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NEWSLETTER COMPETITION LAW/
JAPAN DESK

APRIL 2017

Decision of the European Court of Justice dated 18 January 2017 Toshiba Corp. vs. European Commission, C-623/15

Presentation of the case at stake

Toshiba Corp. manufactures and sells electronic and electrical products including cathode ray tubes (CRT). On 31 March 2003, Toshiba transferred its entire CRT business to a joint venture, Matsushita Toshiba Picture Display Co. Ltd (MTPD) created with Matsushita Electric Industrial Co. Ltd (MEI). Until 31 March 2007, MTPD was held as to 35.5% by Toshiba and as to 64.5% by MEI and on that date, Toshiba transferred its shareholding to MEI. MEI then changed its name to Panasonic Corp. on 1 October 2008.

On 5 December 2012 [1], the European Commission found that the main global producers of CRT had participated in 2 separate infringements notably by infringing Article 101 of TFEU [2]. Those infringements related first to the color cathode ray tubes for computer monitors market and second to the color cathode ray tubes for television sets (the "CPT cartel"). The cartels sentenced by the Commission consisted of price-fixing, market and customer-sharing and output limitations as well as regular exchange of commercial sensitive information. The European Commission sentenced 7 undertakings[3].

Toshiba, Panasonic and MTPD participated in the CPT cartel only. According to the European Commission, such cartel occurred between 3 December 1997 and 15 November 2006. In this context, the Commission, imposed a fine of €28,048,000 on Toshiba individually for the period between the 16 May 2000 (the date on which Toshiba was alleged to have begun participating in the cartel) and the 31 March 2003 (the date on which MTPD was created), and a fine of €86,738,000 on Toshiba jointly and severally with Panasonic (MEI at the time) and their joint subsidiary, MTPD, for the period 31 March 2003 to 15 November 2006.

Ruling on actions for annulment brought against the Commission's decision, by judgment of 9 September 2015[4], the General Court considered that the Commission had not sufficiently established that between 16 May 2000 and 31 March 2003, Toshiba had been aware, or had actually been kept informed, of the existence of the CPT cartel, or that it had intended to contribute by its own conduct to all of the common objectives pursued by the cartel

[1] European Commission, 5 December 2012, Comp/39-437, TV and Computer monitor tubes

[2] Article 101 of the Treaty on the Functioning of the European Union notably stipulates:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.(…)"

[3] Samsung SDI, Koninklijke Philips Electronics, LG Electronics, Panasonic Corp., Toshiba Corp., MTPD and Technicolor SA

[4] General Court, 9 September 2015, T-104/13, Toshiba/Commission

participants. Consequently, it annulled the fine of €28,048,000 imposed on Toshiba individually. It also reduced from €86,738,000 to €82,826,000 the fine imposed jointly and severally on Toshiba, Panasonic and MTPD[5].

On 20 November 2015, Toshiba appealed the decision of the General Court before the European Court of Justice. Toshiba relied on a single ground of appeal, alleging an error of law in the application of the **concept of undertaking** within the meaning of Article 101 of TFEU. In summary, Toshiba considered it should not be held liable for the competition infringement committed by MTPD and it consequently argued that the General Court erred in law (i) by characterizing some elements as evidence that Toshiba had exercised decisive influence over MTPD and (ii) in considering that the entities (Toshiba, Panasonic, MTPD) formed a **single economic unit**.

By a decision dated 18 January 2017, the European Court of Justice dismissed Toshiba's appeal and confirmed the existence of a single economic unit and the fine of more than €82 million imposed jointly and severally on Toshiba, Panasonic and MTPD for the period 31 March 2003 to 15 November 2006.

Consequences of the notion of "single economic unit" under European antitrust law towards parent companies' liabilities

European (and also French) competition law provide for a specific liability regime. Indeed and for instance, from a French corporate law perspective, a subsidiary is an independent legal entity and subject to some exceptions, a parent firm is not liable for its practices. But the rule differs when an infringement committed by a subsidiary is an anti-competitive practice.

Article 101 of the TFEU refers to the anti-competitive practices of an "undertaking" and European case law considers that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. That concept must be understood as covering a single economic unit, even if, from a legal perspective, that unit is made up of several natural or legal persons[6].

Under European law, a "single economic unit" can be characterized and composed of a parent company and its subsidiary when the parent company exercises a decisive influence over its subsidiary. Such characterization can be quickly reached by the European Commission if the parent company holds the totality or the quasi-totality of the capital of its subsidiary, as in such case, the **decisive influence of the parent company over its subsidiary is presumed**[7]. The presumption is of course a rebuttable one, but the practice shows that it is quite difficult to reverse it. To demonstrate that the parent company did not exercise a decisive influence over its subsidiary, it has to prove that its subsidiary was totally independent on the market and notably, that it could fix and decide its own commercial strategy.

If the presumption of decisive influence of the parent company over its subsidiary isn't applied (because the detention of the capital by the parent company is not total or quasi total), the Commission will have to demonstrate, for example, the following factual evidence:

- whether the general commercial policy of the subsidiary is part of and/or coordinated by the parent company's policy[8];
- whether the executive committee of the parent company is regularly informed of its subsidiary's practices[9];
- whether the parent company is involved in its subsidiary's contractual relations[10];
- whether the management team of the subsidiary is made up of personnel from the parent company[11];

[5] The General Court considered that the Commission had not taken the best available figures communicated by the undertakings at stake in order to calculate the fine and thus did not comply with the guidelines on the method of setting fines (Guidelines 2006/C 210/02)

[6] European Court of Justice, 10 April 2014, C-231/11, Commission/Siemens Österreich

[7] The presumption of decisive influence of the parent company over its subsidiary is applied by the Commission in case the parent company holds 100% of its subsidiary's capital (Akzo Nobel/Commission, 10 September 2009, C-97/08) or if it holds 98% of its subsidiary's capital (Elf Aquitaine SA/Commission, 29 September 2011, C-521/09). However the presumption doesn't apply when the parent company only holds 80% of its subsidiary's capital (General Court, 14 March 2013, T-587/08, Fresh Del Monte Produce/Commission).

[8] General Court, 6 October 1994, T-83/91, Tetra Pack International SA/Commission

[9] General Court, 1 April 1993, T-65/89, BPB Industries et British Gypsum/Commission

[10] Tetra Pack International decision above-mentioned

[11] European Commission, decision n°94/19/CE, 21 December 1993, Sea Containers/Stena Sealink

- whether the board of directors of the subsidiary is composed of members working or having worked in the parent company in strategic positions[12];

If several of the above evidence is put forward by the Commission, it could conclude that a decisive influence of the parent company over its subsidiary is exercised and that consequently, a single economic unit exists. And, **if a single economic unit is characterized by the Commission, it will consider all the legal entities part of this unit as jointly and severally liable for the anti-competitive practice committed by one of them.**

The factual evidence taken into consideration in the Toshiba case

As Toshiba held (only) 35.5% of the capital of MTPD, the Commission could not presume that a decisive influence was exercised over it and it consequently had to demonstrate that such an influence was exercised by Toshiba (and Panasonic) by circumstantial evidence in order to conclude that a single economic unit existed.

In practice, the following factors were listed and taken into account by the Commission (and then by the General Court) to decide that the commercial conduct of MTPD was determined jointly by its parent companies Toshiba and Panasonic:

- The statutory provisions of MTPD and the agreement for its creation gave veto rights[13] to both parent companies with respect to matters of strategic importance;
- MTPD's Board of directors consisted of 10 directors among which 6 were appointed by Panasonic and 4 were appointed by Toshiba (one of them simultaneously occupied a management position within Toshiba);
- Toshiba appointed MTPD's vice-president and Panasonic appointed the President;
- All directors were coming from high management level within the respective companies and after working for MTPD, many of them returned to high positions within these companies;
- Toshiba and Panasonic had agreed upon a business plan for MTPD which contained operational and financial objectives;
- Prior to taking important decisions, MTPD's management informally consulted with and obtained the approval of both Toshiba and Panasonic;
- Toshiba had the possibility to prohibit its subsidiary from taking decisions involving relatively modest outlays;
- Toshiba had consented to the closure of 2 subsidiaries of MTPD.

In light of the above, the European Court of Justice concluded that the General Court (in reviewing and approving the Commission's methodology) had not erred in law in considering that (i) Toshiba had exercised a decisive influence over its subsidiary, and that (ii) it formed a single economic unit with its subsidiary (and Panasonic).

The Court thus rejected Toshiba's appeal and confirmed the joint and several liability with Panasonic and MTPD.

The above implies that **under European antitrust law, a parent company can be held liable, not because it is itself involved in the anti-competitive practice, but because it forms a single economic unit with its subsidiary.**

Financial consequences on the liabilities of parent companies

When a single economic unit is held liable of an antitrust infringement, the fine is imposed on the whole economic unit (considered as the "undertaking") and not only on the sole legal entity which committed the anti-competitive practice.

Therefore, the amount of the fine can be quite significant as European antitrust law provides for a maximum fine of 10% of the worldwide turnover of the undertaking [14] and the worldwide turnover of the single economic unit which includes the one of the parent company is obviously higher than the sole worldwide turnover of the subsidiary.

In addition and because this is a **joint and several liability of all the members of the single economic unit**, any of those members may be asked to pay the totality of the fine by

[12] General Court, 12 July 2011, T-132/07, Fuji Co Ltd/Commission

[13] Toshiba alleged that, in practice, it had not exercised its veto right but for the General Court, this could be seen as an approval of MTPD's commercial policy

[14] Council Regulation (EC) N° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (today Articles 101 and 102 of the TFUE)

the Commission (and in most cases, the Commission turns to the parent company as it is usually more solvent).

To conclude, if one company of the single economic unit paid the totality of the fine, it may have a potential recourse against the other members of the unit, before national jurisdictions, to recover (all or part) of the sum he paid [15] unless these members otherwise agree on the payment repartition of the fine. Indeed, the European Commission considers that it does not have to determine the role or involvement of each member of the single economic unit and leaves this task to national jurisdictions[16].

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[15] According to French law and in such a case, the judge would have to fix the amount to be paid by each member according to their implication in the anti-competitive practice

[16] For instance, European Court of Justice, 10 April 2014, C-231/11, Commission/Siemens Österreich