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Laura Atlee
Steptoe & Johnson LLP

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I. INTRODUCTION

Back in 2007 the European Commission ("EC") initiated proceedings against a number of companies involved in the banana market alleging that they had been involved in a cartel. The proceedings took the normal course: Statement of Objections ("SO") decision, then appeal to the General Court. With the whole process taking approximately eight years, it is anyone's guess whether Dole, Del Monte, and Weichert will appeal the General Court's judgments of March 14, 2013 (Case T-588/08 and Case T-587/08). Maybe the old saying applies, "In for a penny, in for a pound…of bananas."

The Court has outdone itself with both judgments—each one is at least 150 pages. In Dole's case (T-588/08), the Court failed to side with the applicant on any point. While the judgment provides a number of reminders on certain points of EU competition law, in most regards it is relatively unremarkable. Most of the judgment in Del Monte's case (T-587/08), in which Weichert intervened, is also fairly unremarkable (except for one very important point) although the Court did reduce the fine for which Del Monte and Weichert were jointly and severally liable. At the time of the infringement, Weichert was a distributor of Del Monte bananas. The EC found the two companies to be part of the same undertaking, a point that we will discuss further below.

II. FINE REDUCTION

The EC found that Weichert had participated in only one aspect of the cartel and therefore granted it a 10 percent reduction on the basic amount of the fine. Del Monte argued that the reduction should be greater. The Court looked at the following points: (i) Weichert had only participated in one aspect of the overall cartel and (ii) Weichert was a significantly smaller player on the banana market than the other cartel members. In a rather unusual move, the Court increased the reduction to 20 percent.

The Court also gave the parties a small 10 percent reduction under the 2002 Leniency Notice (not the more recent 2006 Leniency Notice due to when the investigation started), although the EC had not granted the parties anything. The file clearly showed that the EC relied on Weichert's reply to a Request for Information ("RFI") in concluding that there had been bilateral pricing discussions between Weichert and Dole. While the EC concluded that Weichert was simply cooperating as it should, the Court found that, even if that were the case, Weichert's replies provided the EC with "significant added value." Therefore, the EC should have given

[1] Associate in the Brussels office of Steptoe & Johnson LLP, where her practice focuses on both EU competition and environmental law.

them at least a token something. The Court hinted that Weichert might have received a greater reduction if it had not continuously denied any wrongdoing throughout the proceedings.

III. UNFORTUNATE UNDERTAKINGS

While it is always nice to see the Court stepping in to reevaluate a fine imposed by the EC, one section of the Court's judgment—unrelated to fines—is quite disheartening. This section deals with three important issues: (i) the definition of an undertaking, (ii) access to file, and (iii) right of defense.

A. Definition of Undertaking

From June 24, 1994 until December 31, 2002, Weichert was Del Monte's exclusive distributor of Del Monte bananas in Northern Europe (the infringement was from 1 January 1, 2000 – December 31, 2002). During this time, Del Monte held an indirect 80 percent shareholding in Weichert. As a result, the EC, and then the Court, looked at whether Del Monte was able to exercise and had, in fact, exercised decisive influence over Weichert during the relevant period. If the answer was yes, then they were part of the same undertaking.

The EC and the Court looked at the following: (i) the partnership agreement, (ii) capital links, (iii) the distribution agreement, (iv) information exchanges concerning pricing, and (v) the companies' pricing policy. Having looked at these factors, they considered Weichert and Del Monte to be part of the same undertaking.

B. Access to the File

Weichert and Del Monte parted ways at the end of 2002. It appears that it was not a particularly amicable break-up. Indeed, at some point in time the two wound up in court. Therefore, it is not surprising that Weichert did not share its reply to the SO with Del Monte. Del Monte asked the EC for Weichert's reply, which is understandable considering the fact that the EC had grouped the two together as a single undertaking. Relying on a number of procedural aspects, including the fact that the reply was technically not part of the investigation file, the EC refused the request. The Court endorsed the EC's position.

As to whether or not the reply to the SO included incriminating evidence, the Court stated that, in order to succeed, Del Monte would have to show that the EC would have arrived at a different result if it had not used the reply. The EC did cross-refer to Weichert's reply to the SO. But, pointing to various other documents that apparently supported what was stated in Weichert's reply to the SO, the Court ultimately found that Del Monte was not prejudiced by the EC's refusal to provide Weichert's reply.

C. Right of Defense

Somewhat understandably, Del Monte argued that it found itself in an awkward position. It was liable for the conduct of a company that it had severed all links with some time before the investigation began. But, the EC would not give it the related company's reply to the SO. This was particularly awkward since it appears that Weichert stated in the reply that it agreed with the EC's assessment that Del Monte had decisive influence over it during the relevant period.

It is here that the Court makes a disappointing and somewhat off-point remark:

> [B]y virtue of a general duty of care attaching to any undertaking, [Del Monte] was required to ensure, even in the circumstances of the sale of its interest in Weichert, the proper maintenance of records in its books and files of information enabling details of its activities to be retrieved, in order, in particular to make the necessary evidence available in the event of legal or administrative proceedings.

The Court cites case law in support of this position. One could argue whether the case law relied on is actually directly applicable, but that's not the point. The Court has endorsed one of the EC's more ludicrous moves. When classifying Del Monte and Weichert as **one** undertaking, the EC should have at least given Del Monte a copy of Weichert's reply to the SO.

What does maintaining company files have to do with a reply to an SO, which has been prepared years later as part of proceedings initiated by DG COMP? There is no way that Del Monte could have anticipated this. And, even if it could have saved all of its files, that does not mean that it would have been in a better place vis-à-vis Weichert's reply.

IV. THE UNDERTAKING CRYSTAL BALL

The EC should not be allowed to have it both ways: grouping companies together for the purpose of liability and fining, but dividing and conquering them throughout the proceeding. But given that they currently have it both ways, what should a large company do?

Further, the EC's definition of an undertaking reaches beyond consolidated financial accounts. So, if you were to sit down and look at which companies are included in a large company's accounts, this does not mean that you would be able to identify every company that may be considered part of the same "undertaking."

Therefore, to protect itself, a large company must first look at where all of its interests are—regardless of how small. Second, it must evaluate its relationships with those companies in which it has such interests—if there is any way that the EC could argue that there is decisive influence, make sure that those companies have good compliance programs. Third, if the "parent" company ever sells its interest in one of the identified companies make sure that, when terminating the relationship, there is some contractual obligation for the identified company to fully cooperate with the "parent" company in any competition proceeding. If this cannot be done when terminating the relationship, large companies may wish to consider amending their existing agreements to add the necessary language.

As long as the Court allows the EC to rely on this notion of "undertaking" but does not extend the same procedural rights as would be given to a "legal entity," companies are going to have to find private contractual means to anticipate the unimaginable.