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# Philips & Infineon Technologies (C-98/17 & C-99/17): The Court of Justice Reminds the General Court of the Need to Exercise Full Jurisdiction over Commission Fines

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**Introduction: The Smart Card Chips Cartel, or Collusion through Bilateral Contacts**

The *Philips-Infineon* court saga before the European Courts is not over, at least not for Infineon. On September 26 2018, the Court of Justice ("CJ") set aside a 2016 judgment of the General Court ("GC") which had dismissed the company's appeal against the fine levied on it by the European Commission ("EC") in 2014 for taking part in the Smart Card Chips Cartel.[2] The EC's investigation revealed that, through bilateral contacts, competitors Philips, Infineon, Samsung, and Renesas had exchanged sensitive information relating to *inter alia* price, customers, and production capacity. The practices were considered to amount to a single and continuous infringement since, according to the EC, there were "objective grounds to assume the single anti-competitive aim of the participants in the collusive contacts and their common pattern of behavior."[3] The fines totaled €138 million, and Infineon was hit the hardest with a penalty of almost €83 million. Under the Leniency Notice,[4] Renesas obtained full immunity, while Samsung's punishment was reduced by 30 percent.

On appeal before the GC,[5] Philips and Infineon challenged both the existence of a cartel, and the amount of the fines. The GC found that a company has infringed Article 101 of the Treaty on the Functioning of the European Union ("TFEU") even if it has only exchanged information with some of the competitors involved in the collusion by means of bilateral communications. Unsurprisingly, it reiterated the well-established principle that no anti-competitive effects would need to be proven for conduct which is inherently harmful. Moreover, the evidence was sufficiently credible to uphold a finding of collusion. With regard to the amount of the fines, Infineon's higher penalty was not considered disproportionate by the GC. While a 20 percent reduction was applied as a consequence of the company's limited participation in the cartel, Infineon's turnover was much higher than that of the other companies involved. The GC acknowledged that there had been certain procedural irregularities on the part of the EC, yet there was nothing to suggest that the outcome would have been different in the absence of these. Therefore, both fining decisions were upheld.

**Findings of the Court of Justice**

In dismissing Infineon's appeal, the GC only examined some, but not all, of the contacts deemed to constitute collusion challenged by the appellant. In its judgment,[6] the CJ reminded the GC that it is under an obligation to exercise full jurisdiction over the decisions of the EC, and is therefore "bound […] to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement."[7] The number of contacts between Infineon and the competitors it exchanged information with would be one of the factors considered to determine the gravity of the infringement at the time of setting the penalty. As a consequence, the GC was not entitled "to refrain from responding to the argument" that the principle of proportionality had not been respected by not giving due consideration to this argument.[8] The case was referred to the GC for reconsideration.

At the same time, the CJ upheld the fine imposed on Philips in its entirety.[9] It held that regardless of its extent, information exchanged relating to pricing and production capacities would be sensitive from a competition law perspective, since it could be "capable of influencing directly the commercial strategy of the competitors" or "capable of affecting normal competition."[10] Moreover, it found that the GC had not exceeded the bounds of its jurisdiction by considering that each of the bilateral contacts could have amounted to a restriction of competition by object. Unlike in Infineon's appeal, here the GC assessed all of the contacts and the arguments raised by Philips with regard to each of

them, and thus "it cannot be considered that the General Court altered the constituent elements of the infringement at issue."[11] All other claims were equally dismissed, including that relating to the disproportionality of the fine, which the CJ deemed to be unproven.

**Assessment**

The decisions of the CJ leave no room for doubt that all kinds of information exchanges between competitors relating to price and output will be harshly treated. There may be little novelty in this, since cartels have been relentlessly punished (and with increasing severity) under EU competition law. Yet this was not, strictly speaking, a jointly orchestrated cartel. Instead, multiple bilateral contacts between the companies took place, which amounted to collusion. Infineon, whose involvement was limited, may have felt it was unfair to have been subjected to the largest share of the punishment. However, the Court is clear that fines are dependent upon turnover, and therefore such an outcome is indeed possible and does not jeopardize the proportionality of the resulting fines.

Despite the tough stance against collusion, the CJ is mindful of the need to ensure that the GC complies with its obligation to conduct a full, thorough review of the fines imposed by the European Commission on appeal. After all, the Court itself has insisted on the importance of "an effective regime of judicial control with full jurisdiction to review administrative decisions" in order to meet the procedural rights guarantees of the European Charter of Human Rights (ECHR),[12] and in particular of Article 6(1) ECHR, which requires "a fair and public hearing […] by an independent and impartial tribunal." The GC will likely uphold the fine, but it will have to assess all the grounds for appeal put forward by Infineon. It is under an obligation to duly take into account each and every factor that may have an impact on the gravity of the infringement and therefore on the final amount of the fine.

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[2] Commission Decision of September 3, 2014, case AT.39574 – *Smart Card Chips*, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39574/39574_2801_11.pdf.

[3] *Ibid*, para. 284.

[4] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2016) OJ C298/17.

[5] Case T-762/14, *Koninklijke Philips NV and Others v. Commission*, [2016] ECLI:EU:T:2016:738, http://curia.europa.eu/juris/document/document.jsf?text=&docid=186277&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1091570 and Case T-758/14, *Infineon Technologies AG v. Commission,* [2016] ECLI:EU:T:2016:737, http://curia.europa.eu/juris/document/document.jsf?text=&docid=186273&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1095062.

[6] Case C-99/17 P, *Infineon Technologies AG v. Commission*, [2018] ECLI:EU:C:2018:773, http://curia.europa.eu/juris/document/document.jsf?text=&docid=206116&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1244503.

[7] *Ibid*, para. 195.

[8] *Ibid*, para. 206.

[9] Case C-98/17, *Koninklijke Philips NV and Others v. Commission*, [2018] ECLI:EU:C:2018:774, http://curia.europa.eu/juris/document/document.jsf?text=&docid=206116&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1244503.

[10] *Ibid*, para. 37.

[11] *Ibid*, para. 52.

[12] Case C-212/09 P, *KME Germany AG and Others v. Commission*, [2011] ECLI:EU:C:2011:810, http://curia.europa.eu/juris/document/document.jsf?text=&docid=116121&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1097634, para. 88.