



TOSHIBA V. COMMISSION **– HOW (NOT) TO PROVE** **AWARENESS, AND DECISIVELY** **INFLUENCE PEOPLE**



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I. INTRODUCTION

On September 9, 2015, the European Union (“EU”) General Court handed down its judgment in Case T-104/13 *Toshiba v. Commission* (“*Toshiba Judgment*”),² one of several challenges to the Decision of the European Commission (“Commission”) in Case COMP/39.437 – *TV and Computer Monitor Tubes* (“*CRT Decision*”). The Judgment is important in two respects, firstly for its findings on the standard of proof required for a finding of participation in a single and continuous infringement of competition law, and secondly for its application (subject to appeal) of the legal test for the finding of joint and several liability for competition law infringements.

More broadly, the CRT Decision has given rise to a number of private damages actions and is thereby contributing indirectly to the evolution of the law relating to such actions in Europe, where this field is still in its infancy. The CRT Decision built on principles established in the Commission’s LCD Decision,³ and confirmed by the General Court in the *InnoLux*

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² Case T-104/13 *Toshiba v. Commission* EU:T:2015:610.

³ Commission Decision of 8.12.2010 relating to a proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (COMP/39.309 – LCD - Liquid Crystal Displays).



Judgment,⁴ regarding the ability to take into consideration for fining purposes at least “direct sales of transformed products” by vertically integrated addressees of the Decisions, i.e. sales in the EU of screens incorporating the tubes which were the subject of the Commission Decision, manufactured outside the EU by the addressees of the Decision. The General Court appears to have accepted the Commission’s approach.⁵ Topically, the English High Court has just been called on to consider this particular aspect of the CRT Decision, regarding the jurisdictional scope of damages claims.⁶

The CRT case Decision is also interesting in that the Commission’s investigation initiated a number of “piggy back” investigations, and despite the best intentions of the European Competition Network to be a mechanism to avoid incoherent decisions, the conclusions reached by the Commission and its national competition authority cousins are a case study in inconsistency.⁷ While in theory this situation might be solvable by references to the European Court of Justice (“ECJ”) from Member State Courts, and direct appeals of the Commission Decision to the EU Courts, in reality the speed and practicability of such parallel appeal procedures means this has not happened.

This article focuses on the General Court’s treatment of evidence and the standard of proof necessary to find a single and continuous infringement and to find joint and several liability, and some issues arising in private damages cases to date.

II. BACKGROUND

The CRT Decision found two separate cartels operating in the broader cathode ray tube (“CRT”) industry – the CPT (Color Picture Tubes used in television sets) and CDT (Color Display Tubes used in computer monitors) cartels, each of which constituted single and continuous infringements. Toshiba was only alleged to have participated in the CPT cartel.

The CPT cartel was found to have existed between December 1997 and November 2006. Toshiba’s alleged involvement was split into three periods: (i) May 2000 to April 2002, (ii) April 2002 to April 2003, and (iii) April 2003 to March 2006. The finding that Toshiba participated in each of these periods was based on, for period (i), evidence of bilateral contacts with another cartel member; for period (ii), evidence of participation in multilateral meetings; and for period (iii) Toshiba’s alleged decisive influence over its joint venture with Panasonic, MTPD.

III. SINGLE AND CONTINUOUS INFRINGEMENT

⁴ Case C-231/14 *InnoLux v. Commission* EU:C:2015:451.

⁵ *Toshiba* Judgment, §§154-161.

⁶ See *Iiyama Benelux BV & ors v. Schott AG & ors* [2016] EWHC 1207 (Ch).

⁷ See “Toshiba v Commission: Parental Liability of a Minority Shareholder”, Balazs Csepai, JECLAP, 2016, Vol 7, No.2 p.115.



In the *Toshiba* Judgment, the General Court set out the test for finding that an undertaking had participated in a single and continuous infringement.⁸ The key component in the assessment of whether an undertaking has participated in a single and continuous infringement is that the undertaking in question must have been aware of (or have reasonably foreseen) the anticompetitive activities of the other participants. Only where the undertaking knew or should have known that it was contributing by its conduct to the overall cartel, can it be held liable for it. The undertaking must therefore be shown to have intended to contribute to the common objectives of the cartel and by the same token have been aware of the activity of the other participants in pursuit of that objective (or have reasonably foreseen it and accepted the risk).

Accordingly, the General Court concluded that the Commission had to show that Toshiba knew (or could reasonably have been considered to know) both that its contacts formed part of an overall cartel and were designed to contribute to the objective pursued by it, and of the general scope and essential characteristics of the cartel.⁹

Citing the Charter of Fundamental Rights and the European Convention on Human Rights, the *Toshiba* Judgment also emphasized that a decision finding an infringement of competition law must be supported by evidence that is “sufficiently credible, precise and consistent to substantiate the firm conviction that the applicant participated in the CPT cartel”¹⁰ and that “any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed.”¹¹

A. *Period (i) - May 2000 to April 2002*

During this period, it was accepted that Toshiba had not participated in the multilateral meetings held in Asia and Europe. It was alleged, however, that Toshiba had bilateral contacts with three of the other addressees, who had each participated in the multilateral meetings at the heart of the cartel. Toshiba argued that, even if those bilateral contacts were anticompetitive (which it did not accept), the *CRT* Decision had not shown that Toshiba was aware of the cartel as a whole, as required by the Court’s jurisprudence. The *CRT* Decision also alleged that Toshiba had been kept informed of the cartel by another participant, and that there had been attempts to recruit it to the cartel, all of which showed that Toshiba had the requisite awareness to be found liable for the cartel as a whole. Toshiba disputed those findings.

The General Court agreed with Toshiba that the evidence cited in the *CRT* Decision did not establish, to the requisite legal standard, that Toshiba had been aware of, and had intended by its conduct to contribute to the common objectives of, the CPT cartel. The General Court’s assessment of the evidence concluded that, aside from one meeting, all the other contacts in which Toshiba was alleged to have been involved were in fact between

⁸ *Toshiba* Judgment, §§52-54, citing previous case law of the Court, in particular Case T-68/09 *Soliver v. Commission* EU:T:2014:867.

⁹ *Toshiba* Judgment, §55.

¹⁰ *Toshiba* Judgment, §51.

¹¹ *Toshiba* Judgment, §50.



other parties and a joint venture in which Toshiba had an interest (but over which it was not alleged to have exercised decisive influence). The joint venture in question was not an addressee of the *CRT* Decision. As concerned the one contact in which Toshiba was considered to be involved, the General Court agreed with Toshiba that the contact in question related to CDTs and therefore could not constitute evidence against Toshiba.

The General Court also concluded that there was no evidence that Toshiba intended to contribute to the CPT cartel (and in fact that the evidence, in the form of a letter from Toshiba to the joint venture asking it not to participate in the meetings, showed the contrary). Finally, the *Toshiba* Judgment rejected the unsubstantiated hearsay evidence of a leniency applicant, claiming that Toshiba was kept informed about the CPT cartel by another participant, as being insufficient to establish Toshiba's liability.

B. Period (ii) – April 2002 to April 2003

In this period, the Commission alleged that Toshiba had participated in four multilateral meetings, which formed part of the single and continuous infringement comprised of four parallel sets of meetings between various participants. Toshiba argued that its participation in one of those sets of meetings ("SML Meetings"), which took place outside the EU, did not lead to the conclusion that it had participated in the single and continuous infringement.

The General Court agreed with Toshiba that the *CRT* Decision had failed to demonstrate that Toshiba had been aware of the broader cartel and that Toshiba intended to contribute to its objectives. The *CRT* Decision had simply relied on the finding that the SML Meetings had worldwide scope and an alleged anticompetitive object. The mere parallelism of the SML Meetings with the three other types of meeting at issue in the case was not sufficient to establish Toshiba's awareness of the broader cartel.

The General Court thus adopted a principled stance on the burden and standard of proof required to establish an infringement of competition law. By focusing on the requirement that the *CRT* Decision show Toshiba's intention to contribute to the common objectives of the CPT cartel through its participation in the SML Meetings, the General Court took a more rigorous approach to the assessment of evidence. The EU Courts often permit the Commission significant leeway in establishing the evidentiary basis for an infringement, justifying this for example on the grounds that evidence of secret cartels is often fragmentary and sparse, and therefore the existence of infringing conduct must be able to be inferred from circumstantial evidence.¹² The *Toshiba* Judgment insisted, however, that the evidence put forward by the Commission must meet the requirement that, in order to show participation in a single and continuous infringement, the addressee had been aware of (or had been able to reasonably foresee) the anticompetitive conduct of the other participants and had intended to contribute to the common objectives of the cartel. It is not sufficient that two types of conduct have identical objectives; the objectives must be one and the same, i.e. there must be a concurrence of wills between the various participants. This is a welcome

¹² See for example Joined Cases 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 *Aalborg Portland and Others v. Commission* EU:C:2002:333, §§55-57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v. Commission* EU:C:2005:812, §51.



development. It reflects the reality of the situation in most cases these days, where the Commission has a multitude of cooperating parties proffering documents and explanations in their own self-interest, so that participation of a party in a cartel does not have to be “inferred” from fragmented scraps of evidence fortuitously identified by the Commission. It is to be hoped that this more demanding approach to the use of evidence becomes the norm.

IV. JOINT AND SEVERAL LIABILITY

An issue which has given rise to a number of judgments from the EU Courts over recent years is the question of joint and several liability for a competition law infringement. The law in the EU has evolved into a position very different to that which a corporate lawyer, schooled in the principle of the “corporate veil” segregating the conduct of subsidiaries and parents and other corporate entities, would most likely predict.

The principle under which an undertaking (invariably a parent or shareholding company) can be held jointly and severally liable with another undertaking for the latter’s anticompetitive conduct in the EU can be stated very simply. Liability may be imputed to the parent or shareholder where the subsidiary or joint venture “does not decide independently on its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.”¹³ In those circumstances, the subsidiary or joint venture forms a single economic unit with the parent company.

In assessing whether the above test is satisfied, the EU Courts have developed the concept of “decisive influence.” Though it is generally stated in the jurisprudence that there are two parts to the decisive influence test ((i) that the parent was in a position to exercise decisive influence, and (ii) that it actually did exercise such influence), in reality only the second limb of the test is of any real consequence, and it does not seem that the first limb is a necessary prerequisite to satisfying the second limb.¹⁴

Though the emphasis on the second limb of the test would suggest that it was incumbent on the Commission to adduce sufficient existence of decisive influence, in the *Toshiba* Judgment the General Court unfortunately did not show the same, desirable level of rigor in considering whether the test for “decisive influence” was met as it did when considering the test for finding a single and continuous infringement.

A. *Period (iii) – April 2003 to March 2006*

In March 2003, Toshiba decided to exit the CRT market and transferred its activities in this regard to a joint venture it formed with Panasonic, MTPD. Toshiba initially held 35.5 percent

¹³ See for example Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v. Commission and Commission v. Fresh Del Monte Produce* EU:C:2015:416, §75.

¹⁴ As recognized in Advocate-General Kokott’s Opinion in Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v. Commission and Commission v. Fresh Del Monte Produce* EU:C:2014:2439, §74, and, implicitly, in, for example, Case T-77/08 *Dow Chemical v. Commission* EU:T:2012:47, §75.



of the shares, with Panasonic holding the remaining 64.5 percent. In March 2007, Panasonic became the sole owner of MTPD.

In the third period covered by the *CRT* Decision, Toshiba's liability was derived wholly from the alleged participation of MTPD in the CPT cartel; the *CRT* Decision held Toshiba jointly and severally liable with Panasonic and MTPD for MTPD's alleged conduct.

Toshiba's challenge to its liability for period (iii) was thus based on the finding in the *CRT* Decision that Toshiba formed a single economic unit with MTPD. The *CRT* Decision based its finding that Toshiba exercised decisive influence over MTPD on Toshiba's holding various "negative veto rights" over certain decisions relating to MTPD's management. Toshiba appointed a minority of the members of MTPD's board, but certain strategic decisions required at least one of the Toshiba-appointed directors to vote in favor. In addition, the joint venture agreement provided that Toshiba and Panasonic would jointly adopt the initial business plan (covering the first two years) for MTPD.

The General Court's assessment of whether Toshiba exercised decisive influence over MTPD is notable for its acceptance of an abstract analysis of the joint venture agreement in order to establish the exercise of decisive influence, and a failure to be concerned with the practical reality of how the joint venture worked. In essence the court held that, where the joint venture agreement provided, even at a very high level, that the partners were jointly responsible for setting the policy followed by the joint venture, their exercise of influence over its commercial policy could be presumed. The General Court equated this assessment with the assessment of control carried out in merger control. Indeed, the principles relied upon in the *CRT* Decision and in the *Toshiba* Judgment are derived from those enumerated in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.¹⁵

The General Court found that Toshiba's contractually-required approval of the business plan and budget, which was extended beyond the initial two-year period envisaged in the joint venture agreement (for reasons which served Panasonic and which were explained by Toshiba to both the Commission and the General Court) was also an indication that Toshiba exercised decisive influence over MTPD. The *Toshiba* Judgment also cited with approval the findings of the *CRT* Decision in relation to various other indicia – Toshiba's appointment of directors to MTPD's board, who were either formerly or (in the case of one) currently employed by Toshiba; Toshiba's role in decisions over MTPD's plant closures; and its "preferred-supplier" relationship with MTPD – as additional indicators of decisive influence. The Court found that it was the sum of these indicia that supported the finding that Toshiba formed a single economic unit with MTPD, even if any one of these factors alone may not have been sufficient.

The *Toshiba* Judgment's findings on Toshiba's joint and several liability for the alleged conduct of MTPD are significant because the judgment marks the latest stage in the line of evolving case law of the General Court on the liability of shareholding companies for the conduct of joint ventures. The fact that Toshiba has appealed this aspect of the judgment

¹⁵ OJ C95/1, 16.4.2008.



means that the ECJ will now have the opportunity to review the development of this case law. This is particularly desirable as several judgments¹⁶ of the General Court have seen the adoption and subsequent application of certain principles without confirmation by the EU's highest court: for example the importance of any commercial relationship between shareholder and joint venture (as suggested in *Fuji*) or the ability of the shareholder to influence the day-to-day management of the joint venture (*RWE, Sasol*). Notably, the ECJ has not yet considered a case where liability has been imputed to a minority shareholder.

Of particular importance is the acceptance in the *Toshiba* Judgment that a theoretical analysis of the arrangements for the joint venture is sufficient, and the agreement concerned can be presumed to have been implemented without the need to investigate whether in practice these arrangements allowed the shareholder to exercise “decisive” influence and be held liable for the joint venture’s conduct. This seems difficult to reconcile with the principle, as repeatedly stated by the ECJ, that the subsidiary or joint venture “carries out in all material respects the instructions given to it”, which appears to require some investigation into how any management arrangements have actually been implemented. In the *Toshiba* Judgment, it was accepted that Panasonic was responsible for the operation and management of MTPD, and its Panasonic-appointed President controlled day-to-day management and took most of the important business decisions. Toshiba’s arguments about the fact that, as a matter of corporate law, it could not control the directors it appointed to the MTPD board, and explaining the peripheral role it played in decisions on MTPD’s business plan and other commercial matters, were ignored. The *Toshiba* Judgment endorses a shift toward the type of *ex ante* assessment conducted in merger control, despite the fact that the relevant events have already occurred. This represents a rather stark contrast to the General Court’s commendably strict adherence to the necessary standard of proof when reviewing the finding that Toshiba participated in a single and continuous infringement. Information relating to how a company is run is not likely to be concealed or concealable, and should therefore be readily available to review. There is no reason justifying this difference in approach. Liability for a minority shareholder in a joint venture, who to all intents and purposes believed authority was delegated to the majority parent (and who may be moving to extricate itself from the business completely, as in the case of Toshiba) has major repercussions in terms of the direct penalty imposed by the Commission and further, in terms of private damages actions which now inevitably follow on from a Commission decision. A finding of liability by the Commission should therefore be subject to the full constraints and safeguards granted by judicial review by the EU Courts.

V. PRIVATE DAMAGES

The *CRT* Decision has spawned a number of private damages actions around Europe. Although the cartels ended some ten years ago, the *CRT* Decision was not adopted until December 2012, and a variety of issues are set to arise if proceedings reach trial (which has

¹⁶ Such as Case T-132/07 *Fuji Electric v. Commission* EU:T:2011:344; Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others v. Commission* EU:T:2011:363; Case T-543/08 *RWE and RWE Dea v. Commission* EU:T:2014:627; Case T-541/08 *Sasol and Others v. Commission* EU:T:2014:628.



been the rare exception in damages claims in Europe to date), including liability of non-defendant addressees in contribution claims, and the correct application of the single economic unit doctrine as regards joint ventures in damages claims (both in “anchoring” claims or claims for contribution from joint venture parents).

One particularly interesting issue in the CRT Decision that has recently been addressed in a claim in the High Court in England & Wales concerns the territorial limits on damages actions. In *Iiyama Benelux BV & ors v. Schott AG & ors*,¹⁷ the High Court considered a claim by Iiyama, a manufacturer of computer monitors, against several participants in the CRT cartel. The claim related to monitors that Iiyama had purchased in the EEA but which had been manufactured outside the EEA. The CRTs purchased by Iiyama Corporation (the Claimants’ parent company) from the Defendants were “transformed” into computer monitors outside the EEA and then sold in the EEA to the Claimants. The Claimants argued that the CRT Decision had found that sales of computer monitors in the EEA were affected by the CRT cartel and that implicitly the infringement extended to these products. The Judge ruled against Iiyama, striking out the claim in full, stating that the CRT Decision found no infringement in relation to CRTs sold outside the EEA. The only mention of such sales was in relation to the calculation of the fine, and even then was not in fact factored into that calculation. Accordingly, no “follow-on” claim could be maintained in respect of the monitors bought by the Claimants. The Judge went on to find that any cartel affecting the CRTs used in the monitors purchased by the Claimants was neither implemented in the EEA, nor produced any immediate effects in the EEA, and therefore no “stand-alone” claim could be maintained. In effect, the Judge concluded that the sales alleged by the Claimant Iiyama to be affected by the cartel had an insufficient connection to the cartels that were the subject of the Commission Decision. Of critical importance was the chain of supply through which Iiyama had acquired the cartelized products, all the stages of which took place in Asia.

An even more recent decision of another judge in the English High Court, involving the Commission’s LCD Decision,¹⁸ has added a degree of nuance to the position taken in the English CRT proceedings. The chain of supply was similar to that in the CRT claim; the Defendants sold the cartelized products (LCD panels) to OEMs outside the EU, which then sold finished products to Iiyama Corporation, which then resold those products to its subsidiaries in the EU, which then sold them to dealers. The court concluded that, in light of the applicable EU case law (namely *Woodpulp*),¹⁹ the supply chain would not seem to involve any implementation of the cartel within the EU and thus be within the territorial scope of Article 101 TFEU. Thus, if the focus of the claim was that the Claimants paid an overcharge outside the EU which was passed on to the Claimants’ subsidiaries in the EU, then such claim would not seem to relate to implementation of the cartel inside the EU and be permissible. This reasoning is consistent with the finding made by the court in the *Iiyama v. Schott* CRT case. However, the court found that, to the extent that the claim alleged damage arising out of the cartel’s implementation in the EU (because the effectiveness of the cartel outside the

¹⁷ [2016] EWHC 1207 (Ch).

¹⁸ *Iiyama (UK) Ltd and other companies v. Samsung Electronics Co and other companies* [2016] EWHC 1980 (Ch).

¹⁹ Case C-89/85 *Ahlström Osakeyhtiö v. Commission*, (“*Woodpulp*”) EU:C:1988:447.



EU was dependent on the existence of the cartel implemented in the EU), the claim was sufficiently arguable not to warrant the grant of summary judgment for the Defendants.

At the time of writing, an application for leave to appeal is pending CRT proceedings, and a great deal of attention will be focused on how these similar cases will be finally determined, should they reach trial.

Private damages litigation arising out of competition law infringements is still an emerging field in Europe, by contrast to the United States where private antitrust enforcement is very well established. The adoption of the Damages Directive²⁰ is intended to facilitate “follow-on” damages actions in the EU, but for many often-recounted reasons, including the cross-border aspect of such actions in Europe, antitrust actions in the private sphere remain relatively rare. This is changing, at least as regards “follow-on” cases, and litigation in different jurisdictions based on the *CRT* Decision is likely to result in noteworthy new principles in this area of law.

VI. CONCLUSION

Despite the infringement having ended ten years ago, the *CRT* Decision continues to promote interest in both the public and private law spheres. The next chapter of the story may see important clarifications in the law on joint and several liability for minority shareholders for competition law infringements, and a number of key issues in private damages claims.

²⁰ Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1, 5.12.2014.