The world's greatest glutton - a commentary on Case C-469/15 P - FSL Holdings

Competition law - cartel prohibition - use of information - criminal law - proportionality of sanctions - object/effect dichotomy - Allianz Hungaria

Marc Veenbrink, Lecturer and PhD Candidate at Radboud University Nijmegen, j.veenbrink@jur.ru.nl, 18 May 2017

Introduction

Pacman is one of the most famous gluttons in the world. He eats and eats and obtains points with it. The Commission is perhaps also a bit of a glutton, although one consuming information instead of yellow dots, and all in the general interest of the EU internal market instead of winning a game. The points which the Commission can score are all valuable to a well-functioning internal market. The Commission can receive information voluntarily provided by undertakings, by starting an investigation, but also from national competition authorities. On the 27th of April, the Court of Justice handed down a ruling concerning information which the Commission received from a different source, namely the Italian customs and finance police. The first question in the *FSL Holdings* case is whether the Commission may use the information from the Italian police, even though the police obtained this information for purposes other than competition law. The answer provided by the Court of Justice is very logical, but might be problematic in the Netherlands in light of recent case law by the highest Dutch competition law court. The Court of Justice also dealt with the review of the sanction by the General Court and the distinction between object and effect restrictions.[1] First, this blog post will mention the different aspects of the ruling of the Court of Justice, after which the three aforementioned aspects will be discussed in subsequent order.

Status quo

In 2005, the Commission received a leniency application from Chiquita Brands international Inc. This led the Commission to decide to fine multiple companies for participation in a banana cartel in Northern Europe. In 2007, the Commission received information from the Italian police on a possible cartel in the banana market in Southern Europe. On the basis of that information, the Commission decided to start a new investigation at the premises of Chiquita, which received conditional

immunity for the whole of the EU. A couple of days later, the Commission also decided to carry out inspections at premises of other undertakings. A fine was imposed on multiple undertakings in October 2011 for an infringement of Article 101 TFEU. This fining decision was the subject of Court's review in the *FSL Holdings* case.

The first ground of appeal relates to the transfer of evidence from the Italian police to the Commission. The undertakings argue that this information could not be used by the Commission, since it was obtained for other purposes. This would also mean that the inspections are invalid, since they were issued on the basis of unlawful evidence. The undertakings' arguments follow thus a "fruit of the poisonous tree" type of reasoning. The Court, nevertheless, did not follow this reasoning. The lawfulness of the transfer of evidence is a matter to be decided under national law, which also means that the Union Courts cannot rule on this lawfulness.[2] It should be mentioned though, that the General Court did examine whether the lawfulness of the transfer of evidence was examined at domestic level. The General Court examined this regardless of its statement that the "transmission had not been declared unlawful by a national court".[3] The Court of Justice therefore leaves in the middle whether the Union Courts do have to examine whether the national authorities checked the lawfulness of the transfer of evidence. It thus remains to be seen in future case law whether an extra check by the Union Courts is required to determine that the lawfulness was (properly) examined at national level.

The second ground of appeal is not discussed substantially by the Court and will therefore not be discussed here either. The third ground of appeal deals with the review of the proportionality of the sanction by the General Court, whereas the fourth ground of appeal examines the object/effect dichotomy. Both pleas are, in my opinion not unsurprisingly, rejected by the Court of Justice. The Union Courts should engage in full judicial review of fines, which means that "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".[4] This statement as such was, since the Chalkor[5] and KME[6] judgments to be expected. In fact, the General Court also applied this full judicial review, according to the Court of Justice.[7] When dealing with the last ground of appeal, the Court explained once more the difference between object and effect restrictions and stated that the Commission and the General Court were correct to classify the price-fixing cartel at issue as an object restriction. With this judgment the

Court appears to nuance its, in my opinion, unfortunate statements in *Allianze* Hungaria.[8]

Discussion

Use of evidence obtained in criminal law proceedings

The judgment of the Court of Justice is not very surprising. In the past, the Court of Justice also ruled that all evidence will be admissible in competition law proceedings in line with the principle of the unfettered evaluation of evidence. This means that all information lawfully obtained can be used by the Commission.[9] If the transfer of evidence can take place, the Commission will be free to use it, and is thus not obliged to examine whether the use of evidence is lawful. This ruling, as clear and logical as it is, might however create problems in the Netherlands. In 2013 and 2015 the two Dutch competition law courts, namely the District Court of Rotterdam and the Trade and Industry Appeals Tribunal, disagreed on whether evidence can be transferred from the public prosecutor to the Dutch competition authority. Whereas the District Court emphasised that the *transfer itself* might infringe the right to privacy, and should thus be proportionate,[10] the Appeals Tribunal seems to focus more on the *use* of evidence as a possible infringement of the right to privacy.[11] Obviously, the view of the Appeals Tribunal, as the court of last instance in Dutch competition law proceedings, prevails over that of the District Court of Rotterdam. The transfer of evidence from the public prosecutor is allowed, since there are first of all sufficient safeguards in the criminal procedure. The Appeals Tribunal also refers to the following two additional factors: (1) a (legal) person may hold the state liable if the transfer of evidence did not had to take place on the basis of personal circumstances, and (2) in the competition law procedure, the ACM and the competition courts examine whether the *use* of the transferred evidence is allowed. This last safeguard to protect the right to privacy might be problematic in a case where the Dutch public prosecutor wants to transfer evidence to the Commission. In the *FSL Holdings* case, the Court of Justice ruled that the Commission does not have to examine compliance with procedural rules and fundamental rights when it wants to use information it obtained from national authorities. It might therefore be necessary to move the last safeguard which was mentioned by the Dutch Appeal Tribunal to the stage where the public prosecutor decides to transfer the evidence. This, in the end, boils down to the approach which the District Court of Rotterdam preferred in its annulled judgments. If case law of the Appeal Tribunal would not be changed, it would mean that the last

safeguard was merely mentioned as a means to justify the end without it presenting any protection against infringements of the right to privacy.

Review of the proportionality of the sanction

The reasoning of the Court in *FSL Holdings* relating to the review of the proportionality of a sanction is, as mentioned above, not very surprising. In the literature comments have been made about the factual review of the Union Courts. Vesterdorf, former President of the Court of First Instance, also raised some doubts as to the actual review taking place at Union level. He mentioned in 2009 the following:

To what extent, then, is this unlimited jurisdiction exercised by the ECJ or the CFI in practice? The answer is, formally speaking, that it is used every time the Court has to rule on a demand for annulment or reduction of a fine. However, the reality is that, almost without exception, the Court limits itself to performing a control of the legality of the fine or, rather, to verifying whether the Commission has applied the Guidelines for the calculation of fines correctly. In doing so, it will normally apply the manifest error test, as can be seen in the recent judgment in the *Wieland-Werke* case, paragraph 32.[12]

There are indeed cases where the Union Courts merely state that a fine is not disproportionate or that a comparison shows that the fine is not excessive.[13] In other cases, by contrast, the Union Courts conduct a more extensive review of the proportionality of the factors taken into account,[14] although the conclusion is sometimes still quickly drawn.[15] In the case at hand, the Court of Justice seems to examine extensively whether the General Court conducted a full review or merely a marginal review. With regard to one particular argument of the undertakings concerned on the marginal review by the General Court, the Court of Justice even ruled the following:

"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."[16]

Saying so does not make it so, is thus very true in this instance. While saying the opposite, the General Court did actually engage in a full review by discussing all relevant factors which were raised by the undertakings.

The object/effect dichotomy

The last ground of appeal which the Court of Justice discussed was the object/effect dichotomy. In the *Allianz Hungaria* case, the Court of Justice seemed to confuse the difference between object and effect restrictions.[17] In the case at hand, AG Kokott also stated that "[t]he 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." The arguments on which the undertakings relied all referred to factors which are not relevant in order to determine whether the restriction is one by object, such as the market shares of the undertakings concerned and the frequency of the cartelmeetings. The Court of Justice endorsed the argumentation of AG Kokott, by providing that the factors put forward by the undertakings "are not relevant for the purpose of determining whether there is an anticompetitive object". With this statement the natural order in EU competition law seems to be restored. Object and effect restrictions need to be separated strictly.[18] *Allianz Hungaria*, a much criticized judgment, thereby becomes merely a slip of the pen.

Conclusion

FSL Holdings is not a very surprising case. The Court of Justice follows the principle of the unfettered evaluation of evidence. As long as evidence is lawfully obtained, the Commission may use it. The judgment at hand can, however, at least in relation to the first ground of appeal have some far-reaching consequences for at least Dutch competition law. This judgment is perhaps also a wake-up call to the General Court to make clearer to undertakings that it is indeed carrying out a full review of the proportionality of sanctions. Being bailed out by its big brother, the Court of Justice, over and over again might not be the best approach. Furthermore, clarity by the General Court on the review it carries out also ensures that undertakings understand the General Court's judgments. Why would it be so difficult for the General Court to acknowledge explicitly that it does carry out a full review? Lastly, the confusion

created by the *Allianz Hungaria* judgment seems to be cleared up by the Court of Justice. The case at hand is once again another case where the object and effect distinction is properly made. In my opinion, the Court of Justice provided us with a sound and clear judgment.

[1] The applicants argued in their second ground of appeal (par. 51-60) that Chiquita did not comply with the conditions in order to be granted immunity. This ground of appeal was dismissed by the Court of Justice since it is a question of fact. Furthermore, the applicants did not argue that ruling of the General Court on this point was vitiated by a material error or a distortion. This ground will therefore not be mentioned any further in this blog post.

[2] Par. 32.

[3] Par. 33.

[4] Par. 73.

[5] Case C-386/10 P (*Chalkor* v *Commission*).

[6] Case C-272/09 P (*KME Germany and others* v *Commission*); Case C-389/10 P (*KME Germany and others* v *Commission*).

[7] Par. 81-88.

[8] Case C-32/11 (*Allianz e.a./Gazdasági*), par. 48. The Court of Justice seems to "confuse" the object and effect distinction in the *Allianz Hungaria* ruling. For a critical commentary, see C. Graham, 'Methods for determining whether an agreement restricts competition: comment on Allianz Hungaria', *European Law Review,* 2013, p. 542-551.

[9] Case C-239/11 P, C-489/11 P and C-498/11 P (*Siemens, Mitsubishi and Toshiba* v *Commission*), par. 128.

[10] See ECLI:NL:RBROT:2013:CA3079 and ECLI:NL:RBROT:2013:5042.

[11] See ECLI:NL:CBB:2014:151 and ECLI:NL:CBB:2015:192.

[12] B. Vesterdorf (2009) "The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?", *Global Competition Policy*, 2, p. 2-3.

[13] See e.g. Case T-264/12 (*UTi Worldwide and others* v *Commission*), par. 281; Case T-541/08 (*Sasol* v *Commission*), par. 317-319; Case T-482/07 (*Nynäs Petroleum and Nynas Petróleo* v *Commission*), par. 418; Case T-587/08 (*Fresh Del Monte* v *Commission*), par. 777; and case CFI, T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328-329/94 and T-335/94 (*Limburgse Vinyl Maatschappij NV and others* v *Commission*), par. 1219.

[14] Case T-389/10 and T-419/10 (*SLM* v *Commission*), par. 432-452;Case T-418/10 (*voestalpine and voestalpine Wire Rod Austria* v *Commission*), par. 450-467; Case T-486/11 (*Orange Polska* v *Commission*), par. 179-186 and 228; and Case, T-53/03 (*British Plasterboard* v *Commission*), par. 345 and 347.

[15] Case T-389/10 and T-419/10 (*SLM* v *Commission*), par. 447; Case T-418/10 (*voestalpine and voestalpine Wire Rod Austria* v *Commission*), par. 467.

[16] Par. 83.

[17] See e.g. also C. Graham, 'Methods for determining whether an agreement restricts competition: comment on Allianz Hungaria', *European Law Review,* 2013, p. 542-551.

[18] See e.g. also Case C-67/13 P (*Groupement des Cartes Bancaires* v *Commission*), par. 58; and C-345/14 (*Sia Maxima Latvija* v *Konkurences Padome*), par. 18.