

European Court of Justice Upholds Use of Evidence from Noncompetition Authority

IN SHORT

The Background: The European Court of Justice ruled that in antitrust proceedings, the European Commission may rely on the fortuitous conveyance of evidence by a national tax authority.

The Result: This ruling sets the stage for information sharing that capitalizes on cooperation between the European Commission and national authorities (whether in the field of competition or in other areas).

Looking Ahead: Companies will have even greater incentives for a comprehensive legal compliance system, given the confirmed legitimacy of a more extensive use of information sharing between EU and national authorities.

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The European Court of Justice ("CoJ") has upheld the European Commission's use of evidence transmitted by a national authority other than a Member State competition authority in a cartel investigation. The CoJ ruled on April 27, 2017, that the national authority properly transmitted such evidence under national law and that, in particular, nothing under EU competition rules impeded such transfer (Case C-469/15 P, *FSL Holdings NV, Firma Léon Van Parys NV, and Pacific Fruit Company Italy SpA* ("Pacific Fruit Group") v. *European Commission*).

Background

This ruling arises from the Commission's investigation of anticompetitive practices relating to the exchange of price-related information of bananas in northern Europe, commenced in 2005.

In the context of the northern European investigation, the Commission received documents in July 2007 relating to anticompetitive practices in southern Europe from the Italian tax authority, which uncovered these documents while conducting a national tax investigation of Pacific Fruit Company Italy SpA.

Following receipt of such information, in November 2007, the Commission carried out dawn raids at banana importers' offices in Spain and Italy. Subsequent to its investigation of anticompetitive practices in southern Europe, the Commission issued a decision in October 2011 that fined Pacific Fruit Group €8,919,000.

Commission May Rely on Evidence Properly Transmitted by a National Noncompetition Authority

The CoJ fully dismissed Pacific Fruit Group's claim that the European Commission unlawfully used evidence transmitted by the Italian tax authority.

Proper Transfer of Evidence by National Authorities Under National Law

Pacific Fruit Group asserted that the transmission of the evidence must comply with not only national law, but also EU law. However, the CoJ upheld the General Court's finding that (i) national law governs when national authorities transmit information to the Commission obtained in application of national criminal law, and (ii) the EU courts have no jurisdiction to rule on the lawfulness of a measure adopted by a national authority under national law. In



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this respect, the CoJ referred to the General Court's findings that the Italian tax authority had properly provided the documents to the Commission.

The Commission May Use Information Collected by a Noncompetition Authority for Another Purpose

The CoJ further rejected Pacific Fruit Group's interpretation of the EU competition rules that evidence shall only be used in relation to the subject matter for which it was collected by the national authority (see Article 12(2) of Regulation 1/2003 on information exchange between the Commission and national competition authorities, which provides that "[i]nformation 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").

The CoJ noted that Regulation 1/2003 seeks to enhance cooperation between competition authorities at the EU and national levels by facilitating the exchange of information, including confidential information. With this in mind, the CoJ found that Regulation 1/2003 (Article 12 (2)) did not create a more general rule prohibiting the Commission from using information transmitted by national authorities other than the Member States' competition authorities, solely because such information had been obtained for other purposes. The CoJ found that such a rule would unduly burden the Commission's role in overseeing the enforcement of EU competition law.

No Violation of Fundamental Principles of EU Law

Pacific Fruit Group further argued that the Commission violated its rights of defense in taking over two years to inform it that the Italian tax authority had transmitted such evidence, which then led to the Commission's initiation of the southern European investigation.

In dismissing this claim, the CoJ recalled that access to the file is triggered only upon the Commission's issuance of a statement of objections, which sets out all essential elements of the Commission's case. Receipt of the statement of objections, combined with access to evidence, ensures that the rights of the defense are fully observed. Furthermore, providing the disputed evidence prior to issuing the statement of objections would have endangered the effectiveness of the Commission's investigation.

Implications

The CoJ judgment sets the stage for information sharing that capitalizes on cooperation between the Commission and national authorities (whether in the field of competition or in other areas).

In light of the confirmed legitimacy of a more extensive use of information sharing amongst EU and national authorities, companies will have even greater incentives for a comprehensive legal compliance system. Indeed, as in the present case, a domestic noncompetition inspection (targeting tax evasion, money laundering, insider trading, etc.) may well open the door to a full-blown EU antitrust investigation and hefty consequent fines.

THREE KEY TAKEAWAYS

1. EU law has no general principle that requires competition authorities to rely on only certain forms of evidence or evidence from certain sources.
2. Companies cannot expect that evidence will be shielded from antitrust scrutiny when taken by a national noncompetition authority for purposes unrelated to competition enforcement. Such authority may communicate this evidence to the EU competition authority, as long as such information is properly transferred.
3. Affirming that information exchange between national and EU authorities is primordial to the effective application of EU competition law, this ruling will serve to bolster and perhaps even inspire greater cooperation and information sharing amongst enforcement authorities across different sectors.

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