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The General Court Judgments in *Cathode Ray Tubes*: A Reminder of Key Principles Concerning Cartel Enforcement

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In addition to annulling the fine of EUR28 million imposed individually on Toshiba and reducing the fine imposed on Panasonic, the appeals against the European Commission's decision in respect of the cathode ray tubes cartel presented the General Court with an opportunity to restate a number of key principles concerning cartels and cartel enforcement.

The CRT Judgments

The General Court handed down judgments in respect of five appeals¹ against the Commission's CRT decision,² which had found that the main manufacturers of CRTs had infringed Article 101 TFEU by participating in two distinct cartel infringements relating to (i) the colour display tubes market, from October 1996 to March 2006; and (ii) the colour picture tubes (CPT) market, from December 1997 to November 2006.

Appeals by LG Electronics, Philips and Samsung SDI were dismissed in their entirety. The General Court however annulled a fine of EUR28 million imposed individually on Toshiba and reduced the fine imposed on Panasonic.

Judgment in *Panasonic and MT Picture Display*

Panasonic (at the time of the cartel, MEI) and MT Picture Display (formerly MTPD) are part of a group of companies that produce and market electrical and electronic

¹ Case T-82/13 *Panasonic Corp. and MT Picture Display v. Commission* (EU:T:2015:612); Case T-104/13 *Toshiba Corp. v. Commission* (EU:T:2015:610); Case T-91/13 *LG Electronics Inc. v. Commission* (EU:T:2015:609); Case T-92/13 *Koninklijke Philips Electronics NV v. Commission* (EU:T:2015:605); Case T-84/13 *Samsung SDI, Co. and others v. Commission* (EU:T:2015:611).

² Commission Decision C(2012) 8839 final of 5 December 2012 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39.437 — TV and Computer Monitor Tubes).

goods. Until 2000, MEC, one of the wholly-owned subsidiaries of MEI, manufactured and marketed CRTs. MEC then merged with MEI and MEI directly exercised control of the CRT activities. In March 2003, MEI transferred all its CRT activities to MTPD, a joint venture created with Toshiba. Until March 2007, MTPD was owned as to 64.5% by MEI and as to 35.5% by Toshiba. At that time, Toshiba transferred its CRT activities to MEI and MTPD became a wholly-owned subsidiary of MEI.

The following fines were imposed by the Commission:

- Panasonic individually: EUR157 478 000;
- Panasonic, Toshiba and MTPD, jointly and severally liable: EUR86 738 000;
- Panasonic and MTPD, jointly and severally liable: EUR7 885 000.

On appeal, Panasonic and MT Picture Display claimed that the General Court should (i) annul the contested decision in so far as it finds that MEI or MTPD infringed Article 101 TFEU; and (ii) annul or reduce the fines imposed on Panasonic or, alternatively, on MTPD.

Although the General Court was not persuaded to annul the contested decision, it partially upheld the appeal as regards the fines.

Methodology for Determining the Value of Sales

Panasonic and MT Picture Display claimed that the methodology used for calculating the value of sales was incorrect. In identifying the relevant value of sales, the Commission took into account sales of CRT products (comprising both direct sales and direct sales through transformed products³), which were delivered within the EEA. These figures were to be provided to the Commission in response to a request for information (RFI). The methodology to determine the value of the direct EEA sales through transformed products proposed by the Commission in its RFI was as follows: determine the average of the value of direct EEA sales made during the same period and multiply this average by the number of CRTs concerned. In their response to the RFI, the applicants suggested an alternative and more accurate method to take into account the varying sizes (and hence value) of the CPTs.⁴ The applicants provided a methodology allowing for a more accurate calculation of the value of sales, based on a weighted average taking into account both the time period and the size of the CPTs incorporated into televisions sold during the infringement period.

Point 15 of the Fining Guidelines states that when determining the value of sales the Commission will rely on the best available figures. The General Court held that in this case the Commission departed from those Guidelines—without providing any justification—as the data relied upon by the applicants reflected more accurately the value of direct EEA sales through transformed products. In reaching this conclusion, the General Court held that it is permissible for the Commission to apply different methodologies to different companies that have been found to have participated in a cartel.

Exercising of its unlimited jurisdiction in respect of fines, the General Court reduced the fines imposed as follows:

- Panasonic individually: EUR128 866 000;
- Panasonic, Toshiba and MTPD, jointly and severally liable: EUR82 826 000;

³ The applicants did not dispute the Commission's decision to take into account intragroup sales in the calculation of the fines. For more details on this issue, see [here](#).

⁴ The applicants' action only related to the CPT cartel.

- Panasonic and MTPD, jointly and severally liable: EUR7 530 000.

Extremely Limited Role in the Cartel

Panasonic and MT Picture Display further contended that a reduction in fine was warranted as their role in the cartel was extremely limited and this was a “mitigating circumstance.”

Under the former Fining Guidelines, an “*exclusively passive or ‘follow my leader’ role*” could constitute an attenuating circumstance. The General Court noted that this no longer constitutes a mitigating circumstance in the current Fining Guidelines and that, in any event, the applicants’ participation could not be qualified as “passive” given that they “*participated in a not inconsiderable number of cartel meetings, whose anticompetitive nature has been established, and admitted having provided their competitors with certain information.*”⁵ The General Court also referred to the current Fining Guidelines, which provide that the Commission may reduce a fine where a firm demonstrates that “*its involvement in the infringement is substantially limited and thus demonstrates that [...] it actually avoided applying it by adopting a competitive conduct in the market.*”⁶ For the Commission to consider an argument relating to the non-implementation of the cartel, a business would need to bring evidence that “*it clearly and substantially opposed the implementation of the cartel, to the point of disrupting its very functioning, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question.*”⁷ According to the General Court, the applicants did not satisfy this requirement.

Judgment in Toshiba

Toshiba was involved in the production and sales of CRTs from 1995 until March 2003. At that time, Toshiba transferred its CRT business to a joint venture, MTPD, in which it held 35.5% until March 2007.

The Commission found that Toshiba participated directly in the CPT cartel by engaging in bilateral contacts between May 2000 and April 2002 and also by participating in multilateral cartel meetings from April 2002 onwards. In addition, Toshiba was found jointly and severally liable with Panasonic for the infringement committed by MTPD from the time when the joint venture was established.

The following fines were imposed by the Commission:

- Toshiba individually: EUR28 048 000;
- Panasonic, Toshiba and MTPD, jointly and severally liable: EUR86 738 000.

Participation in a Single and Continuous Infringement

Toshiba sought the partial annulment of the Commission decision alleging, in particular, errors of assessment relating to the characterisation of Toshiba’ participation in certain bilateral contacts or multilateral meetings as forming part of a single and continuous infringement.

Toshiba claimed that the Commission had not established that the bilateral contacts between Toshiba and the other cartel members between May 2000 and April 2002 formed part of the single and continuous infringement found by the Commission. In this regard, the General Court recalled that “*the fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable*

⁵ Case T-82/13, para. 183.

⁶ 2006 Fining Guidelines, point 29.

⁷ Case T-82/13, para. 178.

*for the infringement as a whole.”*⁸ The Commission is still required to establish that that company was aware of the others’ anticompetitive activities or that it could reasonably have foreseen them. A “concurrence of wills” between the parties is required, as: *“it is only if the undertaking knew or should have known when it participated in an agreement than in doing so it was joining in the overall cartel that its participation in the agreement concerned can constitute the expression of its accession to the same cartel.”*⁹

The General Court examined the evidence relied upon in the decision and found that the Commission had not established to the requisite legal standard that Toshiba was aware or had actually been kept informed of the existence of the overall CPT cartel by its competitors.¹⁰

From April 2002, Toshiba began to participate in certain cartel meetings. The General Court examined whether the Commission was entitled to find that the applicant had participated in a single and continuous infringement by virtue of its participation in four cartel meetings. The General Court concluded that, apart from the evidence showing that Toshiba participated in these meetings and their anticompetitive object, the Commission did not specify the evidence upon which it relied in order to find that Toshiba was aware of the unlawful conduct planned or put into effect by the cartel participants and that it intended, by its own conduct, to contribute to the common objectives pursued by those companies.¹¹

The General Court concluded that with regard to both the bilateral contacts held between May 2000 and April 2002 and the multilateral meetings held from April 2002, the evidence relied upon by the Commission did not establish that Toshiba intended to contribute by its own conduct to the common objectives pursued by the cartel participants.¹² Accordingly, the General Court held that the Commission had failed to establish to the requisite legal standard that Toshiba participated in a single and continuous infringement during these periods. Consequently, the General Court annulled the fine of EUR28 048 000 imposed individually on Toshiba for its direct participation in the infringement.

The General Court’s ruling on Toshiba’s appeal serves as an important reminder of both the burden and standard of proof in cartel cases and underlines the importance of adducing evidence to substantiate a finding of a single and continuous infringement.

Minority Shareholding and Parental Liability

Toshiba was held jointly and severally liable with Panasonic for MTPD’s participation in the infringement. Toshiba claimed that MEI had sole control over MTPD through its majority 64.5% shareholding and the appointment of the members of its Board of Directors.

The General Court noted that a minority interest may enable a parent company to exercise a decisive influence on its subsidiary’s market conduct *“if it is allied to rights which are greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary’s market conduct.”*¹³

⁸ Case T-104/13, para. 52.

⁹ *Ibid.*, para. 53.

¹⁰ *Ibid.*, para. 78.

¹¹ *Ibid.*, para. 84.

¹² *Ibid.*, para. 78 and 86.

¹³ *Ibid.*, para. 97.

Further, the General Court stressed that the exercise of joint control over a subsidiary, by two parent companies which are independent of each other, does not preclude a finding of the existence of an economic unit comprising one of those parents and the subsidiary. This is the case even if the proportion of the subsidiary's shareholding owned by that parent is smaller than that owned by the other parent.¹⁴

The General Court examined the evidence relied upon by the Commission and concluded that Toshiba exercised decisive influence over MTPD as, in particular, both parents had veto rights with respect to matters of strategic importance, both parents' approval was required for MTPD's business plan and Toshiba had the right to appoint certain members of the Board of Directors. The General Court therefore held that the Commission had not erred in finding that the applicant, as MTPD's parent company, had exercised together with Panasonic, decisive influence over MTPD's conduct on the CPT market. On that basis, the Commission was entitled to hold Toshiba jointly and severally liable with Panasonic for MTPD's anticompetitive conduct.

¹⁴ *Ibid.*, para. 99.
