p. 144). The bananas only have to acquire the latter colour when they are sold to the consumers. It appears to me therefore that the clause prohibiting the resale of green bananas is not only an instrument or a constituent part of the dominant position like the brand name, but one of the consequences flowing from this position and in itself an abuse.

2. Refusal to sell to Olesen

On the other hand United Brands' rationing of its ripeners/customers assumed an extreme form in the case of the Danish wholesaler Olesen and is unquestionably an infringement of Article 86.

Before the facts were analysed in the contested decision they were established by the Danish Monopolies Commission.

It has been United Brands unchanging and general practice during the years 1970/1973 to reduce supplies to Danish ripeners. However it notified the Olesen firm in October 1973 that it would no longer supply it with bananas. It blamed Olesen for having taken part in an advertising campaign to promote the bananas which Olesen was selling under a competing brand name, for having become the exclusive distributor of this brand name and for selling more bananas under the latter than under the Chiquita brand name. It called in evidence Olesen's bad financial situation as well as its unsatisfactory performance as a distributor.

On 11 February 1975, that is two days before the Commission sent its last list of questions to United Brands in the context of the investigation which it had opened, this company "of its own accord" put an end to what must be called a boycott by entering into an agreement with Olesen.

This course of conduct on the part of United Brands led at least to a temporary but serious deterioration in the position of one distributor if not to that position ceasing to exist. Refusal to sell to a long-standing customer, who cannot make any call upon suppliers other than the one with whom he has regular dealings, is an abuse prohibited by Article 86 in so far as it may affect trade between Member States, and this occurs if a ripener/distributor may very well disappear from the market and the pattern of the supply of bananas may be

appreciably modified in a substantial part of the Common Market. To accept as a justification of this refusal that the ripener in question was said to have participated in an advertising campaign to promote the bananas which it was selling under a competing brand name would mean that the undertaking would be entitled to enlarge the dominant position which it enjoys and consequently to abuse it.

3. Discriminatory prices

I come now to the complaint based on the discriminatory nature of the f.o.r. prices imposed by United Brands.

In spite of the questions put to United Brands during the hearing it has not given any answer which permits an accurate idea to be obtained of the mechanism it uses for its price formation.

I have believed the position to be that orders had to arrive before the Monday of the week preceding the arrival of the vessel. On the next day or the Wednesday United Brands confirms these orders as well as the "weekly quota allocated" to the purchaser, with the proviso that the goods are available and the cargo includes a sufficient number of transportable bananas. In summer if the purchaser wishes to take delivery of bananas in refrigerated wagons he must notify United Brands to that effect when he places his order. The selling price is only fixed and notified to the customer four days before the arrival of the ship. The customer may reduce or cancel his order, provided that he so notifies United Brands on the day when he is informed of the selling price.

In the case of the Netherlands a system of "placing orders in advance" was introduced in February 1971: a distinction was made between short-term and long-term orders. If the customer reduced or increased his order the price notified to him was altered accordingly. We are told that this system of "placing orders in advance" was suspended several times and has not been used since October 1974.

In fact 80% of a ship's cargo is sold in advance by telex or telephone. As I have said ripeners no longer go to the docks to select the goods themselves or to discuss the price. Pressure by the ripeners can only be exerted at best after a time-lag of one week. In these circumstances United Brands is in a position of strength when it negotiates the f.o.r. price, which is the only one which can be analysed, for it controls the whole of the initial distribution of a product which soon becomes perishable after it leaves the ripening installation. The ships and the warehouses are themselves fruit depots which may regulate the flow of banana supplies and United Brands has control over the movements of the ships and arrivals. It can divert or split up certain cargoes.

Even in the Federal Republic of Germany the price applied by United Brands plays the role of a pilot price although the quantities sold by Scipio are much larger than those sold directly by United Brands. If it has to be admitted that bananas from Scipio's ripening installations are sold at the same price as those sold by other German ripeners independent of Scipio but dependent on United Brands, the reason is that United Brands is the "price leader".

It in fact emerges clearly from United Brands' answer, which moreover was somewhat vague, to question No 3 (1) put to it by the Court that the f.o.b. price offered to Scipio for the agreed or additional amounts is aligned on the price worked out by United Brands for the other German customers and not the other way round.

The result could be that, if the prices applied to the "other German customers" by United Brands are

considered to be unfair, the prices invoiced by Scipio are also or, at least, that there is collusion between United Brands and this group with a view to fixing directly or indirectly the selling price (Article 85 (1)) or to "control markets ... and to share markets or sources of supply" (Article 85 (1) (b) and (c)). However I leave this point to be determined by your Lordships since the decision took care to exclude from its field of application sales carried out by Scipio, a group legally distinct from United Brands whose conduct alone has been called in question.

In the field of prices United Brands therefore occupies the position of a "leader" and the fact that its competitors may have been able to take advantage of the "umbrella effect" of this "leadership" in no way diminishes the seriousness of its abuses in this respect.

The f.o.r. or "wagon-départ" price, that is to say the price paid by the ripener to the importer, is determined by adding unloading and transit costs and commission to the c.i.f. price and disregarding customs duties (when there are any) and various taxes. It is at this stage that the sale materializes, while the "ex ripening installation" price is practically unknown and is not covered by any official statistics.

Now the f.o.r. price applied by United Brands is found to be a price which has been determined in circumstances which are a breach of the rules of competition under two heads.

In the first place it appears normal that this price varies from one week to another for the same destination according to the many current factors influencing supply and demand (the quality of the fruit unloaded, the outside temperature, stocks in the ripening installation ...). But, as the decision points out (rt col. p. 9), the prices of bananas of the same kind, sold at the same place and at the same time vary considerably according to the location of the buyers and the final destination of the bananas. Thus the same supplier receives for an equivalent consideration a price which differs according to the purchaser to whom he sells. In general the f.o.r. price of bananas for the Federal Republic of Germany and to a lesser extent for Denmark and Ireland are the lowest, the price of bananas for Benelux being the highest.

The first explanation of these differences, which comes to mind, is the disparity in the level of the duty under the Common Customs Tariff: zero in the Federal Republic of Germany, 8 or 12% in Ireland and Denmark and 20% in Benelux. The Commission's answer to this is that this disparity is not explained by the differences in the customs duties which are paid by the purchasers. This is in principle correct except that some of them pay nothing (the Federal Republic of Germany), while others have to pay higher duties (Benelux) or lower duties (Ireland and Denmark).

Community regulations applicable to fruits and vegetable covered by an organization of the market certainly do not imply the obligation to apply uniform selling prices whether these products are imported from third countries or harvested in the Community. It is understandable that prices vary to some extent from one week to another in the same country or from one country to another but not that prices of an absolutely identical product in the same locality vary in the same week.

United Brands' explanation is that the price in question is a deduced price, calculated by working back from the point of the ultimate sale and that it does not "make" the price but simply takes it passively from the strength of the demand without attempting either to influence or direct it. A trader

carrying on business, in the usual way, who takes into account the volume of the amounts delivered, wishes to align his prices on those of his competitors, be they higher or lower, or accepts sacrifices for the purpose of penetrating a new market, may be able to account for such discriminations. But in view of United Brands' dominant position such an argument is tantamount to a blunt acknowledgment that it has the power to dictate its own laws. The reason why United Brands charges what the market can bear and applies discriminatory prices is that it does not in fact consider that there is even a residual common market in bananas; what is more it makes this assertion quite categorically.

In the second place is it lawful for an importer to take account of differing customs duties on imports in the prices invoiced to his customers when he does not himself have to bear these customs duties? Ripeners certainly take account of them in the price they charge their customers; that is indeed the aim or at least the effect of customs duty.

But United Brands seems to think that, since the wholesalers who ripen its bananas can pass on to their customers the duty payable under the Common Customs Tariff in Benelux, Denmark and Ireland, it is itself entitled to increase by the same amount the price of its bananas intended for these ripeners: this is tantamount to treating these ripeners as if they were integrated into its commercial channel; in practice it takes the view that it is United Brands which pays or does not pay the import duties: this is a perfect example of an abuse of the market.

Furthermore the differing rates of the Common Customs Tariff do not themselves account for the different prices charged each week by United Brands. The aim of the discrimination is to prevent ripeners from selling in Member States other than those where they have their installations by exploiting the price differences. But it is also to be explained by the relation between the strength of United Brands and that of the ripeners to whom it sells. The gross margin of the ripeners breaks down as follows: customs duties, if any, cost of ripening, general marketing expenses, advertising costs, taxes and profit. Who will be persuaded that United Brands supplies bananas to which brand names have already been affixed, offers its technical assistance for ripening and pays for advertising the sale of its bananas for no consideration? This consideration is either some form of an exclusivity or preferential treatment granted by the ripeners on the purchase or sale of Chiquita bananas or the partial surrender of that part of the price represented by the net margin, a proportion of which thus finds its way into the price differences which are applied.

Consequently there appears to me to be evidence that United Brands has engaged in the abuse referred to in Article 86 (c) and the fact that some of its competitors are guilty of the same infringement cannot exonerate it in view of its dominant position.

4. Excessive prices

The decision also finds that United Brands has imposed unfair business conditions, namely by charging excessive prices.

Before considering whether this complaint has been made out it is advisable to ask whether imposing excessive prices is in itself conduct amounting to an abuse of an undertaking which occupies a dominant position in a substantial part of the market.

It seems to me that this question must be answered in the affirmative. The abuse defined in Article 86 (a) is "directly or indirectly imposing unfair *purchase or selling prices* or other unfair

trading conditions". It must be borne in mind that Article 85 (a) regards the fixing of prices in connexion with a cartel or concerted practices as an interference with free competition but does not state that they must be unfair.

The difference in the wording of these two provisions is due to the fact that there are two different situations to be dealt with.

In the case of an agreement between undertakings which, either in accordance with a specific agreement or simply by means of a concerted practice, apply identical prices or price increases the distortion of competition lies only in the fact that these undertakings impose upon each other in this way a prohibition on any unilateral price reduction.

In the case of an undertaking in a dominant position or of a group of associated undertakings, such as United Brands and its wholly owned subsidiary, United Brands Continentaal, that is to say of a group in which the power to take decisions emanates entirely from the parent company there can be no question of any agreement for the fixing of prices. The mere fixing of prices is not in itself an abuse of a dominant position because every undertaking has to fix its prices. But the infringement arises when an undertaking or the group in a dominant position turns its position to account, in particular by imposing on its customers unfair prices, that is to say prices which are excessive and bear no reasonable relation to the consideration.

Although there is no actual precedent in the Court's decided cases for such an abuse it has at least held in this connexion "Although the price level of the product does not necessarily suffice to disclose the abuse of a dominant position within the meaning of Article 86, it may, however, if unjustified by any objective criteria, and if it is particularly high, be a determining factor" (judgment of 18 December 1970, Case 40/70, *Sirena S.r.l* v *Eda S.r.l and Others* [1971] ECR 70).

Similar considerations concerning the differences between the imposed price and the price of a product reimported from another Member State are found in the Court's judgment of 8 June 1971 in Case 78/70, *Deutsche Grammephon-Gesellschaft mbH* v *Metro-SB-Großmärkte GmbH and Co. KG* [1971] ECR 487).

It is therefore my view that, when the Commission has to deal with selling prices which have been imposed and are unfair because they are excessive having regard to production costs, it is entitled under Article 86 to impose a mandatory price reduction without prejudice to the power which it has to fine the undertaking in a dominant position which has engaged in this kind of abuse.

But the question whether United Brands has in fact charged excessive prices has now to be considered.

United Brands' margin in the relevant market is bound to be larger than that of the French, Italian or British commission agents, because it has to cover itself against risks which the latter do not incur. But can the prices charged by United Brands for its branded bananas be regarded as excessive?

For the purpose of this evaluation the following parameters are at my disposal: the banana prices of competing brand names, the prices of United Brands' non-branded bananas, the prices of United Brands' bananas with brand names affixed according to the country of destination, a criterion linked to the preceding detailed explanations.

However before applying these criteria it is advisable to consider a general proposition: that the prices charged by United Brands, like moreover those charged by its competitors, have not altered or have even dropped compared with what they were ten or twenty years ago.

It is true that the increases in the selling prices f.o.r. the ripening installations which appear to be very large when expressed in current dollars seem moderate or even non-existent if account is taken of variations in the exchange rate.

But, in order to determine whether a selling price is unfair or not, it is not enough to examine its trend at one particular stage; it is necessary to go further and take into account the trend of costs at the preceding stages. Now the price which United Brands pays in order to obtain its bananas is found to have dropped considerably either because of the "shortening of the chains" or for some other reason.

With regard to the relationship between the selling price to the ripeners and the price paid to the producers it is generally held that the proportion of the final retail price attributable to the local producers scarcely exceeds 10%. The aggregate of the ripeners' and retailers' margins is nearly five times the gross return of the planters. While the export tax represents 0.8% of the retail unit value the entry taxes charged by the developed importing countries amount, as adjusted, according to the FAO to 6.9%, that is eight times the amount of the export tax of the producers/exporters on the world market.

If current prices, adjusted to take account of the price increases of manufactured articles are taken, the real value per unit of bananas exported by almost all the producing countries is found to have dropped considerably since the fifties. Nor must it be forgotten either that in countries with a hard currency United Brands has had the benefit of a much more favourable rate of exchange, whereas costs in the producing countries were financed in the local currency. This situation has resulted in an actual reduction of purchase prices f.o.b. and it has thus weakened the impact of the increase in freight rates. The stagnation of, or, indeed, the decline in the retail prices of bananas may perhaps have benefited consumers in the developed countries but it has undoubtedly deprived the exporting countries of the advantages springing from the cost reductions which should have resulted from the introduction of the Cavendish variety and the cardboard packaging. Almost all the profits thus realized have maintained if they have not increased the difference between the price paid to the planters and the price charged by United Brands and, have therefore in the end kept up, if they have not augmented, the profits of this undertaking. The producer/exporters have certainly not seen any gains in productivity which have been obtained converted into increased earnings in foreign currency per unit exported. The unfavourable exchange rates reflect the rate of the inflation which has spread to the developing countries.

In the second place, if the "cost of production" factor is disregarded, the price difference between Chiquita bananas and United Brands' bananas which have been downgraded or not distinguished by a brand name is found to be in the region of 30 to 40%. This is by no means a negligible price range for the housewife.

There is no doubt that there are also disparities in the case of other fruits which are however covered by an organization of the market. It therefore seems to me that the first thing to do, in order to put the matter right, is to inform and educate the customer.

In the third place the price differential between Chiquita bananas and bananas having other brand names is unquestionably less significant, but Chiquita bananas are generally sold with a larger margin than those bearing other brand names and especially when they are retailed. Several distribution chains have shown a preference for this

brand name because of the uniformity of the product, its good quality and of the large turnover which can be attained by means of it. Some have stated that their aim was to succeed in retailing at steady prices throughout the year as they are able to set off against the reduced retail margin a much higher turnover and a decrease in price fluctuations. However certain ripeners would be very interested in increasing their sources of supply and would like to be able to sell bananas bearing their own brand name in preference to the importer's. Notwithstanding the high level of consumption per capita which has already been attained in the relevant market a reduction of retail prices could still stimulate demand. But it is difficult to decide from this point of view alone whether the price differences between the brand names are excessive or not without finding fault with the latter.

There is another factor which the Commission has brought to light and which appears to be more conclusive: if the f.o.r. price charged by United Brands in the countries of the relevant market other than Ireland are compared with the delivered Rotterdam price for bananas to be sold to Irish customers c.i.f. Dublin, there is a considerable difference. The Commission thinks that the delivered Rotterdam price of bananas to be sold to Irish customers c.i.f. Dublin are to be regarded as an indication of this and that according to United Brands' own statement, it left a profit margin which is much lower than that arising from the prices charged to customers of the other Member States concerned.

United Brands, without admitting that this price amounts to dumping, which would clearly be a different form of abuse, claims that it represents an attempt to enter the Irish market, which moreover succeeded judging by the complaint made to the Commission by two Irsih importers/ripeners who are competitors of United Brands, and that it cannot therefore be used as a valid parameter. During the last stage of the procedure United Brands, in answer to a question put to it, explained that the calculation of the Irish price had to be adjusted by an increase in order to take account of the losses caused by hurricane Fifi. This hurricane destroyed in September 1974 about 80% of the production in Honduras and some 25% of that in Guatemala. This catastrophe has not however had any immediate impact on deliveries and prices, because the areas which were not affected, and in particular Ecuador, delivered sufficiently large compensatory quantities in September, October and the beginning of November. They only had an effect on the market during the first quarter of 1975 and prices have consequently increased.

I do not find this belated explanation very convincing and I think that the prices charged in Ireland, even taking into account the strategy of penetrating a new market which might have been the chief reason for fixing them, are a useful parameter for evaluating the level of United Brands' prices. Like its competitors, United Brands may have "lost" money in 1974 but in the case of an undertaking integrated as it is these deficits might have been set off against profits on carrying or ripening. United Brands' assertion that in the long run it was only making small profits while suffering heavy losses cannot in any circumstances be accepted; if that were true it would have ceased to be in business long ago.

IV — The Fine

The operative part of the contested decision begins by declaring that United Brands has infringed Article 86 of the Treaty under the four heads which I have analysed above. In consequence it imposes on United Brands a fine of one million units of account. In addition

Article 3 thereof orders it to bring to an end "without delay" the infringements referred to in Article 1 of the operative part, unless it has already done so of its own accord, which appears to refer to the Olesen boycott. To this end it orders United Brands to inform the Commission not later than 1 February 1976 that it has notified its ripeners that it has ceased to apply the clause prohibiting the resale of green bananas, a periodic penalty payment of 1 000 units of account to be paid for each day of delay; furthermore it orders United Brands to inform the Commission twice yearly after 20 April 1976 for a period of two years of the prices charged on the relevant market during the preceding half-year.

It is implied that in order to bring to an end the abuse of imposing unfair prices United Brands was to reduce the prices which it charged customers in Germany (with the exception of the prices charged by the Scipio group), Denmark and Benelux to a level on average at least 15% below the prices invoiced to its German and Danish customers in December 1975. Compliance with this latter obligation was not subject to any sanction other than the fine relating to the preceding period, with the possibility of another fine in the event of further non-compliance, and the obligation to notify prices, a penalty payment becoming payable if United Brands fails to do so.

In its application United Brands asks for the decision to be set aside, payment to it of damages in the amount of one unit of account and, should the decision be upheld, the cancellation or reduction of the fine and also for an order that the Commission bears the costs.

Before United Brands lodged its application it "clarified" for its ripeners before 30 January 1976 the wording of the clause at issue by completing it with the insertion of the words "except for sales between Chiquita ripeners". Consequently on this point the decision is no longer disputed or has been enforced, at least if it is thought as the Commission does, that this form of wording is sufficient. Furthermore the question has no relevance to the fixing of the fine since, although Article 2 of the operative part of the decision imposes a fine for the infringements found to have been committed in Article 1 — including the prohibition on resale even to Chiquita ripeners — the actual amount of the fine has been fixed in accordance with the reasons given in Part II B of the decision. Now in this appraisal the decision states explicitly that (relating to the prohibition on the resale of green bananas) "no fine should be imposed on account of its acts in this aspect" (lt. col. p. 18).

By order of 5 April 1976 the President of the Second Chamber of the Court of Justice took note of the statement concerning the amendment of the clause relating to the resale of green bananas.

The same order has suspended the operation of the decision until judgment is given on the substance of the case in that it required United Brands to bring to an end without delay the infringements found to have been committed and to amend the wording of the clause relating to the resale of green bananas — in so far as it has not already of its own accord put an end to the course of conduct complained of.

Since, as I have mentioned, United Brands has amended the clause and has notified, at least I think it has, its prices to the Commission, there only remains a dispute as to the merits of the Commission's findings concerning United Brands' conduct and the determination of the amount of the fine.

In this connexion I have said that the prohibition on the resale of green Chiquita bananas to other Chiquita ripeners and the prohibition on the resale of green unbranded United Brands bananas to ripeners of

competing bananas whether branded or not is an abuse.

Since I believe that I have given an adequate explanation of the other abuses for which United Brands is blamed it only remains for me to give my view on the amount of the fine, the conclusions in support of the claim for damages, and the costs.

Let me however also make an observation on the argument based on denial of due process in that United Brands was not given a proper hearing during the administrative procedure. This argument does not seem to me to be well founded. Even if such a procedural defect were to be proved it would not according to the Court's case-law (judgment of 14 July 1972 in Case 48/69, *Imperial Chemicals Ltd.* v *Commission of the European Communities* [1972] ECR 620) be such as to lead to the annulment of the decision since United Brands had every opportunity to explain its case to the Court.

Pursuant to the provisions of Article 87 of the Treaty read together with Article 3 (1) of Regulation No 17/62, where the Commission finds that there is an infringement of Article 85 or 86, it may by decision require the undertakings concerned to bring such an infringement to an end. As the Court held (judgment of 6 March 1974 in Joined Cases 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v *Commission of the European Communities* [1974] ECR 224) Article 3 of Regulation No 17 should be applied with reference to the breach which has been established and its application may include an order to do certain acts or provide certain services which had been wrongfully withheld as well as a prohibition on the continuation of certain activities and practices. The Commission is therefore fully entitled in the case of an infringement coming under Article 86 to require an undertaking by means of a decision to abide by a specific price bracket or, if you prefer it, to act as a prices "Commissioner". It has only made its order in this case subject to a fine for the past and to the obligation imposed on United Brands to notify its prices. No penalty payment has in fact been enforced and cannot be under the terms of the decision and this means that, if your Lordships confirm the amount of the fine, the Commission could reopen the file to ascertain whether United Brands has in fact carried out its orders.

It might be asked whether, rather than impose a fine, it would have been better, as was done in the United States, to forbid United Brands — and its competitors — to have any interest in the ripening of bananas with a view to strengthening the position of this marketing stage in relation to the suppliers, or even to forbid United Brands — and its competitors — to advertise a brand name or else stop using it. But that would presuppose the adoption of a whole series of Community regulations and, as things stand at present, there is nothing for it but to remedy abuses rather than prevent them. The countervailing power created by supermarkets ripening their own bananas might be an effective counterweight to that of the suppliers, provided that they do not themselves destroy the retail trade and there is no collusion between them and the importers.

I do not know how much weight the Commission attached in its general appraisal to each of the infringements which it intended to penalize. For example the two abuses relating to prices which it found to exist, (discriminatory prices and unfair prices) are treated as two separate complaints but their gravity and duration are evaluated together. As far as concerns the conduct relating to the pricing policy the Commission "reduced" the amount of

the fine, because it was the first occasion on which it had fully carried out an examination in depth of the entire pricing policy of an undertaking in the light of Article 86 and made its decision subject to the obligation imposed upon United Brands to notify it for a specific period of its policy, periodic penalty payments to be paid in default; but during the procedure for the adoption of an interim measure it agreed not to enforce this direction. As far as the Olesen boycott is concerned the Commission has taken into account the fact that United Brands had brought the infringement to an end "of its own accord".

The Commission is under no duty to state the amount of the fine attributable to each infringement: it only has to take account of the duration and gravity of each infringement and obviously must avoid imposing a penalty twice in respect of the same facts. The breakdown of the fine among the different infringements would only be relevant if your Lordships were to cancel or reduce it.

In my opinion the Commission must be acknowledged to have a general discretion in this field, especially in a matter where the operations are closely connected and the infringements overlap.

When the Commission decides to impose the maximum fine provided for by Article 15 (2) of Regulation No 17/62 this maximum can itself be varied according to the turnover of the undertaking in the business year preceding the infringement. This figure of one million units of account represents in fact 2% of the turnover in the relevant market, that is to say of the whole of United Brands' sale of bananas in Benelux, the Federal Republic of Germany except for the bananas sold by Scipio, Ireland and Denmark. Therefore the Commission could have imposed a fine of as much as 10% of the turnover.

I am myself of the opinion that the amount of the fine which has been imposed is not excessive and I submit that your Lordships should confirm it.

On the other hand Regulation No 17/62 only mentions turnover without distinguishing between a profit or a loss made in the financial year.

The Commission without making a detailed analysis of United Brands' cost structure takes note however of the large profits made by this undertaking and submissions on this point were developed during the written and oral procedure.

As things stand at present it is impossible to find out with any degree of accuracy, except in so far as it emerges from the audited figures, whether the financial year of United Brands like that moreover of all transnational companies, shows a loss or a profit. The losses recorded in the balance sheets are not necessarily referable to operations carried out on the relevant market: they may be losses arising out of transactions in the producing countries of South America.

It is difficult to ascertain how much of the gross profit margin, that is to say the difference between the costs f.o.b. and the earnings f.o.b., the producer and exporter each get. The producers' f.o.b. earnings only represent the amount paid by the exporting company for the fruit which it buys. In order to calculate the exporting companys' actual f.o.b. earnings it would also be necessary to take into account the cost of the technical assistance provided by this company, its general expenses and the margin which corresponds to its marketing rôle. All that is known, for example, is that f.o.b. sales of Chiquita bananas from Honduras and Panama by United Brands to German importers bring in larger receipts than the sale of bananas from Costa Rica; but the general expenses of the company and the advertising expenditure have to be

deducted. It must also be borne in mind that American companies can expatriate a certain percentage of their after sales profits in the importing countries and that the fiscal arrangements for American companies which have subsidiaries in the tropics are such that they are charged tax at a lower rate than if all the profits had been made in the United States; for fiscal reasons the United States has also agreed to 60% of the net profit being allocated to the producing countries.

Bananas are usually sold in the importing countries f.o.r. port of entry and the calculations made on the f.o.r. sales for tariff purposes tend to be of a purely accounting nature; when customs duties are zero there is moreover no need for a calculation for this purpose. The c.i.f. values in Benelux are those provided by the customs statistics; it is not the prices which were in fact obtained during the commercial transactions but the prices fixed at a flat rate by the fiscal authorities, before the unloading and sale of the fruit, for a period of four weeks which are taken.

Dealings between undertakings forming a multinational economic unit which have as their object a transfer of profits and losses from one subsidiary to another and possibly from one country to another are shrouded in considerable mystery. The transfer prices applied by United Brands must be considered as being referable to operations carried out between undertakings belonging to the same group, that is to say as internal trading prices, the levels whereof are fixed with reference to fiscal, financial and economic considerations peculiar to the undertaking. It is impossible to have an exact idea of these internal transfer prices without knowing the profits in South America. In answer to the questions put to it during the hearing United Brands stated that the inter-company trading prices paid by the Netherlands subsidiary, United Brands Continental, to companies of the group operating in South America are calculated on the basis of a percentage fixed by agreement with the national authorities. It is known that some internal practices concerning internal transfer pricing may be evidence of an agreement or a concerted practice between various companies or that a policy of transferring prices at high or various levels to subsidiaries in countries where the public authorities do not intervene may be a constituent part of behaviour amounting to an abuse through the effects they have on the price the buyers are charged in so far as the companies in question are in a dominant position. It is impossible to interpret the accounts of firms which are integrated into international holding companies controlling entire production cycles within which they determine at least part of the price of the services or goods which they supply to themselves. When the Commission presented its programme for 1977 it announced that it would introduce a proposal for a directive concerning the auditors of these companies. In the meantime must reliance be placed entirely on national audits which are by definition incomplete? All that can be said in this connexion is that United Brands' profits appear to have been lower in 1974 than in 1975.

In this connexion the figure of one million units of account can be compared with the "commission" paid by United Brands in 1975 to a Honduras general in an attempt to obtain certain commercial advantages and also with the sum which it appropriates each year for advertising and which its President regards, in another context it is true, as "quite acceptable", indeed "trivial". United Brands' advertising expenditure is much higher than that of most of its competitors. In order to promote its sales of bananas in the Federal Republic of Germany, Benelux and Denmark, which represent about one half of the bananas sold by

United Brands in the EEC, this company spent about two million units of account in each of the years 1967 and 1968 when it introduced its Chiquita brand name into these Member States and on average one and a half million units of account in each of the following years.

Finally it should be pointed out that, in accordance with its usual practice, the Commission has not enforced its decision and that, since the fines do not carry interest, their actual effect is to that extent reduced.

Although the Commission is well aware of the difficulties which the recovery of fines has caused in the past, it has not expressed the fine which it imposed in national currency. The Court in the exercise of its unlimited jurisdiction and following its judgment of 9 March 1977 in Joined Cases 41, 43 and 44 to 73, *Société Anonyme Générale Sucrière and Others* v *Commission of the European Communities* [1977] ECR 445, will be bound to determine the amount of the fine in national currency. If it is acknowledged, in accordance with the judgment of 14 July 1972 in Case 48/69, *Imperial Chemical Industries Limited* v *Commission of the European Communities* [1972] ECR 621 *et seq.*), that the joint nature of the conduct on the market as between a parent company and its subsidiaries prevails over the formal separation of these companies, this amount could even be expressed in American dollars; if not it should be the currency of the country where the principal subsidiary of United Brands has its registered office. I prefer to leave this last point as well as the admissibility of United Brands' claim for damages to be determined by your Lorships. If your Lordships were to uphold this claim it would only be necessary according to the same case-law to convert it into national currency.

To sum up I submit that the application be dismissed and that the costs, including those relating to the procedure for the adoption of an interim measure, be borne jointly and severally by the applicants.

ORDER OF THE COURT OF 11 MAY 1978

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,