Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 November 2016 [1]

Case C-469/15 P

FSL Holdings and Others
v

European Commission

(Appeal — Competition — Cartels (Article 101 TFEU) — European banana market — Southern European banana cartel (Italy, Greece, Portugal) — Coordination in the fixing of prices and exchange of pricing information — Admissibility of evidence — Prohibitions on the use of evidence — Fortuitous discoveries — Cooperation with national authorities — Transmission of evidence by national authorities which are not themselves competition authorities — Rights of the defence — Effective judicial protection — Leniency Notice — Concept of the restriction of competition by object)

I – Introduction

1. May the Commission, in antitrust proceedings, use evidence that was transmitted to it fortuitously by a national tax authority? That, in essence, is the question which the Court is called upon to address in the present appeal proceedings.

2. That question has arisen in the context of the southern European 'banana cartel' which was uncovered a number of years ago. [2] Participating in that cartel were the Chiquita and Pacific groups of undertakings. In that regard, the Commission, in 2007, received from the Italian finance police [3] information obtained in the course of criminal proceedings relating to tax offences. Later, in its decision of 12 October 2011, [4] the Commission relied not least on that information in order to establish an infringement of Article 101 TFEU and impose a multi-million-euro fine on the three Pacific group companies, namely FSL Holdings (FSL), Léon Van Parys (LVP) and Pacific Fruit Company Italy SpA (PFCI). [5]

3. An action brought by those companies for the annulment of that decision was only partially successful at first instance. In its judgment of 16 June 2015 [6] the General Court partially dismissed their action. FSL, LVP and PFCI are now pursuing their search for relief before the Court of Justice acting in its appellate jurisdiction.

1 — Original language: German

2 — The Court examined the *northern* European banana cartel which was uncovered some years earlier in its judgments of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184), and of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2015:416).

3 — Guardia di Finanza.

4 — Commission Decision C(2011) 7273 final of 12 October 2011 relating to a proceeding under Article 101 [TFEU] (Case COMP/39482 — Exotic Fruit (Bananas), summarised in OJ 2012 C 64, p. 10), 'the contested decision'.

5 — Hereinafter also referred to jointly as 'the appellants'.

6 — Judgment of 16 June 2015, *FSL and Others* v *Commission* (T-655/11, EU:T:2015:383), 'the judgment under appeal'.

4. The Commission's ability to use information and evidence which it has obtained from national authorities touches on one of the central building blocks of the modernised system for the enforcement of antitrust law that was introduced by Regulation (EC) No 1/2003.[7] Accordingly, the Court's judgment in the present case will pave the way for future cooperation between authorities at EU and national levels, both antitrust authorities and administrative bodies active in other areas.

5. The present case also raises a number of routine questions relating to the Leniency Notice, effective judicial protection and the concept of the restriction of competition by object.

II – Legal framework

6. The legal framework for this case is defined by Article 101 TFEU and Regulation No 1/2003.

7. Article 12 of Regulation No 1/2003 contains the following provision, under the heading 'Exchange of information':

'1. For the purpose of applying [Articles 101 TFEU and 102 TFEU] the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying [Article 101 TFEU or 102 TFEU] and in respect of the subject matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

— the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of [Article 101 TFEU or 102 TFEU] or, in the absence thereof,

— the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.'

8. Recital 16 of Regulation No 1/2003 gives the following clarifications with respect to Article 12:

'Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the [European Competition Network] even where the information is confidential. This information may be used for the application of [Articles 101 TFEU and 102 TFEU] as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards

7 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), 'Regulation No 1/2003'.

natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority'.

9. Regard must also be had to Article 28 of Regulation No 1/2003, paragraph (1) of which is worded as follows:

'Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.'

10. Finally, under the heading 'Review by the Court of Justice', Article 31 of Regulation No 1/2003 provides:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

III – Background to the dispute

11. The Pacific group of undertakings markets bananas under the Bonita brand. According to the findings of the General Court, Pacific and Chiquita committed a cartel offence under Article 101 TFEU in the southern European banana market, more specifically in Greece, Italy and Portugal.

A – *Facts and administrative procedure*

12. On 26 July 2007, the Commission received from the Italian finance police copies of a Pacific employee's personal notes which had been obtained during a search of that employee's home and office in Italy as part of a national criminal investigation into tax offences. [8]

13. The Commission subsequently carried out inspections at the offices of banana importers in Italy and Spain. In addition, it sent the undertakings concerned, their customers and other market participants requests for information in which it asked once again for certain details that were already contained in the case file relating to the northern European banana cartel. [9]

14. After issuing a statement of objections, granting access to the file and hearing the undertakings concerned, the Commission, on 12 October 2011, adopted the contested decision.

15. In that decision, the Commission explains that, during a specified period between 2004 and 2005, the participants in the cartel coordinated their price strategy in Greece, Italy and Portugal regarding future prices, price levels, price movements and/or price trends and exchanged information on future market conduct regarding prices. [10] It states that that conduct formed part of an overall scheme which laid down the lines of their action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anticompetitive object and a single economic aim, namely to restrict or distort the normal movement of prices in the banana business in Italy, Greece and Portugal and to exchange information on that subject. [11]

8 — Paragraph 7 of the judgment under appeal and recital 81 of the contested decision.

9 — With regard to the northern European banana cartel, see Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39.188 — Bananas, summarised in OJ 2009 C 189, p. 12).

10 — Paragraph 22 of the judgment under appeal and recitals 94 and 187 of the contested decision.

11 — Paragraph 24 of the judgment under appeal and recitals 209 and 213 of the contested decision.

16. According to the Commission, the facts at issue constitute an agreement within the meaning of Article 101(1) TFEU in that the undertakings concerned explicitly agreed on certain conduct on the market, in order knowingly to substitute practical cooperation between them for the risks of competition. The Commission also takes the view that, even if it is eventually not demonstrated that the parties explicitly subscribed to a common plan that constitutes an agreement, its findings show that that conduct constitutes a concerted practice within the meaning of Article 101(1) TFEU, the communications between the parties having influenced their conduct in the setting of banana prices for southern Europe. [12]

17. On account of their participation in that single and continuous infringement of Article 101 TFEU, the Commission, in the contested decision, imposed on FSL, LVP and PFCI, jointly and severally, a fine of EUR 8.919 million. Pursuant to the Leniency Notice, by contrast, the fine to be imposed on Chiquita was fixed at zero. [13]

B – *The proceedings at first instance*

18. On 22 December 2011, FSL, LVP and PFCI together brought an action for the annulment of the contested decision, at first instance, before the General Court.

19. In its judgment of 16 June 2015, the General Court partially annulled the contested decision, reduced the fine by about a quarter to EUR 6.689 million and ordered the costs to be shared.

IV – Procedure before the Court of Justice

20. By document of 4 September 2015, the appellants together lodged the present appeal against the judgment of the General Court.

21. The appellants claim that the Court should:

— in principal, set aside the judgment under appeal for use of evidence obtained in complete disregard of the procedure laid down for gathering it and for misapplication of the 2002 Leniency Notice, and, consequently, annul the contested decision in its entirety;

— in the alternative, partially set aside the judgment under appeal to the extent that the General Court has not performed a full judicial review of the fine imposed on the appellants and, as a result, substantially reduce the fine imposed on the appellants by virtue of the judgment under appeal;

— in the further alternative, partially set aside the judgment under appeal to the extent that the General Court has not correctly established that the infringement had as its object or effect the restriction of competition, and consequently, refer the case back to the General Court, unless the Court considers that it is sufficiently well-informed to annul the contested decision;

— in any event, order the Commission to pay the appellants' costs of the proceedings before the Court of Justice and the General Court.

22. For its part, the Commission contends that the Court should:

— dismiss the appeal; and

12 — Paragraph 23 of the judgment under appeal and recitals 188 and 195 of the contested decision.

13 — Paragraph 32 of the judgment under appeal and Article 2 of the contested decision.

— order the appellants to pay the costs.

23. The appeal was examined before the Court of Justice on the basis of the written documents.

V – Assessment

24. By their appeal, FSL, LVP and PFCI are not taking forward all of the issues which formed the subject matter of the proceedings at first instance. Rather, the legal debate in the appeal proceedings is now confined to selected issues only. In this regard, the appellants rely on four grounds of appeal, the first being concerned with the admissibility of the evidence transmitted by the Italian finance police (see in this regard section A immediately hereafter), the second with the application of the Leniency Notice (see in this regard section B below), the third with the principle of effective judicial protection in relation to the fine (see in this regard section C further below) and the fourth with the concept of the restriction of competition by object (see in this regard the final section, D).

A – *The admissibility of the evidence transmitted by the Italian authorities (first ground of appeal)*

25. The focus of interest in the present case is the first ground of appeal, concerning the admissibility of the evidence transmitted by the Italian finance police to the Commission. In the appellants' view, the Commission was not permitted to rely on the personal notes of a Pacific employee, which the Italian police had obtained during a search of that employee's home as part of a criminal investigation into tax offences, as evidence of the existence of an antitrust offence in an administrative procedure under Article 101 TFEU and Regulation No 1/2003.

26. In essence, the appellants accuse the General Court of having failed to observe the rights of the defence in paragraphs 66 to 99 of the judgment under appeal and of having disregarded fundamental procedural requirements — namely the principles expressed by the legislature in Article 12(2) of Regulation No 1/2003. They further consider that the General Court distorted evidence.

27. I shall address each of those three views in separate sections below, although I think it expedient to group the complaints raised by the appellants according to subject matter and to examine them in a different order.

1. The alleged existence of a prohibition on the use of evidence

28. The grounds of appeal raised against the judgment of the General Court hinge on the argument that, at EU level, evidence cannot be accepted, and must not therefore be used, if it has been 'obtained in complete disregard of the fundamental rights of the persons concerned'.

29. With regard, first, to the alleged failure to observe fundamental rights, however, the appellants do not at any point specify exactly what form that failure is supposed to have taken, be it at EU or at national level.[14] Consequently, the appellants' line of argument in this regard is too general and imprecise to be assessed by the Court.[15]

14 — With the exception of the alleged infringement of the rights of the defence, with which I shall deal separately below (see in that regard points 52 to 63 of this Opinion).

15 — Judgments of 11 September 2007, *Lindorfer* v *Council* (C-227/04 P, EU:C:2007:490, paragraph 83); of 18 July 2013, *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraph 45); and of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 151).

30. With regard, next, to the alleged inadmissibility of the evidence transmitted by the Italian finance police to the Commission, the appellants' contention calls for some clarification of the circumstances in which a prohibition on the use of evidence must be assumed to be present in antitrust proceedings.

31. The starting point for the deliberation of this allegation should be that the existence of an antitrust offence can be demonstrated by any appropriate evidence. There is no general principle in EU law to the effect that competition authorities may rely only on certain forms of evidence or take into account only evidence from certain sources.

32. On the contrary, the range of evidence that may be used to demonstrate the existence of antitrust offences is very broad. It is thus recognised in case-law that, in most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.[16] This is particularly true in the case of cartels, which are by their nature inclined to be secret and the participants in which usually keep their records to a minimum.[17]

33. So far as concerns the probative value of given items of evidence, the prevailing principle is that of the unfettered evaluation of evidence, the only relevant criterion for the purpose of assessing evidence being its credibility.[18]

34. Reliance on particular items of evidence to demonstrate infringements of Article 101 TFEU or 102 TFEU is only exceptionally precluded by prohibitions on the use of evidence. Such prohibitions may be based on the fact that evidence was obtained in breach of essential procedural requirements intended to protect the individuals concerned (see in this regard section a) immediately hereafter) or on the fact that evidence is to be used for an unlawful purpose (see in this regard section b) further below).

(a) The evidence was not obtained by the Commission in breach of essential procedural requirements

35. First, the appellants complain that the General Court should have examined whether the Commission obtained the evidence acquired in the course of the national criminal proceedings relating to tax offences in a lawful manner.

36. In principle, the lawfulness of the taking of evidence by national authorities and the transmission to the Commission of information obtained in application of national law is governed by national law; furthermore, the EU judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority.[19] The General Court was absolutely right to make this point.[20]

16 — Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 57); of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 70); and of 17 September 2015, *Total Marketing Services* v *Commission* (C-634/13 P, EU:C:2015:614, paragraph 26).

17 — Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 55), and of 25 January 2007, *Sumitomo Metal Industries and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52).

18 — Judgments of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraphs 49 and 63), and of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 128).

19 — Judgment of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 62).

20 — Paragraph 45 of the judgment under appeal.

37. This does not mean of course that, in antitrust proceedings, the Commission or the EU courts may knowingly rely on evidence which was quite clearly obtained in breach of essential procedural requirements. Fundamental principles of EU law such as, in particular, the right to good administration (Article 41(1) of the Charter of Fundamental Rights) and the right to a fair trial (Article 47(1) of the Charter of Fundamental Rights) require that the EU institutions undertake at least a summary examination in the light of all the circumstances of the particular case that are known to them. [21]

38. In the administrative proceedings, therefore, the Commission must ensure that, according to all the indications available to it, the evidence in question was neither unlawfully gathered by the national authorities nor unlawfully forwarded to it. Moreover, the General Court too must check the evidence against those criteria where complaints that the latter were not satisfied are raised in the proceedings at first instance. [22]

39. In the present case, the General Court, like the Commission beforehand, had before it two indications in particular that the evidence had been lawfully transmitted by the Italian finance police to the Commission. First, the transmission of that evidence had not been prohibited by an Italian court. [23] Secondly, the aforementioned evidence obtained in the course of the national criminal proceedings relating to tax offences was forwarded to the Commission with the authorisation of the competent Italian prosecutor's office. [24]

40. The appellants do not put forward any argument capable of contesting the soundness of the General Court's findings in that regard or casting doubt on the lawfulness of the transmission of that evidence. Indeed, on appeal, they expressly concede that no Italian court judgment has considered the transmission of the documents at issue to be unlawful, even though they have by their own account endeavoured to 'exercise their rights at national level'.

41. In those circumstances, the General Court cannot be accused of having relied on evidence which the Commission obtained unlawfully and which would therefore be subject to a prohibition on use.

(b) The evidence was not used for an unlawful purpose

42. The appellants further allege that the evidence obtained in the course of criminal proceedings relating to tax offences which was transmitted by the Italian finance police should not have been used in antitrust proceedings as proof of an infringement of Article 101 TFEU.

43. The appellants rely in essence on Article 12(2) of Regulation No 1/2003. They contend that that provision is to be understood as an expression of a general principle to the effect that all evidence exchanged between the Commission and the national authorities should be intended for a particular purpose. The appellants submit that the only evidence that may be exchanged with a view to proving anticompetitive conduct under Article 101 TFEU or 102 TFEU is that which was gathered for that very purpose.

44. That argument too is unconvincing, however.

21 — See also to that effect the judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 284), which states that measures incompatible with respect for human rights are not acceptable in the European Union.

22 — See to that effect the judgment of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 63, final sentence), according to which it is important to consider whether a national court has declared the transmission of the evidence at issue to the Commission to be unlawful.

23 — Paragraphs 80 and 81 of the judgment under appeal.

24 — Paragraphs 82 to 89 of the judgment under appeal.

45. Article 12 of Regulation No 1/2003 pursues a specific objective: it seeks to facilitate and promote cooperation between the authorities within the European Competition Network, that is to say between the competition authorities at EU and national levels. For that reason, Article 12 expressly stipulates that evidence exchanged between competition authorities may — subject on each occasion to the conditions specified there — be used automatically in antitrust proceedings.

46. It cannot be concluded by converse inference from the foregoing, however, that, *outside* the European Competition Network, an exchange of information and the transmission of evidence from one authority to another is impermissible. Such a restrictive view would be contrary to the principle of the procedural autonomy of the Member States. It would at the same time unduly restrict the means available to the Commission and the national competition authorities for gathering evidence in antitrust proceedings.[25] This would have the effect of thwarting a fundamental objective of EU law, namely the effective enforcement of the competition rules in the European internal market.[26]

47. On the other hand, Article 12(2) of Regulation No 1/2003, referred to by the appellants, does not express a general principle of law to the effect that the only evidence that may be used in antitrust proceedings is that which has already been gathered for the purposes of such proceedings. It is true that evidence — even if it has been obtained in an entirely lawful manner — must never be used for an *unlawful purpose*. To that extent, therefore, evidence that is used for an unlawful purpose is subject to a prohibition on use. It does not follow from this, however, that evidence which was gathered for *a purpose other than competition* (for example, in the course of criminal proceedings relating to tax offences) must never be used for a *purpose connected with competition law* (namely in the course of antitrust proceedings under Article 101 TFEU such as those at issue here). Accordingly, the EU courts have already recognised that evidence obtained in criminal proceedings at national level may be used by the Commission in antitrust proceedings.[27]

48. It is only where the legislature — at EU or national level — expressly prescribes an intended purpose for particular items of evidence that their reuse for purposes other than that for which they were originally gathered is subject to a prohibition. This is true in particular, pursuant to Article 28(1) of Regulation No 1/2003, in the case of evidence gathered by the Commission in the course of antitrust proceedings which it is conducting, and the position is similar, pursuant to Article 12(2) of Regulation No 1/2003, in the case of evidence exchanged between European competition authorities.

49. Such special provisions and the case-law relating to them[28] cannot, however, be extrapolated generally to mean that evidence other than that gathered specifically for the purposes of antitrust law may never be used in antitrust proceedings conducted by European competition authorities. Articles 12(2) and 28(1) of Regulation No 1/2003 are, rather, intended only to safeguard undertakings against the prospect of evidence which has been gathered by a competition authority in antitrust

25 — The General Court too rightly emphasised this point (see, in particular, paragraph 78 *in fine* and paragraph 79 of the judgment under appeal).

26 — On the importance of the competition rules to the functioning of the internal market, see the judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 36), as well as — in relation to the legal position following the entry into force of the Treaty of Lisbon — the judgments of 17 February 2011, *TeliaSonera* (C-52/09, EU:C:2011:83, paragraph 20), and of 17 November 2011, *Commission* v *Italy* (C-496/09, EU:C:2011:740, paragraph 60). The need for the effective implementation of Articles 101 and 102 TFEU (formerly Articles 81 EC and 82 EC) was made clear more recently in, for example, the judgments of 11 June 2009, *X BV* (C-429/07, EU:C:2009:359, paragraphs 33 to 35); of 7 December 2010, *VEBIC* (C-439/08, EU:C:2010:739, paragraph 59); of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 19); and of 18 June 2013, *Schenker and Others* (C-681/11, EU:C:2013:404, paragraph 46).

27 — See, in that regard, the judgment of the General Court of 8 July 2004, *Dalmine* v *Commission* (T-50/00, EU:T:2004:220, paragraphs 83 to 91), confirmed by the judgment of the Court of Justice of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraphs 62 and 63).

28 — See, fundamentally, the judgments of 17 October 1989, *Dow Benelux* v *Commission* (85/87, EU:C:1989:379, paragraphs 17 and 18), and of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 298 to 300), both of which related to Article 20 of Regulation No 17. This is now Article 28(1) of Regulation No 1/2003.

proceedings — or even information which they themselves voluntarily provide in such administrative proceedings, for example by means of an application for leniency — later being used against them in other proceedings in which stricter standards of procedural law may apply, that is to say in certain judicial proceedings that make up the core of criminal law.

50. In the present case, however, there is nothing to indicate that the procedural standards specifically applicable in Italian criminal proceedings relating to tax offences, with which the Italian finance police had to comply, are any less strict than those laid down by the Commission as being applicable in antitrust proceedings. A situation comparable to that provided for in Article 12(2) or Article 28(1) of Regulation No 1/2003 is not therefore present.

51. All things considered, therefore, the evidence transmitted by the Italian finance police in the antitrust proceedings conducted by the Commission in the case at issue here cannot be regarded as having been the subject of unlawful use such as to support the assumption of a prohibition on the use of evidence.

2. The alleged infringement of the rights of the defence

52. At various points under the second ground of appeal, the appellants further maintain that the General Court failed to observe their rights of defence. I shall look at all of those complaints together now.

53. First, the appellants criticise the fact that they were not made aware that the Italian finance police had transmitted the evidence to the Commission until some time after it had done so. Secondly, they complain that the Commission would never have initiated proceedings in respect of the southern European banana cartel if the Italian finance police had not sent it — as a prompt to undertake further investigation — the aforementioned personal notes of a Pacific employee.

54. Neither of the arguments put forward by the appellants points to any kind of infringement of their rights of defence, however.

55. The rights of the defence are fundamental rights forming an integral part of the general principles of law, whose observance the Court ensures.[29] They are now prominently enshrined in Articles 41(2) and 48(2) of the Charter of Fundamental Rights too.

56. Contrary to what the appellants appear to think, the rights of the defence do not, however, provide protection against the very prospect of the Commission initiating proceedings on account of alleged infringements of Articles 101 TFEU or 102 TFEU and using in those proceedings evidence transmitted to it by national authorities outside the European Competition Network. The rights of the defence provide only certain procedural safeguards which the Commission must observe when conducting those proceedings, with the infringement of such safeguards leading to the annulment of the Commission's final decision.

29 — Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 64); of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraph 92); and of 25 October 2011, *Solvay* v *Commission* (C-110/10 P, EU:C:2011:687, paragraph 47).

57. Respect for the rights of the defence requires in particular that the undertakings concerned be given an opportunity to express their views. They must be able to make usefully known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim of an infringement [30] (see also Article 41(2)(a) and (b) of the Charter of Fundamental Rights).

58. It is common ground in the present case that the appellants were given access to the evidence transmitted by the Italian finance police and an opportunity to make known their views on that evidence. They complain only that that opportunity was given to them too late in the administrative procedure.

59. In that regard, it should be noted that the administrative procedure is divided into two stages, [31] access to the file and the opportunity to be heard having to be granted only after the conclusion of the preliminary investigation, that is to say once the Commission has notified the undertakings concerned of the statement of objections. [32] Notifying the undertakings concerned at an earlier stage might unduly restrict the Commission's investigations, in which case there would be a risk of evidence being suppressed. [33]

60. It is true that the Commission must ensure that the rights of defence of the undertakings concerned are not impaired during its preliminary investigations either, that is to say before it has even sent the statement of objections. [34]

61. However, the appellants have made no specific submission that would indicate that, in the present case, the Commission, in order to respect the rights of defence of FSL, LVP and PFCI, was required to disclose the evidence transmitted by the Italian finance police immediately — and, therefore, long before sending the statement of objections — and to seek any views they might have on that evidence. [35] Still less have the appellants demonstrated that the mere use of the evidence transmitted by the Italian finance police might in itself have the effect of infringing the rights of the defence. The complaint that their rights of defence have been 'irremediably prejudiced' is nothing more than an extremely vague and entirely unsubstantiated assertion.

62. In effect, what the appellants are really saying by their argument is, in my opinion, that the Commission should not even have taken the evidence transmitted to it by the Italian finance police as the starting point for antitrust proceedings and as a prompt for further investigations of its own. In accordance with settled case-law, however, the Commission may do just that, in any circumstances, [36] and its right to do so is essential to the effective enforcement of the competition rules in the European internal market.

30 — Judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 11); of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 66); of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 44); and of 25 October 2011, *Solvay* v *Commission* (C-110/10 P, EU:C:2011:687, paragraph 48).

31 — Judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 181 to 184); of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* (C-105/04 P, EU:C:2006:592, paragraph 38); and of 3 September 2009, *Prym and Prym Consumer* v *Commission* (C-534/07 P, EU:C:2009:505, paragraph 27).

32 — Judgment of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraphs 58 and 59).

33 — Judgment of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 60).

34 — Judgments of 21 September 1989, *Hoechst* v *Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 15); of 18 October 1989, *Orkem* v *Commission* (374/87, EU:C:1989:387, paragraph 33); and of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 63).

35 — See to the same effect the judgment of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 61).

36 — Judgments of 17 October 1989, *Dow Benelux* v *Commission* (85/87, EU:C:1989:379, paragraph 19), and of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 301); see to the same effect — in the converse scenario — the judgments of 16 July 1992, *Asociación Española de Banca Privada and Others* (C-67/91, EU:C:1992:330, paragraphs 42 and 43), and of 19 May 1994, *SEP* v *Commission* (C-36/92 P, EU:C:1994:205, paragraph 29).

63. In the light of the foregoing, the General Court cannot be accused of having failed to observe the rights of the defence. [37]

3. The alleged distortion of evidence by the General Court

64. Last but not least in the context of this first ground of appeal, the appellants accuse the General Court of having distorted evidence. That distortion is said to lie in the fact that, in paragraphs 67 and 68 of the judgment under appeal, the General Court held it to be irrelevant whether two of the four contested pages from the personal notes of a Pacific employee were, as alleged, unlawfully transmitted by the Italian finance police to the Commission.

65. In that regard, it should be noted that a distortion is present only where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect. [38] Moreover, the appellants must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in their view, led to that distortion. [39]

66. In the present case, the appellants do not give any indication of exactly which evidence the General Court is alleged to have distorted. They simply make the very general assertion that the General Court 'distorted the clear sense of the evidence'. Also, paragraphs 67 and 68 of the judgment under appeal do not contain the wording criticised by the appellants, to the effect that it is irrelevant whether the aforementioned two pages from the personal notes of a Pacific employee were unlawfully transmitted to the Commission.

67. It is true that the General Court held that the aforementioned two pages from the notes of a Pacific employee are 'in the file of the present case irrespective of whether the documents transmitted by the Guardia di Finanza are admissible'. [40] By that statement, however, the General Court was referring only to the fact that the Commission had also found those two pages in its own search of Pacific's premises in Italy. In that connection, it is not possible, even on the most favourable examination of the appellants' line of argument, to establish the presence of a distortion of evidence.

68. By its comments in paragraphs 67 and 68 of the judgment under appeal, the General Court is in effect providing a legal characterisation of the facts: it is making an assessment of the causal link (or lack of one) between any procedural error there may have been in the transmission of certain items of evidence by the Italian finance police to the Commission and the subsequent stages of the procedure. This has nothing to do with a distortion of evidence.

4. Interim conclusion

69. All things considered, therefore, the first ground of appeal is unfounded in its entirety.

37 — See to the same effect the judgment of the General Court of 8 July 2004, *Dalmine* v *Commission* (T-50/00, EU:T:2004:220, paragraphs 83 to 91), confirmed by the judgment of the Court of Justice of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraphs 62 and 63).

38 — Judgments of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 37); of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 37); of 17 June 2010, *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 17); and of 4 July 2013, *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 51).

39 — Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 50 and 159); of 17 June 2010, *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 16); and of 8 March 2016, *Greece* v *Commission* (C-431/14 P, EU:C:2016:145, paragraph 32).

40 — Paragraph 68 of the judgment under appeal.

B – *The application of the Leniency Notice and the admissibility of the evidence thereby obtained (second ground of appeal)*

70. By their second ground of appeal, the appellants claim in essence that the information provided by Chiquita during the administrative procedure should not have been used as evidence of the existence of a cartel. After all, Chiquita provided that information with an eye only to its status as a leniency applicant. The appellants take the view, however, that Chiquita held the status of leniency applicant only in relation to the *northern European* banana cartel, but not in relation to the *southern European* banana cartel at issue here. In their submission, the General Court failed to take that fact into account. They consider that, if it had not had the status of leniency applicant, Chiquita might not have provided the incriminating information.

71. The crux of the appellants' argument under the second ground of appeal is their assertion that, so far as concerns the southern European banana cartel, Chiquita did not cooperate with the Commission to an extent sufficient to earn the status of leniency beneficiary. [41]

1. Whether admissible

72. It is important to look first at whether this ground of appeal is admissible.

73. On the one hand, it cannot be argued — contrary to the view taken by the Commission — that this is a completely new complaint. It is true that the proceedings at first instance were primarily concerned with another question, namely whether the Commission had misused its discretion and exercised an unlawful influence over Chiquita. In the judgment under appeal, however, the General Court does at least touch on the requirement to cooperate on a continuous basis and expeditiously throughout the administrative procedure as a condition of the status of leniency applicant. [42] If the appellants were now to be prevented from taking issue with the General Court's findings in this regard, the appeal would be deprived of part of its purpose. [43]

74. On the other hand, however, the question of whether an undertaking cooperated sufficiently with the Commission during the administrative procedure forms part of the appraisal of facts and evidence which falls to the General Court alone and which may not be challenged before the Court of Justice on appeal, unless there has been a distortion of facts or evidence, which has not been claimed to be the case here. [44]

75. The second ground of appeal is therefore inadmissible.

41 — The conditions of cooperation with the Commission are set out in point 11(a) of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

42 — See, in particular, paragraphs 121 to 126 and 147 of the judgment under appeal.

43 — Judgments of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 61); of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 47); and of 14 June 2016, *Marchiani* v *Parliament* (C-566/14 P, EU:C:2016:437, paragraph 37).

44 — Order of 17 September 1996, *San Marco* v *Commission* (C-19/95 P, EU:C:1996:331, paragraphs 39 and 40), as well as the judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 449), and of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535, paragraph 37).

2. Whether well founded

76. Even if the second ground of appeal were to be considered admissible, for instance because it relates in reality to the legal characterisation of the facts, the allegation made by the appellants would be substantively unsound. After all, the information provided and evidence furnished by an undertaking during the administrative procedure do not become unusable by the Commission solely because that undertaking may have been wrongly granted the status of leniency applicant.

77. On the contrary, the reasons why a leniency applicant decides to cooperate with the authorities do not as such have any bearing on the lawfulness of the evidence gathering process or the admissibility of that evidence. They may at most have a role to play in the assessment of the value and credibility of the leniency applicant's evidence. These, however, are not actually at issue in the present case.

78. Consequently, the second ground of appeal is not only inadmissible but also unfounded.

C – *The principle of effective judicial protection in relation to the fine (third ground of appeal)*

79. The third ground of appeal is devoted to the principle of effective judicial protection and is directed essentially against paragraphs 501 to 564 of the judgment under appeal. The appellants complain that the General Court carried out only an 'extremely limited judicial review' of the fine imposed by the Commission and therefore failed to have regard to the concept of unlimited jurisdiction (Article 31 of Regulation No 1/2003) and infringed Article 6 ECHR and Article 47 of the Charter of Fundamental Rights. As a result, they claim, the General Court also miscalculated the fine.

80. This ground of appeal is raised in the alternative. I am considering it on the basis that, in accordance with my foregoing submissions, the first and second grounds of appeal cannot be upheld.

81. Contrary to what the Commission seems to think, this third ground of appeal cannot be regarded as an impermissible extension of the subject matter of the dispute (Article 170(1) of the Rules of Procedure). For, in paragraph 501 et seq. of the judgment under appeal, the General Court looked expressly at the alternative heads of claim by which FSL, LVP and PFCI sought the cancellation *or reduction* of the fine. Unlike a 'cancellation of the fine', a 'reduction of the fine' necessarily relates to the concept of unlimited jurisdiction within the meaning of Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003. Consequently, the issue to be addressed here already formed part of the subject matter of the proceedings at first instance.

82. However, the General Court's exercise of its unlimited jurisdiction in cartel cases (Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003) is reviewed by the Court of Justice only from the point of view of the existence of any manifest errors. [45] Such errors must be assumed to be present, first, where the General Court misconstrued the extent of its powers under Article 261 TFEU, [46] secondly, where it did not fully consider all relevant factors [47] and, thirdly, where it applied incorrect legal criteria, [48] not least in the light of the principles of equal treatment [49] and proportionality. [50]

83. The complaint raised by the appellants in the present case, to the effect that the General Court's approach to '*pleine juridiction*' was too superficial, falls into the first of the aforementioned categories. The General Court is effectively accused of having misconstrued the extent of its powers under Article 261 TFEU and, therefore, of having infringed the principle of effective judicial protection (Article 47 of the Charter of Fundamental Rights). [51]

84. In reality, however, the General Court addressed in great detail — over the course of more than 60 paragraphs in the judgment under appeal — all of the arguments exchanged by the parties at first instance in relation to whether the fine should be cancelled or reduced.

85. The fact that, in that connection, the General Court referred extensively to the 2006 Guidelines [52] and examined whether the Commission made an error in the application of those guidelines is linked to the complaints which FSL, LVP and PFCI themselves raised at first instance. [53] It certainly cannot be concluded from this that the General Court felt bound by those guidelines and unable to exceed them. [54] The appellants' criticism to that effect is based on a manifestly erroneous reading of the judgment under appeal.

45 — Judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 365).

46 — See, in this regard, my Opinions in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* (C-105/04 P, EU:C:2005:751, point 137), *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:248, point 190), and *Pilkington Group and Others* v *Commission* (C-101/15 P, EU:C:2016:258, point 112); see to the same effect the judgments of 18 July 2013, *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraphs 155 and 156), and of 24 October 2013, *Kone and Others* v *Commission* (C-510/11 P, not published, EU:C:2013:696, paragraphs 40 and 42).

47 — Judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 244 and 303); and of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 125).

48 — Judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 244 and 303); and of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 125).

49 — Judgments of 16 November 2000, *Weig* v *Commission* (C-280/98 P, EU:C:2000:627, paragraphs 63 and 68); of 16 November 2000, *Sarrió* v *Commission* (C-291/98 P, EU:C:2000:631, paragraphs 97 and 99); and of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58).

50 — Judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 126), and of 18 July 2013, *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraph 165).

51 — Article 6 ECHR, on which the appellants also rely, does not constitute, as long as the European Union has not acceded to the ECHR, a legal instrument that can be used directly as a criterion for reviewing the lawfulness of acts of the EU institutions; reliance must rather be placed only on Article 47 of the Charter of Fundamental Rights (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44, and of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 32).

52 — Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

53 — See, for example, paragraph 501 of the judgment under appeal.

54 — As the Court of Justice has held, while it is true that those guidelines are not binding on the EU judicature, the Courts of the European Union may nonetheless be guided by them in the exercise of their unlimited jurisdiction: judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 80), and of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 90).

86. Contrary to what the appellants appear to think, moreover, the General Court was also under no obligation to examine the fine separately from the complaints and arguments raised by FSL, LVP and PFCI in the proceedings at first instance. It should be noted in this regard that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. [55]

87. The appellants' main objective in raising this third ground of appeal seems, in essence, to be to obtain for themselves the same 60% reduction of the fine that was accorded to the participants in the northern European banana cartel, based on mitigating circumstances. [56]

88. However, the General Court gave a detailed explanation of why, in its opinion, such a reduction in the fine was not conceivable in the present case. [57]

89. It is not for the Court of Justice to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law. [58]

90. On the contrary, the General Court could be found to have committed an error of law by setting the fine at an inappropriate level only if 'the level of the penalty were not merely inappropriate but also excessive to the point of being disproportionate'. [59] However, the appellants have not submitted any specific evidence to show that that is the case. [60]

91. All things considered, therefore, the General Court cannot be accused of having erred in law in the exercise of its unlimited jurisdiction, or of having infringed the principle of effective judicial protection. Consequently, the third ground of appeal is unfounded.

D – *The concept of restriction of competition by object (fourth ground of appeal)*

92. By their fourth and final ground of appeal, the appellants turn to the concept of restriction of competition by object within the meaning of Article 101 TFEU. They accuse the General Court of having relied, in paragraphs 463 to 474, and in particular paragraph 466, of the judgment under appeal, on an incorrect understanding of the concept of restriction of competition by object as a result of which the characterisation of the facts was erroneous and the rights of defence enjoyed by FSL, LVP and PFCI were infringed.

93. This ground of appeal is raised in the further alternative. It must be examined since all of the other grounds of appeal, as I have indicated, have no prospect of succeeding.

55 — Judgments of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 64), 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 213), and of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2016:416, paragraph 85).

56 — See, in this regard, paragraph 544 et seq. of the judgment under appeal.

57 — Paragraphs 547 to 554 of the judgment under appeal.

58 — Judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 125), and of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2016:416, paragraph 81).

59 — Judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 126); of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 205); of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2016:416, paragraph 82); of 7 September 2016, *Pilkington Group and Others* v *Commission* (C-101/15 P, EU:C:2016:631, paragraph 73); and of 14 September 2016, *Trafilerie Meridionali* v *Commission* (C-519/15 P, EU:C:2016:682, paragraph 56).

60 — See to the same effect the judgment of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2016:416, paragraph 83).

94. In essence, the appellants allege that the General Court did not assess in the requisite detail the economic and legal context in which the contested conduct of the participants in the cartel took place.

1. Whether admissible

95. The Commission considers that the appellants' plea constitutes an inadmissible new complaint inasmuch as, in the proceedings at first instance, FSL, LVP and PFCI addressed the economic and legal context only from the point of view of any anticompetitive *effects* of the contested conduct of the cartel participants, but not from the point of view of any anticompetitive *object*.

96. However, that approach seems to be excessively formalistic. It is true that the subject matter of the proceedings before the General Court may not be changed in the appeal and that the appeal must not seek a different form of order (Article 170(1) of the Rules of Procedure of the Court of Justice).[61] Within the limits of the existing subject matter of the dispute, however, the appellants may put forward any relevant argument[62] and, in particular in this connection, may further develop and refine the line of argument they advanced at first instance.[63]

97. That is the situation here. The subject matter of the proceedings at first instance was, in a nutshell, whether the contested conduct of the cartel participants was anticompetitive.[64] Since FSL, LVP and PFCI had already — albeit superficially — put forward arguments relating to the economic and legal context of their conduct before the General Court, they may reiterate and elaborate on that line of argument on appeal without thereby extending the subject matter of the dispute.

98. The fourth ground of appeal is therefore admissible.

2. Whether well founded

99. It is largely common ground between the parties to the proceedings that the anticompetitive object of a practice from the point of view of Article 101 TFEU must be assessed in the light, inter alia, of the economic and legal context in which that practice takes place.[65] The only point at issue before the Court of Justice is whether, in the present case, the General Court actually examined that economic and legal context to a sufficient extent.

100. The level of detail with which the General Court must examine the aforementioned economic and legal context depends, of course, on the nature of the contested conduct. In cases where the anticompetitive object is readily apparent, the analysis of the economic and legal context in which the practice occurs may naturally be limited to what is strictly necessary.[66]

61 — See also the judgments of 25 June 2014, *Nexans and Nexans France* v *Commission* (C-37/13 P, EU:C:2014:2030, paragraph 45), and of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2016:416, paragraph 58).

62 — Judgments of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 66), and of 18 November 2010, *NDSHT* v *Commission* (C-322/09 P, EU:C:2010:701, paragraphs 41 and 42).

63 — See to that effect the judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 39), and of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 36); see, similarly, the judgment of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2016:416, paragraphs 59 to 61).

64 — The General Court itself examined the issue of an anticompetitive object and the issue of an anticompetitive effect in the self-same section of the judgment under appeal (see, in that regard, the heading above paragraph 463 of that judgment).

65 — Judgments of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraphs 27); of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 117); and of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraph 27).

66 — Judgment of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraph 29).

101. Just such a readily apparent anticompetitive object is present where competitors enter into agreements with each other on the prices of their goods [67] or where they exchange sensitive information which is relevant to their respective pricing models. [68] Contrary to the view taken by the appellants, Article 101 TFEU prohibits not only price-fixing agreements but also the exchange of sensitive information in relation to price formation. [69]

102. Against that background, the General Court cannot be accused in the present case of not having examined the economic and legal context of the contested conduct to a sufficient extent.

103. The fundamental difference between restrictions of competition by effect and by object within the meaning of Article 101 TFEU would become blurred if the competition authorities and the courts dealing with competition matters in the European Union were required to carry out an extensive examination of the economic and legal context even in the case of collusive practices between undertakings which are self-evidently anticompetitive.

104. What is more, none of the contextual factors to which the appellants refer in an attempt to demonstrate specifically that the exchange of information between them is not detrimental to competition is particularly convincing.

105. First, the fact that the common agricultural policy provides for an organisation of the market in bananas does not amount to a carte blanche for price-fixing agreements or the exchange of sensitive pricing information between competitors. On the contrary, on a market where, because of regulatory intervention, there is only limited scope for competition, it is particularly important to counter firmly any improper practices by undertakings which might impair what competition is still present there.

106. Secondly, the frequency of the exchange of sensitive information between competitors is irrelevant. It is settled case-law that even a single exchange of information can form the basis of a finding of infringement and the imposition of a fine if the undertakings concerned remained active on the market after that exchange of information. [70] The frequency and regularity with which information having an anticompetitive object was exchanged may have a bearing at most on the amount of the fine. [71]

107. Thirdly, the appellants' references to their small size and their small share of the European banana market also do nothing to alter the anticompetitive object of their conduct. After all, an agreement that may affect trade between Member States and that has an anticompetitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition. [72] The prohibition of anticompetitive collusive practices laid down in Article 101 TFEU applies without distinction to small and large undertakings and to small and large markets.

67 — Judgments of 30 January 1985, *Clair* (123/83, EU:C:1985:33, paragraph 22), 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 51), and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 115).

68 — Judgments of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraphs 32 to 37), and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraphs 119 to 124).

69 — Ibid.

70 — Judgment of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraphs 58 and 59); see also the judgments of 8 July 1999, *Commission* v *Anic Partecipazioni* (C-49/92 P, EU:C:1999:356, paragraph 121), and of 8 July 1999, *Hüls* v *Commission* (C-199/92 P, EU:C:1999:358, paragraph 162).

71 — See, in addition, my Opinions in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, points 97 to 107), and *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2014:2437, point 125).

72 — Judgment of 13 December 2012, *Expedia* (C-226/11, EU:C:2012:795, paragraph 37).

108. Finally, there is also no infringement of the rights of the defence where the General Court has refrained from carrying out a detailed analysis of the economic and legal context in which the contested conduct takes place. The rights of the defence (in the administrative proceedings) and the principle of *inter partes* proceedings (in the judicial proceedings) are safeguarded if all of the parties to the proceedings had sufficient opportunity to make known their views. In those circumstances, the rights of the defence cannot be infringed solely because the General Court forms a view on the substance of the matter that is different from that held by one or more of the parties to the proceedings. After all, the correct assessment of the substance of the contested conduct is a matter not of procedural law but of material law.

109. All things considered, the fourth ground of appeal is therefore unfounded too.

E – *Summary*

110. As none of the grounds of appeal put forward by the appellants is successful, the appeal must be dismissed in its entirety.

VI – Costs

111. Under Article 184(2) of its Rules of Procedure, the Court is to make a decision as to costs where it dismisses an appeal.

112. It follows from Article 138(1) and (2) in conjunction with Article 184(1) of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings; where there is more than one unsuccessful party, the Court is to decide how the costs are to be shared. Since the Commission has applied for costs and the appellants have been unsuccessful in their pleas, the latter must be ordered to pay the costs. Having brought the appeal together, they must bear the costs jointly and severally.

VII – Conclusion

113. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order the appellants to pay the costs of the proceedings jointly and severally.