purpose. Hence, Weichert's responses to a simple RFI did not justify a reduction of the fine pursuant the 2002 Leniency Notice—regardless of the usefulness of the information. Arguably, the CoJ might have reached a different conclusion if Weichert had provided the information separately from its response to a RFI.

Therefore, the CoJ annulled the GC's judgment granting an additional 10 per cent reduction of the fine and increased the fine from €8,820,000 to €9,800,000.

IV. Practical significance

The CoJ's judgment provides a rather formalistic application of the Leniency Notice: no matter how much added value the information provided in a RFI (whether it is part of a simple RFI or RFI by decision) brings to the EC investigation, it does not justify a reduction of the fine within the meaning of the Leniency Notice. This means that companies who are contemplating going well beyond their obligation to cooperate in an investigation should be very clear how they are doing so and avoid disclosing facts not specifically requested in responses to RFIs. If the two are not kept distinct, the company runs the risk of losing the benefit of leniency and having the EC claim that all of the significant added value of the information provided was merely part of the response to the RFI.

doi:10.1093/jeclap/lpv061
Advance Access Publication 9 September 2015

Exotic Fruits (Bananas): Admissibility of Evidence and Burden of Proof of the Continuous Nature of a Single Infringement

Stefaan Raes and Pierre M. Sabbadini*

General Court Case T-655/11 *FSL Holdings, Firma Léon Van Parys, Pacific Fruit Company Italy SpA v European Commission*, 16 June 2015

* Respectively, Partner and Junior Associate at Liedekerke Wolters Waelbroeck Kirkpatrick (Brussels office).

Documentary evidence resulting from an investigation by a national tax authority—the transmission to the Commission of which has not been declared unlawful by a national judge on the basis of national law—or from an inspection in a previous antitrust investigation by the Commission is admissible in an antitrust investigation by the Commission. In order to prove the continuous nature of a single infringement, the Commission should adduce evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two specific dates.

Legal context

The applicants sought the annulment of Decision C(2011) 7273 Final of 12 October 2011, rendered by the Commission at the outset of a cartel investigation, whereby a single and continuous infringement, from 28 July 2004 until 8 April 2005, was established and the applicants were imposed a fine.

The General Court annulled the Decision in so far as it refers to the period from 11 August 2004 to 19 January 2005 and to the extent that it concerns the applicants, and sets the fine at a lower amount.

Facts

The applicants are active in the importation, marketing, and sales of 'Bonita'-branded bananas in Europe. In a previous case, COMP/39188—Bananas, the Commission had investigated several importers of bananas, including Chiquita and the applicants, though the latter were not addressees of the final decision. During the investigation, the Commission received documents from the Italian tax authority, which had been obtained during a tax inspection carried out at the home and office of an employee of Pacific, the third applicant.

A second investigation relating to Southern Europe was conducted in Case COMP/39482—Exotic Fruit (Bananas), in which the Commission relied on the cooperation by Chiquita deriving from its status of leniency applicant in the first investigation and used a document resulting from an inspection in the same first investigation, to adopt the Decision of 12 October 2011.

Before the General Court, the applicants were unsuccessful in obtaining the annulment of the Decision, but they were successful in obtaining a reduction of the fine on the basis that the period during which the infringement could be established was less long than the Commission had decided.

Analysis

1. The Commission's finding of an infringement was *inter alia* based on documents seized in the course of a national tax investigation and transmitted to the Commission by the Italian tax authority with the authorisation of the Public Prosecutor in Rome.

   The General Court decides, referring to its Judgment in *Dalmine* (C-407/04 EU:C:2007:53) that, since the lawfulness of their transmission is a matter of national law and that it has not been declared unlawful by a national court, they cannot be regarded as inadmissible evidence that must be removed from the file.

   The General Court also addresses the argument that Article 12 of Regulation N° 1/2003 providing that the information exchanged within the network formed by the Commission and the national competition authorities can be used as evidence only in respect of the subject matter for which it was collected by the transmitting authority, precludes the use of the documents transmitted by the Italian tax authority. It decides that this rule meets the specific need to ensure that the procedural safeguards inherent to the collection of information by the Commission and by the national competition authorities in the context of their tasks are respected, while allowing an exchange of information between those authorities, but that it cannot be inferred from this prohibition that there is a general prohibition on the use of evidence, by the Commission, of information obtained by another national authority in the exercise of its tasks.

2. The Commission's finding of an infringement was also based on a document from the file of Case COMP/39188—Bananas obtained during surprise inspections carried out in the context of that case. The General Court decides that, although the information used by the Commission during inspections must not be used for purposes other than those specified in the decision under which the inspection is carried out, it cannot, however, be concluded that the Commission is barred from initiating an investigation in order to verify or supplement information which it happened to obtain during a previous inspection if that information indicates the existence of conduct contrary to the competition rules.

3. The applicants claimed that the Commission had failed to establish the continuous nature of the infringement.

   The General Court refers to the following rules laid down in settled case law. An infringement of Article 101 (1) TFEU may result not only from an isolated act but also from a series of acts or from continuous conduct. The notion of a single infringement covers a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition, and also in which individual infringements are linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object). As regards a continuing infringement, the notion of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that the undertaking participated in the infringement prior to and after that period and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking. However, the principle of legal certainty requires that, if there is no evidence directly establishing the duration of the infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two specific dates. Whether or not a period is long enough to constitute an interruption of the infringement cannot be examined in the abstract, but needs to be assessed in the context of the cartel in question.

   In the present case, the General Court observes that the Commission has not adduced documentary evidence of a contact between the parties for the period from 11 August 2004 until 19 January 2005. Although Chiquita's statements may be regarded as evidence relating to that period and may, as statements of a leniency applicant, be considered as having a particularly high probative value, corporate statements must be supported by other evidence if they are disputed by other undertakings that are also alleged to have agreed upon the common understanding.

   The General Court concludes that there was an interruption of the infringement from 11 August 2004 until 19 January 2005. Given the fact that the applicants resumed and repeated, after the period of approximately 5 months, their participation in an infringement which they do not dispute was a manifestation of the same cartel in which they had participated before the interruption, the infringement must be characterised as single and repeated and must be regarded as having lasted 3 months and 11 days rather than 8 months and 12 days. The amount of the fine being based on the duration of the infringement, the General Court reduces the fine accordingly.

Practical significance

As far as the admissibility of evidence in an antitrust investigation by the Commission is concerned, this judgment is noteworthy in two respects. First, a document seized by a national tax authority—and, for that matter, by an authority conducting a criminal investigation—can be used by the Commission, unless a national judge has decided otherwise. Second, a document resulting from an inspection in the framework of a previous investigation can, as a rule, be used in a subsequent one.

In addition, this judgment is a useful reminder of the burden of proof resting on the Commission regarding the continuous nature of a single infringement in the absence of documentary evidence covering a certain period of time, as well as of the unlimited judicial review the General Court is ready to exercise on the body of evidence in order to ascertain whether that burden of proof has been discharged.

doi:10.1093/jeclap/lpv065
Advance Access Publication 9 September 2015