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## Information Exchanges – Difficult Not to Go Bananas!

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**The European Court of Justice recently confirmed that pre-pricing communications between competitors involving discussions about price-setting factors, quotation prices and pricing trends may be incompatible with EU antitrust law if they make it possible to reduce the degree of uncertainty between participants as regards their strategy or conduct on the market.**

### The Bananas Cartel

In 2008, the European Commission fined a number of banana suppliers as they engaged in bilateral pre-pricing communications, during which they discussed banana price-setting factors, pricing trends or gave indications of quotation prices for the forthcoming week. The Commission considered these information exchanges were liable to influence the market players' pricing behavior, concerned the fixing of prices and gave rise to a concerted practice having as its object the restriction of competition, thus resulting in a breach of EU competition law. The General Court and, most recently, the Court of Justice, the highest court of the EU judiciary, confirmed these findings.<sup>1</sup>

### Appeal to the Court of Justice

On appeal to the Court of Justice, Dole argued, inter alia, that the exchanges of information did not amount to a "by object" concerted practice, submitting that (i) the pre-pricing communications were not capable of removing uncertainty as to actual prices and (ii) those communications were carried out by employees who were not responsible for setting quotation prices.

<sup>1</sup> *Dole Food Company et al. v. Commission*, Case T-588/08 and Case C-286/13 P, respectively.

In its judgment, the Court of Justice rehearsed the applicable framework for assessing information exchanges under EU competition law:

- an exchange of information qualifies as a concerted practice and is liable to be incompatible with EU competition law if it reduces or removes the degree of uncertainty between participants as regards their strategy or conduct on the market in question;
- certain types of information exchanges are so harmful to competition that there is no need to examine their effects. In order to determine whether an exchange of information between competitors is a restriction “by object,” regard must be had to its objective and the economic and legal context in which it occurs. While the parties’ intention may be relied upon, it is not a necessary factor for a “by object” finding.

The Court of Justice then addressed Dole’s arguments.

It first held that the detailed findings of the General Court showed that bilateral pre-pricing communications were exchanged between Dole and its competitors and that, as part of those communications, the companies discussed their own quotation prices and certain price trends.

It then referred to the General Court’s findings that quotation prices were relevant to the market concerned as (i) market signals, market trends and indications as to the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained and (ii) in some cases, the actual prices were directly linked to the quotation prices.

Finally, the Court of Justice pointed out to the General Court’s finding that the Dole employees involved in the pre-pricing communications participated in the company’s internal pricing meetings.

## **Lessons From Bananas**

The Court of Justice’s judgment is short as, on appeal, the Court’s task is limited to examining whether the General Court made an error of law.

This judgment is highly valuable however. It confirms the findings of the Commission and the General Court: pre pricing communications between businesses, not relating to actual prices but rather to price-setting factors, quotation prices or price trends, can give rise to a concerted practice having an anti-competitive object if they make it possible to reduce the uncertainty for each of the participants as to the foreseeable strategy and conduct of its competitors.

Businesses must ensure that their exchanges of information with – or disclosure of information to – competitors are legitimate under EU competition law. Attention must be paid to the type of information exchanged or disclosed – not just communications on intended future prices or output are caught – but also more broadly to the possibility for the communication to reduce strategic uncertainty.

The fact that the employees involved in the information exchanges have no authority for ultimately deciding upon prices or output has no relevance. As indicated by the General Court, the attribution to a company of an infringement of EU competition law does not require action by the principal managers. Action by a person authorized to act on behalf of the company suffices.

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