

ORDER OF THE COURT (Eighth Chamber)

16 November 2010*

In Case C-73/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union,
brought on 8 February 2010,

Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG, established
in Hamburg (Germany), represented by A. Rinne, Rechtsanwalt, S. Kon and C. Humpe,
Solicitors, and C. Vajda QC,

appellant,

the other party to the proceedings being:

European Commission, represented by M. Kellerbauer and A. Biolan, acting as
Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, C. Toader and A. Prechal (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,

after hearing the Advocate General,

makes the following

Order

- 1 By its appeal, Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG seeks to have set aside the order of the Court of First Instance of the European Communities (now 'the General Court') of 30 November 2009 in Case T-2/09 *Internationale Fruchtimport Gesellschaft Weichert v Commission* ('the order under appeal') dismissing as manifestly inadmissible its action for annulment of Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81

EC (Case COMP/39.188 — Bananas) ('the contested decision') on the ground that the action was brought out of time.

Facts and procedure before the General Court

- 2 The appellant is a limited partnership created under German law.

- 3 On 21 October 2008, it was notified of the contested decision by which the Commission of the European Communities found that a number of undertakings, including the appellant, had infringed Article 81 EC by participating in a concerted practice concerning the coordination, in a part of the common market, of reference prices for bananas, and imposed fines on the undertakings.

- 4 Fresh Del Monte Produce Inc. ('Del Monte') was ordered jointly and severally with the appellant to pay the fine imposed on the latter because, in the course of the period during which the appellant participated in the infringement, Del Monte exerted a decisive influence over it. By application lodged on 31 December 2008, Del Monte brought an action before the General Court for annulment of the contested decision. In that case, which is pending, the appellant was granted leave to intervene in support of Del Monte by order of 17 February 2010 in Case T-587/08 *Fresh Del Monte Produce v Commission*.

- 5 By fax received at the Registry of the General Court on 2 January 2009, the appellant sent a copy of an application seeking the annulment of the contested decision, the original of which application was lodged at the Registry on 9 January 2009.

- 6 Having been informed, by letter of 4 February 2009 from the Registrar of the General Court, that its action had not been brought within the period laid down by Article 230 EC, the appellant, by letter of 20 February 2009, lodged its observations on the late lodging of its application and requested that the Court depart from the time-limit.

- 7 The appellant claimed in that regard that the late lodging of the application resulted from a misinterpretation on the part of its representatives of the General Court's Rules of Procedure. More specifically, it provided, in an annex to its observations, a witness statement from one of its representatives stating that three of his associates considered, in good faith, that the time-limit for bringing proceedings expired, according to a reading of Article 101(1)(a) and (2) in conjunction with Article 102(2) of the Rules of Procedure, on 2 January 2009.

- 8 The appellant also put forward a number of arguments to justify, notwithstanding the late lodging of its application, the General Court in declaring the action admissible.

- 9 Thus, first of all, it claimed that it would suffer significant injustice and damage were the action to be declared inadmissible.

- 10 Next, it argued that the application was only just out of time and there was an explanation for its late lodging. Further, the admissibility of the action would, in the appellant's submission, create no material prejudice to legal certainty or to the Commission.

- 11 Lastly, the appellant maintained that, in any event, the principle of proportionality and the right of access to a court, guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), outweigh the principle of legal certainty, which is, in particular, acknowledged in the law of criminal procedure in Germany and the United Kingdom.

The order under appeal

- 12 By the order under appeal, the General Court dismissed the action as inadmissible on the ground that it had not been brought within the time-limit laid down.
- 13 After finding that, under the fifth paragraph of Article 230 EC, Article 101(1)(a) and (b) and (2) and Article 102(2) of the General Court's Rules of Procedure, the time-limit for bringing the action had started to run on 22 October 2008 and expired at midnight on 31 December 2008, taking into account the extension of the time-limit on account of distance, the General Court first of all confirmed, in paragraphs 10 to 17 of the order under appeal, that the action had been commenced out of time.
- 14 The General Court then rejected, in paragraphs 20 to 23 of the order under appeal, the appellant's argument seeking to account for the late lodging of its application.
- 15 First, the General Court recalled, in paragraph 20, that, according to the case-law of the Court of Justice, no derogation from the application of the Community rules on procedural time-limits may be made save where the circumstances are quite

exceptional, in the sense of being unforeseeable or amounting to *force majeure*, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice, since the strict application of those rules serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice.

- 16 The General Court pointed out in paragraph 21 of the order under appeal, on the one hand, that the appellant had, in the present case, neither established nor relied on the existence of unforeseeable circumstances or of *force majeure*. On the other hand, the General Court held that, to the extent that, by relying on the incorrect interpretation by its representatives of the provisions of the General Court's Rules of Procedure, the appellant intended to rely on an excusable error which would justify derogation from the application of the rules on procedural time-limits applicable in this case, those rules do not, according to the case-law, pose any particular difficulty of interpretation, so that it could not be accepted that there was an excusable error on the part of the appellant which would justify derogation from the application of those rules.
- 17 In the second place, the General Court noted, in paragraph 22 of the order under appeal, that it follows from the case-law of the Court of Justice that the Community legal order does not in fact aim, in principle, to define its concepts on the basis of one or more national legal systems without express provision to that effect and concluded therefrom that it was necessary to dismiss the arguments derived by the appellant from the law of criminal procedure in Germany and the United Kingdom.
- 18 In the third place, in paragraph 23 of the order under appeal, in so far as the appellant relied on the right to effective judicial protection, the General Court held that that right had been adequately protected by the possibility for the appellant to bring an action against the act adversely affecting it within the time-limit laid down by Article 230 EC and was in no way affected by the strict application of the Community rules concerning periods of time for commencing proceedings. The General Court concluded therefrom that neither the right of access to a court nor the principle of

proportionality justified derogating from the time-limit in the light of the allegedly exceptional circumstances relied on in this case.

Forms of order sought by the parties

19 By its appeal, the appellant claims that the Court should:

— set aside the order under appeal;

— declare its action for annulment of the contested decision admissible and refer the case back to the General Court; or

— in the alternative, refer the case back to the General Court for the admissibility of the action to be considered.

20 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

- 21 Under Article 119 of the Rules of Procedure of the Court of Justice, where an appeal is clearly inadmissible or clearly unfounded, the Court may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, by reasoned order dismiss the appeal without opening the oral procedure.
- 22 In the present case, the Court considers that it has been sufficiently informed by the contents of the file to dismiss the appeal as clearly unfounded by means of such a reasoned order.

Arguments of the parties

- 23 The appellant complains that the General Court erred in law by holding, in paragraph 20 of the order under appeal, that there can be no derogation from the application of the rules of the European Union on procedural time-limits save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to *force majeure*.
- 24 The appellant submits that such an approach is unduly narrow and fails to take any, or any proper, account of the importance of the right of access to a court in criminal proceedings, the principle of legality in criminal proceedings, the principle of proportionality and the overriding need to avoid an unjust result.

- 25 As regards, first, the fundamental right of access to a court, the appellant maintains that the substantial fines imposed for collusive conduct contrary to the competition rules concern criminal charges for the purposes of Article 6(2) of the ECHR. It refers in that regard to Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and European Court of Human Rights, *Jussila v. Finland*, ECHR 2006-XIII, § 43.
- 26 That fundamental right is, the appellant submits, by reference in particular to Case C-185/97 *Cooté* [1998] ECR I-5199, paragraph 21 and the case-law cited, a general principle of European Union law, which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).
- 27 Secondly, the appellant submits that the principle of legal certainty and that of the protection of legitimate expectations cannot be applied in an absolute manner, since the principle of legal certainty must coexist and be applied in harmony with the principle of legality. A balance must be struck between those principles and, in certain circumstances, the principle of legality must take precedence, as the case-law shows, the appellant citing in that regard Joined Cases 42/59 and 49/59 *SNUPAT v High Authority* [1961] ECR 53; Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633; and Case C-273/04 *Poland v Council* [2007] ECR I-8925.
- 28 Thirdly, the principle of proportionality requires that a measure be suitable and necessary to achieve a desired objective and not impose excessive burdens on the individual in relation to that objective.

- 29 As regards, first of all, the fundamental right of access to a court, the General Court failed, in the appellant's submission, to take into account the criminal law nature of the fine, although in criminal proceedings the full and effective protection of that right is essential.
- 30 Next, the General Court did not, according to the appellant, explain why the principle of proportionality was not relevant in justifying derogation from the rules relating to procedural time-limits. On that point, the order under appeal is, moreover and more fundamentally, vitiated by an error of law because of the misapplication of that principle.
- 31 Lastly, the General Court, in the appellant's submission, failed, wrongly, to take into consideration several matters which it should have taken into account for the purposes of applying the principle of proportionality. They are, particularly, the fact that, by its action for annulment, the appellant was challenging a substantial criminal penalty, that the application before the General Court was lodged only one day late and that the impact on the appellant and the harm suffered by it if the action is inadmissible because it is time barred is disproportionate to the effects that a decision declaring the action admissible would have on the Commission.
- 32 The Commission refers to the case-law of the European Court of Human Rights relating to Article 6(2) of the ECHR, in particular to *Jussila v Finland*, from which it follows that:
- to assess whether a penalty is criminal and, therefore, whether a charge is 'criminal' within the meaning of Article 6 of the ECHR, reference must be made to three criteria, namely the classification of the penalty in the State concerned, the nature of the offence and the severity of the penalty;

- penalties which fall within the ‘hard core’ of criminal law, because of their characterisation under national law (first criterion) must be distinguished from another category of penalties which may be regarded as ‘criminal’, but only under the second and third criteria;

 - fines in respect of competition matters come within the latter category of criminal penalties, and therefore do not form part of the ‘hard core’ of criminal law, so that the guarantees provided by the criminal law aspect of Article 6 of the ECHR should not necessarily be applied with their full stringency.
- 33 Under the law of the European Union, penalties imposed under its competition rules are, in the Commission’s submission, not at all of a criminal law nature.
- 34 The Commission contends, moreover, that the alleged flexibility in respect of time-limits exhibited by certain national systems cannot give rise to the recognition of a general principle of European Union law.
- 35 It submits, furthermore, that the appellant had the right of access to a court like any other company fined under the competition law of the European Union. The non-compliance with the time-limits governing the exercise of that right is a different question and is due to the appellant’s fault, whether in good faith or not.
- 36 As regards the principle of proportionality, the Commission contends that, in this case, the right of access to a court has not been unduly impaired by the application of the rules relating to time-limits.

- 37 Those rules are of long standing and the case-law establishes that they do not present any particular difficulty. In this case, it cannot validly be alleged, in the Commission's submission, that the 'genuine mistake' in calculating the time-limits for bringing actions constitutes an excusable error.
- 38 The General Court fully respected the principle of proportionality in applying the second paragraph of Article 45 of the Statute of the Court of Justice, which, by providing for derogations from those time-limits in exceptional circumstances, enables that principle to be respected.
- 39 In addition, compliance with the procedural time-limits cannot depend on factors such as the size of the fine imposed or the infringer's financial resources. The appellant's right to claim damages from its representatives also largely deprives those factors of their relevance.
- 40 Finally, the Commission points out that, since Del Monte has raised, in the proceedings which it has brought before the General Court, pleas in law by which it puts in issue, among other things, the appellant's participation in the infringement concerned, and since the appellant has been granted leave to intervene in those proceedings, the General Court will have to examine most of the parts of the contested decision which concern the appellant. If the General Court annuls those parts of the contested decision, the Commission submits that it will be able to draw consequences as regards the appellant, although it would not be legally bound to do so.

Findings of the Court

- 41 It is settled case-law that no derogation from the application of the European Union's rules on procedural time-limits may be made save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to *force majeure*, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice, since the strict application of those rules serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, in particular, order in Case C-325/03 P *Zuazaga Meabe v OHIM* [2005] ECR I-403, paragraph 16, and the order of 3 July 2008 in Case C-84/08 P *Pitsiorlas v Council and ECB*, paragraph 14 and the case-law cited).
- 42 It is also apparent from the case-law that, in the context of the European Union's rules on time-limits for instituting proceedings, the concept of excusable error justifying a derogation from those rules can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of the party acting in good faith and displaying all the diligence required of a normally well-informed person (see, in particular, order in Case C-112/09 P *SGAE v Commission* [2010] ECR I-351, paragraph 20 and the case-law cited).
- 43 Before the General Court the appellant did not claim that the failure to comply with the time-limit could be justified by circumstances which should be characterised as unforeseeable or as a case of *force majeure*.
- 44 Nor, in its appeal, does the appellant expressly complain that the General Court refused, in paragraph 21 of the order under appeal, to accept that there was an excusable error on the appellant's part.

- 45 In that regard, it may in any event be noted that, in a case relating to a Commission decision imposing a fine under Article 81 EC in which an error had been made in calculating the time-limits for commencing proceedings like the error in question in the present case, the Court of Justice refused to accept that there had been an excusable error, holding in particular that the wording of Article 101(1)(a) and (b) of the General Court's Rules of Procedure is clear and presents no particular difficulty of interpretation (order in *SGAE v Commission*, paragraph 24).
- 46 The appellant submits, by contrast, that the General Court erred in law in holding that no derogation from the application of the European Union's rules on procedural time-limits may be made in circumstances other than those that are unforeseeable or amount to *force majeure*.
- 47 The appellant submits that derogation from those rules should also be permitted by virtue of the fundamental right of access to a court, of the principle of legality and that of proportionality as well as because of the overriding need to avoid an unjust result. Such derogation is required above all, the appellant argues, if the action in question concerns a Commission decision imposing a substantial fine which should be classified as of a criminal law nature, so that the applicant would be the subject of a criminal charge for the purposes of Article 6(2) of the ECHR.
- 48 In that regard, it is clear from the Court's case-law that the principle established by Article 6 of the ECHR, namely to ensure that every person has a fair trial, which is recognised by the legal order of the European Union, does not preclude the setting of a time-limit for the institution of legal proceedings (Case 257/85 *Dufay v Parliament* [1987] ECR 1561, paragraph 10).

- 49 The Court has also held that the right to effective judicial protection is in no way undermined by the strict application of the European Union's rules on procedural time-limits, which, according to settled case-law, serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (order in Case C-406/01 *Germany v Parliament and Council* [2002] ECR I-4561, paragraph 20 and case-law cited).
- 50 It is also clear from the case-law that a derogation from those rules cannot be justified by the fact that fundamental rights are at stake. Rules concerning time-limits for bringing proceedings are mandatory and must be applied by the court in question in such a way as to safeguard legal certainty and equality of persons before the law (Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 101).
- 51 The appellant submits that, in each case of exceeding a procedural time-limit in an action against a decision imposing a substantial fine because of an infringement of the rules of competition law, the right to effective judicial protection and the principles of legality and proportionality require the Courts of the European Union to weigh in the balance, on the one hand, the period by which that time-limit was exceeded and the extent to which the underlying purpose of the time-limit is affected by its being exceeded, and, on the other, the consequences for the applicant of the dismissal of the action because it is out of time.
- 52 However, such derogation on a case-by-case basis, if it could be implemented by the Courts of the Union notwithstanding the fact, noted in paragraph 50 of the present order, that the rules concerning time-limits for bringing proceedings are mandatory, would be difficult to reconcile with the objective of the European Union's rules in respect of those time-limits, that is to say to meet the requirements of legal certainty

and the need to avoid any discrimination or arbitrary treatment in the administration of justice.

- 53 In any event, without it being necessary to examine whether a fine such as that imposed on the appellant by the contested decision is of a criminal law nature for the purposes of Article 6(2) of the ECHR, the 'right to a court', of which the right of access to a court is one aspect, is not absolute and is subject to limitations permitted by implication, in particular as regards the conditions of admissibility of an action, since by its very nature it calls for regulation by the State, which enjoys, in that regard, a certain margin of appreciation. Those limitations must not restrict a litigant's access in such a way or to such an extent that the very essence of the right is impaired. Lastly, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (European Court of Human Rights, *Pérez de Rada Cavanilles v. Spain*, judgment of 28 October 1998, *Reports of judgments and decisions* 1998-VIII, § 44).
- 54 It must also be observed that litigants must expect the rules relating to time-limits for bringing actions to be applied since they are designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. However, those rules or their application should not prevent litigants from making use of an available remedy (*Pérez de Rada Cavanilles v. Spain*, § 45).
- 55 However, it cannot be maintained that the European Union's rules relating to procedural time-limits and their application in this case prevented the appellant from making use of the remedy available against the contested decision.

56 Indeed, while the two-month time-limit in question constitutes, admittedly, a limitation on the right of access to a court, that limitation clearly does not constitute an impairment to the very essence of that right, since, as already observed in paragraph 45 of the present order, the rules relating to the calculation of that time-limit, including those at issue in the present case, are clear and present no particular difficulty of interpretation.

57 Also of relevance in this context is the fact that, in this case, the failure to comply with the time-limit is solely due to an error by the appellant's lawyer which, as noted in paragraph 45 of the present order, cannot be regarded as an excusable error which would permit derogation from the rules relating to the time-limits for bringing actions.

58 Similarly relevant is the fact, noted in paragraph 41 of the present order, that derogation is also provided for in cases of failure to comply with such a time-limit in circumstances which are unforeseeable or amount to *force majeure*.

59 It follows therefrom that the General Court was correct in holding, correctly, in paragraph 23 of the order under appeal, that the right to effective judicial protection was adequately protected by the possibility for the appellant to bring an action against the act adversely affecting it within the time-limit laid down by Article 230 EC and that that right was in no way affected by the strict application of the Community rules concerning periods of time for commencing proceedings. It was thus also without making any error of law that the General Court concluded therefrom, in the same paragraph, that neither the right of access to a court nor the principle of proportionality justified derogating from the time-limit for bringing actions in the light of the circumstances relied on.

60 Having regard to the foregoing, the appeal must be dismissed as clearly unfounded.

Costs

- ⁶¹ Under Article 69(2) of the Rules of Procedure of the Court of Justice, which applies to the procedure on appeal pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs.

On those grounds, the Court (Eighth Chamber) hereby orders:

1. The appeal is dismissed.

2. Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG shall pay the costs.

[Signatures]