Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

27 April 2017 *

(Appeal — Competition — Agreements, decisions and concerted practices — European banana market in Greece, Italy and Portugal — Coordination in the fixing of prices — Admissibility of evidence transmitted by national tax authorities — Rights of the defence — Calculation of the amount of the fine — Scope of judicial review — Classification as an 'agreement having as its object the restriction of competition')

In Case C-469/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 September 2015,

FSL Holdings NV, established in Antwerp (Belgium),

Firma Léon Van Parys NV, established in Antwerp,

Pacific Fruit Company Italy SpA, established in Rome (Italy),

represented by P. Vlaemminck and B. Van Vooren, advocaaten, and by C. Verdonck, avocate, J. Auwerx, advocaat, and B. Gielen, avocate,

appellants,

the other party to the proceedings being:

European Commission, represented by A. Biolan, M. Kellerbauer and P. Rossi, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot (Rapporteur), C.G. Fernlund and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2016,

* Language of the case: English.

gives the following

Judgment

1 By their appeal, FSL Holdings NV, Firma Léon Van Parys NV and Pacific Fruit Company Italy SpA ask the Court to set aside the judgment of the General Court of the European Union of 16 June 2015, *FSL and Others* v *Commission* (T-655/11, 'the judgment under appeal', EU:T:2015:383), by which the General Court annulled only in part Commission Decision C(2011) 7273 final of 12 October 2011 relating to a proceeding under Article 101 [TFEU] (Case COMP/39482 — Exotic Fruit (Bananas)) ('the decision at issue').

Legal context

2 Article 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) provides:

'1. For the purpose of applying Articles [101 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 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 Article 23(3) of Regulation No 1/2003 provides:

'In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

4 Article 31 of Regulation No 1/2003 states:

'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.'

5 The Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the 2002 Leniency Notice') sets out the conditions under which undertakings cooperating with the Commission in an investigation it is carrying out into a cartel may be exempted from fines, or may be granted reductions in any fine which would otherwise have been imposed on them. Point 11(a) of that notice stipulates in that regard that the undertaking must cooperate fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provide the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement.

Background to the dispute

6 The appellants, FSL Holdings and Firma Léon Van Parys, two public limited companies incorporated under Belgian law, and Pacific Fruit Company Italy, a public limited company incorporated under Italian law, import, market and sell bananas under the 'Bonita' brand in Europe.

7 On 8 April 2005, Chiquita Brands International Inc. ('Chiquita') applied for immunity pursuant to the 2002 Leniency Notice in relation to the business of distribution and marketing of imported bananas and other fresh fruit in Europe. That application was registered as Case COMP/39188 — Bananas ('the northern European case'). Chiquita was granted immunity on 3 May 2005.

8 On 26 July 2007, the Commission received documents from the Guardia di Finanzia (Customs and finance police, Italy), found during an inspection at the home and office of an employee of Pacific Fruit Company Italy in the course of a national tax investigation.

9 On 26 November 2007, the Commission informed Chiquita that its officials would carry out an inspection at the premises of that undertaking on 28 November 2007. On that occasion, Chiquita was informed that a new investigation, relating to practices in Greece, Italy and Portugal ('the southern European case'), would be carried out. Chiquita was reminded that it had received conditional immunity from fines for the whole of the European Union and that it therefore had a duty to cooperate.

10 From 28 to 30 November 2007, the Commission carried out inspections at the premises of banana importers in Spain and Italy. During the inspections carried out in Rome (Italy) at Pacific Fruit Company Italy, the Commission found two pages of notes which had already been transmitted to it by the Customs and finance police.

11 Chiquita was requested to identify the parts of its oral statements in the northern European case which it considered also to be related to the southern European case.

12 On 15 October 2008, the Commission adopted Decision C(2008) 5955 final relating to a proceeding under Article [101 TFEU] (Case COMP/39188 — Bananas), in which it found that several major importers of bananas in northern Europe, including Chiquita, had infringed Article 81 of the EC Treaty by engaging in a concerted practice in which they coordinated quotation prices for bananas, which they set weekly for several Member States between 2000 and 2002. That decision was not addressed to FSL Holdings or Firma Léon Van Parys.

13 On 10 December 2009, the Commission adopted a statement of objections in the southern Europe case addressed to, amongst others, Chiquita and the appellants. After having obtained access to the file, all the addressees of that decision made their views known to the Commission and took part in a hearing held on 18 June 2010.

14 On 12 October 2011, the Commission adopted the decision at issue, whereby it (i) found that Chiquita and the appellants had infringed Article 101 TFEU by participating in a cartel relating to the importation, marketing and sale of bananas in Greece, Italy and Portugal from 28 July 2004 to 8 April 2005, during which period those undertakings coordinated their price strategy in those three Member States, and (ii) imposed fines on them which it calculated according to the 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, 'the 2006 Guidelines') and the 2002 Leniency Notice.

15 First, the Commission determined a basic amount of the fine to be imposed, namely:

— EUR 47 922 000 for Chiquita; and

— EUR 11 149 000 for the appellants.

16 Next, the Commission came to the conclusion that the particular set of circumstances of the northern European case –– on the basis of which it had reduced the basic amount of the fine by 60% in order to take account of the specific regulatory regime for the banana business and of the fact that the coordination related to quotation prices in that case –– did not exist in the southern European case.

17 Finally, the Commission decided to apply a reduction of 20% to the basic amount for all the undertakings concerned.

18 Following that adjustment, the basic amounts of the fines to be imposed were determined as follows:

— EUR 38 337 600 for Chiquita; and

— EUR 8 919 200 for the appellants.

19 Chiquita was nonetheless granted immunity from the fine under the 2002 Leniency Notice. Since no other adjustment was made for the appellants, they were ordered to pay, jointly and severally, a rounded final amount of EUR 8 919 000.

The action before the General Court and the judgment under appeal

20 By application lodged at the Registry of the General Court on 22 December 2011, the appellants brought an action for annulment of the decision at issue.

21 In the judgment under appeal, the General Court granted the appellants' form of order only in part.

22 Having found that the infringement was interrupted between 12 August 2004 and 19 January 2005, the General Court annulled Article 1 of the decision at issue in so far as it referred to that period of the infringement and in so far as it concerned FSL Holdings, Firma Léon Van Parys and Pacific Fruit Company Italy, and reduced the fine set in Article 2 of the decision at issue from EUR 8 919 000 to EUR 6 689 000.

Forms of order sought

23 By their appeal, the appellants claim that the Court should:

— set aside the judgment under appeal and annul the decision at issue;

— in the alternative, set aside the judgment under appeal in so far as the General Court did not perform a full judicial review of the fine imposed on them, and substantially reduce the amount of the fine;

— in the further alternative, set aside the judgment under appeal in so far as the General Court did not establish that the infringement had as its object or effect the restriction of competition, and refer the case back to the General Court, unless the Court considers that it is sufficiently well informed to annul the decision at issue; and

— in any event, order the Commission to pay the costs incurred by them in the proceedings before the Court of Justice and the General Court.

24 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

25 The appellants rely on four grounds in support of their appeal.

The first ground of appeal

Arguments of the parties

26 The first ground of appeal alleges an infringement of essential procedural requirements and of the rights of the defence in so far as the General Court did not find the use of the evidence transmitted to the Commission by the Italian Customs and finance police to be unlawful.

27 They maintain in that regard that the General Court erred in law by limiting itself to recalling, in paragraph 80 of the judgment under appeal, that the lawfulness of the transmission of that evidence to the Commission was a question governed solely by Italian law, whereas the transmission of evidence must also comply with EU law.

28 They submit that the Commission must, in particular, prevent the rights of the defence from being irremediably compromised by such a transmission of evidence, which requires the Commission to assess whether the documents transmitted are, in fact, used only in respect of the subject matter for which they were collected by a national authority, as laid down in Article 12(2) of Regulation No 1/2003 with regard to exchanges of information between competition authorities.

29 The appellants also claim that the Commission infringed the rights of the defence by notifying them of the transmission of the documents in question by the national authority only two years after their transmission.

30 The appellants submit that the General Court distorted the evidence by taking the view, in paragraphs 67 and 68 of the judgment under appeal, that the issue of whether the two pages of notes had been transmitted illegally by the Italian authorities had no bearing on the legality of their use inasmuch as those documents were also found by the Commission in the course of its inspection in July 2007. They claim, contrary to what is stated in paragraph 68 of the judgment under appeal, that they challenged the legality of the inspections conducted by the Commission. They also refer to the judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission* (C-583/13 P, EU:C:2015:404) in support of the argument that, given the illegality of the transmission of the documents on the basis of which the Commission conducted an inspection, the documents found in the course of that inspection could not legitimately be used as evidence.

31 The Commission contends that the first ground of appeal must be dismissed as unfounded.

Findings of the Court

32 As regards the first aspect of the line of argument developed in support of the first ground of appeal, the General Court was correct in stating, in paragraphs 45 and 80 of the judgment under appeal, first, that the lawfulness of the transmission to the Commission by a prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law and, second, that the Courts of the European Union ('Courts of the

Union') have no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority (judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 62).

33 Leaving aside the question whether the General Court could, in order to accept that the documents in question were admissible by the Commission, limit itself to finding, in paragraph 80 of the judgment under appeal, that their transmission had not been declared unlawful by a national court, it must be stated that not only did the General Court review, in paragraphs 82 to 89 of the judgment under appeal, the circumstances of that transmission, but it also correctly rejected as unfounded, in paragraphs 71 to 79 of the judgment under appeal, the appellants' argument that, in view of the provision made in Article 12 of Regulation No 1/2003 for exchanges of information between competition authorities, the documents transmitted by the Customs and finance police to the Commission could be used by the latter in evidence only in respect of the subject matter for which they were collected by that national authority.

34 As the Advocate General stated in point 45 of her Opinion, Article 12 of Regulation No 1/2003 pursues the specific objective of simplifying and encouraging cooperation between the authorities within the European Competition Network by facilitating the exchange of information. To that end, Article 12(1) of Regulation No 1/2003 provides that, for the purpose of applying Articles 101 and 102 TFEU, the Commission and the competition authorities of the Member States are to have the power to provide one another with, and use in evidence, any matter of fact or of law, including confidential information, while Article 12(2), in particular, lays down the conditions under which that information can be used.

35 It cannot therefore be inferred from those provisions that they give expression to a more general rule preventing the Commission from using information transmitted by national authorities other than the Member States' competition authorities on the sole ground that that information was obtained for other purposes.

36 The Court also points out that, as the General Court found in paragraph 79 of the judgment under appeal, such a rule would excessively hamper the role of the Commission in its task of supervising the proper application of EU competition law.

37 It follows that the General Court properly addressed the appellants' criticism of the legality of the use of the documents transmitted by the Customs and finance police.

38 As regards the appellants' argument that the use of those documents for purposes other than those for which they were obtained could irremediably compromise the rights of the defence, it should be recalled that the prevailing principle in EU law is that evidence may be freely adduced and that the only relevant criterion for the purpose of assessing the evidence adduced is its credibility (see judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 63).

39 Next, the appellants criticise the General Court for not having found that the Commission infringed their rights of defence on the ground that the Commission waited almost two years before informing them that it was in possession of those documents.

40 In that regard, the Court recalls that respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement (see, inter alia, judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 44 and the case-law cited).

41 In proceedings under Article 101 TFEU, it is therefore appropriate to draw a distinction between two stages, that preceding the statement of objections and that following it (see, inter alia, judgment of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 27).

42 It has thus been held by the Court that the Commission was not under an obligation to inform the undertaking concerned before the notification of the statement of objections that it was in possession of evidence since it is the notification of the statement of objections, on the one hand, and access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure that the rights of the defence are observed and that the undertaking concerned is able to rely in full on its rights of defence after that notification (see, inter alia, judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraphs 58 and 59).

43 However, the Court has also made clear that the Commission must ensure that the rights of the defence are not impaired during the stage of the investigation procedure which precedes the notification of the statement of objections (see, inter alia, 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 63).

44 In rejecting the plea alleging that the Commission had been in possession of certain documents long before the notification of the statement of objections, the General Court noted, in paragraph 98 of the judgment under appeal, that the Commission had expressly mentioned the fact that it was relying on documents transmitted by the Italian authorities in the statement of objections and that the Commission had transmitted those documents to the appellants several months before that statement.

45 In addition, the General Court found, in paragraph 99 of the judgment under appeal, that the appellants did not put forward any reasons as to why the fact of not having known about those documents during the investigation stage might have had an impact on their subsequent ability to defend themselves during the stage which followed the notification of the statement of objections (see, by analogy, judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 61).

46 The General Court was thus fully entitled to reject that part of the appellants' line of argument.

47 Lastly, as regards the General Court's alleged distortion of the evidence, it must be borne in mind that there is distortion where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect (see, inter alia, judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 17).

48 As the Advocate General stated in point 65 of her Opinion, an appellant must also indicate precisely the evidence which has been distorted and show the errors of appraisal which have allegedly been made (see, inter alia, judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 16).

49 However, the appellants do not challenge the General Court's appraisal of the documents in question but their admissibility in the event of the transmission of those documents by the Customs and finance police being considered unlawful, which has, in any event, not been established.

50 Having regard to the foregoing, the first ground of appeal must be dismissed in its entirety.

The second ground of appeal

Arguments of the parties

51 By their second ground of appeal, the appellants submit that the General Court erred in law by not finding that the Commission breached its 2002 Leniency Notice in granting immunity to Chiquita and therefore by not considering that the information transmitted by that undertaking to the Commission during the procedure which led to its granting that immunity should be removed from the case file.

52 They claim that, as regards the southern European case, Chiquita did not cooperate fully, on a continuous basis and expeditiously throughout the procedure, as required under point 11(a) of that notice.

53 In addition, certain information obtained by the Commission is confidential and should therefore not have been used as evidence since the appellants did not have access to it.

54 The appellants emphasise that their second ground of appeal concerns a question of law relating to the Commission's compliance with its own rules and that it is not a new plea in the light, in particular, of point 42 of their application and point 21 of their reply.

55 The Commission submits that this ground, which it maintains is inadmissible in so far as it concerns an assessment of facts in respect of which no allegation of distortion has been made in the appeal, is new and is in any event ineffective because, even if Chiquita should not have been granted immunity, the information that it provided would not have to be removed from the case file.

56 The Commission submits, in the alternative, that Chiquita's request for immunity was not limited to the northern European case, but also covered the events which took place in the European Economic Area. It considers that that undertaking provided timely evidence also with regard to the unlawful conduct in southern Europe.

57 The Commission adds that the argument that it could not refer to confidential information to establish the existence of a cartel is not only inadmissible for being unrelated to the second ground of appeal, but in any event unfounded since the appellants had access, at the Commission's premises, to the information at issue in the course of the procedure.

Findings of the Court

58 Quite apart from the question as to whether the second ground of appeal must be regarded as new, or whether non-compliance with point 11(a) of the 2002 Leniency Notice could affect the legality of the Commission's use of the information provided by Chiquita in that connection, the question as to whether an undertaking has cooperated fully, on a continuous basis and expeditiously within the meaning of that point, is in any event a question of fact, the General Court's assessment of which is not subject to review by the Court of Justice in an appeal, unless the General Court's findings are vitiated by a material error, or a distortion, which is obvious from the documents in the case, which has not been claimed in the present case.

59 As for the appellants' argument that the General Court erred in law by not finding that certain statements made by Chiquita in that regard could not be used by the Commission for reasons of confidentiality, that plea is, in fact, new, and, moreover, not adequately substantiated.

60 The second ground of appeal must therefore be dismissed as inadmissible.

The third ground of appeal

Arguments of the parties

61 By their third ground of appeal, relied on in the alternative, the appellants submit that the General Court infringed the principle of effective judicial protection enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 47 of the Charter of Fundamental Rights of the European Union in that it carried out only a limited judicial review of the fine and failed to exercise the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003. As a result, the General Court also miscalculated the fine.

62 The appellants add that it is for the Court, in the exercise of its unlimited jurisdiction, to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine and refer to paragraph 80 of the judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778).

63 They submit that it is for the Courts of the Union to carry out the review of legality on the basis of the evidence adduced by an applicant in support of the pleas in law put forward and they lay emphasis on the fact that the Courts cannot, in carrying out that review, use the Commission's margin of discretion in the matter. They refer in particular in that regard to the judgment of 8 December 2011, *KME Germany and Others* v *Commission* (C-389/10 P, EU:C:2011:816, paragraph 129).

64 However, as regards the assessment of the gravity of the infringement, the General Court merely cited, in paragraph 525 of the judgment under appeal, the 2006 Guidelines, in support of the finding that the Commission was fully entitled to apply a rate of 15% in assessing the proportion of the value of sales taken into account for such infringements.

65 They maintain that the General Court erred in the same manner in then rejecting their line of argument concerning the need to take account of the limited combined market shares and the limited geographical scope of the infringement.

66 They also claim that the General Court erred in law by stating, in paragraph 532 of the judgment under appeal, that it was not necessary for the Commission to take into account additional facts or circumstances when, in accordance with the 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 91), it should have had regard to objective factors such as the content and duration of the anticompetitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order, the relative importance and market share of the undertakings responsible and also any repeated infringements, even though the appellants had specifically referred to these factors.

67 The appellants rely on similar arguments as regards the General Court's assessment, in paragraphs 544 to 554 of the judgment under appeal, of the mitigating circumstances.

68 They also submit that although the General Court correctly examined the level of the fine, it should have ordered a reduction identical to the 60% reduction applied by the Commission in the northern European case since the two factors taken into account by the Commission in that case, namely the specific regulatory regime and the existence of an infringement by object, also apply in the present case.

69 In response to the objection of inadmissibility raised by the Commission, the appellants state that they requested the General Court to exercise its unlimited jurisdiction.

70 The Commission contends that the appellants did not ask the General Court to exercise its unlimited jurisdiction, so that the third ground of appeal must be dismissed as inadmissible, and that, in any event, the General Court examined the particular circumstances of the case in accordance with the requirements of the principle of judicial protection.

71 Furthermore, the question whether the General Court should have reduced the fine by at least 60%, the same reduction as the Commission granted in the northern European case, on the ground that the infringement here is also an infringement by object, concerns a question of fact.

Findings of the Court

72 As a preliminary point, the Court finds that the appellants asked the General Court to exercise its unlimited jurisdiction by annulling or reducing the fine imposed on them, as follows, in particular, from point 142 of their application, and that, accordingly, the third ground of appeal is not new.

73 As regards the judicial review of fines imposed by the Commission where competition law is infringed, it must be borne in mind that the Courts of the Union must carry out the review of legality on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out that review, the Courts cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the application of the criteria mentioned in the guidelines or as regards the assessment of those factors — as a basis for dispensing with an in-depth review of the law and of the facts (see, inter alia, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 62).

74 The review of legality is supplemented by the unlimited jurisdiction conferred on the Courts of the Union by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, beyond carrying out a mere review of legality with regard to the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see, inter alia, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 63).

75 In order to satisfy the requirements of the principle of effective judicial protection and bearing in mind that Article 23(3) of Regulation No 1/2003 provides that the amount of the fine must be fixed by reference to the gravity and duration of the infringement, the General Court is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see, inter alia, judgment of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission*, C-617/13 P, EU:C:2016:416, paragraph 86).

76 The role of the Court of Justice in an appeal is to establish whether the General Court erred in law in the manner in which it adjudicated on the action brought before it (see, inter alia, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 46).

77 However, it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, 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 (see, inter alia, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 72).

78 Only if the Court of Justice were to consider that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, owing to the inappropriateness of the amount of a fine (see, inter alia, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 73).

79 In the present case, as the Advocate General stated in point 85 of her Opinion, the General Court cannot be criticised for referring in that regard to the 2006 Guidelines given that the plea raised by the applicants at first instance concerned, as is apparent from paragraph 501 of the judgment under appeal, an infringement of Article 23(3) of Regulation No 1/2003 and of the 2006 Guidelines owing to an incorrect assessment, inter alia, of the gravity of the infringement and of the mitigating circumstances.

80 It should also be borne in mind that the exercise of unlimited jurisdiction is not equivalent to a review of the Court's own motion and, with the exception of pleas involving matters of public policy, which the Courts of the Union are required to raise of their own motion, it is for the applicant to raise pleas in law against the contested decision and adduce evidence (see, inter alia, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 64).

81 As regards the gravity of the infringement, the General Court was correct to find, in paragraph 525 of the judgment under appeal, that the Commission was entitled to apply, for the most harmful restrictions, such as the one in question, a rate of at least 15% of the value of sales, which is the minimum of the 'higher end of the scale', within the meaning of point 23 of the 2006 Guidelines, for that type of infringement (see, in that regard, judgment of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraph 124).

82 The General Court also made its assessment and responded to the requisite legal standard, in paragraphs 528 to 533 of the judgment under appeal, to the appellants' argument that the Commission should have taken account of the limited combined market shares and the limited geographical scope of the infringement in determining the proportion of the value of sales applied. It was, in particular, fully entitled, in paragraph 530 of that judgment, to find that, for the most harmful restrictions, that rate should, at the very least, be above 15%.

83 Although the General Court's statement, in paragraph 532 of the judgment under appeal, that where the Commission simply applies a rate equal or almost equal to the minimum rate of 15% of the value of sales laid down for the most harmful restrictions, it is not necessary to take into account additional factors, is prima facie erroneous, that statement does not, however, reflect the assessment actually undertaken by the General Court in that judgment: the Court examined the relevance of the circumstances relied on by the appellants in their application with regard to the analysis of the gravity of the infringement, in particular in paragraph 533 of the judgment under appeal (see, by analogy, judgment of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraph 129). The point must also be made that since the General Court rightly found, in the judgment under appeal, that the infringement at issue fell within the category of the most harmful infringements, the individual conduct of the undertakings was certainly taken into account.

84 Furthermore, contrary to what is stated in paragraph 531 of the judgment under appeal, it is not apparent from recital 329 of the decision at issue that the rate of 15% of the value of sales was set by the Commission purely on the basis of the nature of the infringement, since that recital also refers to the other circumstances of the case.

85 Lastly, as regards its assessment of the mitigating circumstances, the General Court did not confine itself to referring, in paragraph 549 of the judgment under appeal, to the Commission's margin of discretion, but considered, in paragraph 551 of that judgment, that one of the two factors justifying a

reduction in the northern European case, namely the coordination of quotation prices, was in fact lacking in the present case, which justified the difference in the percentage of the reduction in this case.

86 The appellants' argument that the General Court should, however, have taken account of the fact that the present case, like the northern European case, involved an infringement by object, is, apart from calling into question an assessment of the facts, in any event irrelevant, since such a fact cannot constitute a mitigating factor.

87 Furthermore, the General Court also correctly reiterated, in paragraphs 552 and 553 of the judgment under appeal, the reasons why the Commission cannot be bound by its previous practice when taking decisions so that the sole fact that it has, in the past, accepted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure.

88 It therefore follows from the foregoing that the General Court did not err in law in the exercise of its judicial review.

89 The third ground of appeal must therefore be dismissed as unfounded.

The fourth ground of appeal

Arguments of the parties

90 By their fourth ground of appeal, the appellants allege that the General Court infringed the concept of an agreement having an anticompetitive object by failing to take into account the economic and legal context of which the agreement at issue forms part and, as a result, infringed their rights of defence.

91 They thus criticise the General Court for having held, in particular in paragraph 466 of the judgment under appeal, that the Commission was entitled to conclude that the parties' conduct had the object of preventing, restricting or distorting competition in the internal market.

92 They claim that an analysis of the economic and legal context of which the agreement at issue forms part is needed to determine whether or not an infringement has as its object the restriction of competition (judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraphs 36 and 48, and of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 16).

93 They add that the concept of a restriction of competition by object must be interpreted narrowly, that the General Court must explain the reasons why that restriction reveals a sufficient degree of harm to competition and that it can make reference to analogous behaviour that has been characterised as an infringement by object in previous case-law only if it is sufficiently analogous to that being examined (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204).

94 The appellants thus infer that the General Court could not simply consider, in paragraph 468 of the judgment under appeal, that the practice in question fell under Article 101(1)(a) TFEU, which refers only to the fixing of prices and not to the mere communication of future intentions regarding price movements.

95 They submit that had the General Court taken account of the nature of the goods and the conditions of the functioning and structure of the market, it would have had to conclude that the agreement at issue lacked an anticompetitive object.

96 In that connection, they point, in particular, to the fact that, at the time of the infringement, the European banana market was subject to a common organisation of the market which, in their opinion, led to inflexibility and to a high degree of transparency on volumes and prices which then stimulated competitors to enter into business relationships with each other. They add that the exchange of information at issue took place on an occasional basis without any clear link between the timing of those contacts and the timing of the respective price setting. They also submit that the infringement involved only two competitors on the market, that Pacific Fruit Company Italy, as a mere price-taker, could not impose prices upon its customers and that only a limited part of the European banana market was concerned.

97 They submit that it cannot be concluded from scattered references to the context of the case in the judgment under appeal, which are not made in relation to the characterisation of the conduct as an infringement by object, that that context was actually taken into account in finding an infringement by object.

98 The appellants also submit, as regards the infringement of the rights of the defence, that the erroneous finding of an anticompetitive object deprived them of a thorough adversarial discussion on the effects of their conduct.

99 The Commission contends that the fourth ground of appeal is inadmissible in that it is new and also because the arguments relating to the legal and economic context of the infringement at issue call into question the assessment of the facts.

100 In any event, the General Court took account of the economic and legal context of the agreement at issue to the requisite legal standard and did not err in law.

Findings of the Court

101 As regards the objection of inadmissibility raised by the Commission on the basis that the fourth ground of appeal is new, the Court finds that it is clear from point 135 of the application before the General Court that the appellants challenged the characterisation of an infringement by object, having regard, in particular, to 'the facts and circumstances of the case', but that their sole contention in that regard was that the agreement at issue concerned only exchanges of vague and sporadic information relating to general market trends.

102 However, there is no need to rule on the admissibility of the fourth ground of appeal, since it must be held that it is, in any event, unfounded.

103 It must be recalled that the concept of restriction of competition 'by object' must be interpreted narrowly and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. Certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, inter alia, judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 17, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 26).

104 The essential legal criterion for ascertaining whether an agreement involves a restriction of competition 'by object' is the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects (see, inter alia, judgment of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 20).

105 In that connection, regard must be had to the content of the provisions of the agreement at issue, the objectives which it seeks to attain and the economic and legal context of which it forms part (see, inter alia, judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 27).

106 In the present case, it must be recalled, as is clear from the judgment under appeal and, in particular, from paragraphs 246, 524 and 550 thereof, that the Commission found that the appellants had taken part in a price-fixing cartel and that that assessment of the facts and evidence was not called into question by the General Court in the judgment under appeal.

107 In respect of such agreements, which represent particularly serious restrictions of competition, the analysis of the economic and legal context of which the practice forms part may therefore be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object (see, by analogy with market-sharing agreements, judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 29).

108 The General Court, in paragraph 466 of the judgment under appeal, correctly addressed the argument put forward in that regard by the appellants in their application, referring, inter alia, to the assessment of the facts examined in connection with the third plea in law.

109 Furthermore and in any event, as the Advocate General stated in point 104 of her Opinion, the arguments relating to the economic and legal context of the case which the appellants put forward in support of their fourth ground of appeal are not relevant for the purpose of determining whether there is an anticompetitive object; there is therefore no ground for criticising the General Court for not having taken them into account in the judgment under appeal.

110 Some of those arguments also seek to demonstrate the lack of coordination related to prices and, in actual fact, to call into question the very existence of the agreement. That is the case so far as the application of a common organisation of the market to the European banana market is concerned.

111 The General Court did not therefore err in law in considering, in paragraph 473 of the judgment under appeal, that the Commission was fully entitled to state that the infringement could be characterised as a restriction of competition by object.

112 Furthermore, the General Court cannot validly be criticised for having infringed the adversarial principle on the ground that the characterisation of the agreement as having an anticompetitive object deprived the appellants of the possibility of relying on the lack of any anticompetitive effect.

113 It follows that the fourth ground of appeal must be dismissed as unfounded.

114 Consequently, since none of the grounds relied on by the appellants in support of their appeal can be upheld, the appeal must be dismissed.

Costs

115 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) 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 appellants have been unsuccessful and the Commission has applied for costs to be awarded against them, the appellants must be ordered to pay the costs relating to the present appeal proceedings.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders FSL Holdings NV, Firma Leon Van Parys NV and Pacific Fruit Company Italy SpA to pay the costs.**

Silva de Lapuerta Regan Bonichot

Fernlund Rodin

Delivered in open court in Luxembourg on 27 April 2017.

A. Calot Escobar
Registrar

R. Silva de Lapuerta
President of the First Chamber