



Press and Information

Court of Justice of the European Union
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Advocate General's Opinion in Case C-17/10
Toshiba Corporation and Others

Advocate General Kokott considers that the rule prohibiting punishment twice for the same offence (*ne bis in idem*), laid down in the Charter of Fundamental Rights does not preclude that within the EU several competition authorities may proceed against one and the same cartel with respect to different territories or periods

The Czech competition authority was entitled to impose penalties under national law for the period before 1 May 2004 in respect of the anticompetitive effects in the Czech Republic of a worldwide gas insulated switchgear cartel

This case concerns an international cartel in which numerous European and Japanese undertakings divided the worldwide gas insulated switchgear (GIS¹) markets amongst themselves from 15 April 1988 until well into 2004. In 2007 both the European Commission² and the Czech competition authority imposed fines totalling many millions on the cartel members in this case. However, the Czech authority initiated proceedings after the Commission and also adopted its decision after the Commission's. In its decision the Czech authority also penalised only the effects of the cartel in the Czech Republic in the period prior to 1 May 2004, the date on which the Czech Republic acceded to the European Union; it also applied solely its national competition law on cartels.

Toshiba and numerous other cartel members brought actions against the Czech competition authority's decision before the Krajský soud v Brně (Regional Court, Brno). They claim, inter alia, that the anti-competitive consequences of the cartel in the Czech Republic before its accession to the European Union had already been penalised by the Commission's earlier decision. They argue that the separate fine imposed by the Czech authority therefore infringes the prohibition against punishing the same offence twice (*ne bis in idem* principle). The national court wishes the Court of Justice to answer the question whether the *ne bis in idem* principle precludes the application of national competition law by a national competition authority in such a case.

In her Opinion today Advocate General Juliane Kokott notes first of all that the *ne bis in idem* principle is recognised at EU level **as a general principle of law** and now enjoys the status of a fundamental right of the EU under **Article 50 of the Charter of Fundamental Rights**. In accordance with that principle, **no one may be tried or punished again in criminal proceedings for an offence for which he has already been finally acquitted or convicted within the European Union in accordance with the law.**

¹ GIS is the main component of electricity sub-stations which serve to transform high voltage electricity into lower voltage electricity and vice versa. GIS protects the transformer from overload and/or insulates the electrical circuit or defective transformer.

² By its Decision C (2006) 6762 final of 24 January 2007 the Commission imposed fines totalling €750.71 million. The undertakings fined have brought actions before the General Court seeking annulment of the Commission decision or a reduction in the fines: as regards the cases concerning the European undertakings see the judgments of the General Court of 3 March 2011 in Cases [T-110/07 Siemens AG v Commission](#), [T-117/07](#) and [T-121/07 Areva, Areva T&D Holding SA, Areva T&D SA, Areva T&D AG, and Alstom v Commission](#) and Joined Cases [T-122/07 to T-124/07 Siemens AG Österreich, VA Tech Transmission & Distribution GmbH & Co KEG, Siemens Transmission and Distribution Ltd., Siemens Transmission & Distribution SA, Nuova Magrini Galileo SpA v Commission](#), and also Press Release No [15/11](#); as to the cases concerning Japanese undertakings, see the judgments of the General Court of 12 July 2011 in Cases [T-112/07 Hitachi and Others v Commission](#), [T-113/07 Toshiba v Commission](#), [T-132/07 Fuji Electric Co Ltd v Commission](#) and [T-133/07 Mitsubishi Electric v Commission](#), and also Press Release No [70/11](#).

She considers that the issue in the present case is the meaning of *idem*, and thus the question of the criteria to be used in determining whether the undertakings concerned were prosecuted or punished again *for the same anti-competitive conduct* when the Czech competition authority imposed a fine on them. Advocate General Kokott's view is that the EU principle of *ne bis in idem* should be interpreted by **taking due account of the case law of the European Court of Human Rights in Strasbourg**. Consequently it is solely the identical nature of the facts which is relevant for determining whether there is *idem* and not the identical nature of the protected legal interest. Thus it depends on the **identical nature of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together**.

The Advocate General then examines whether in the present case the Commission decision and that of the Czech competition authority relate to **the same material acts, that is to say to identical facts or facts which are substantially the same**. She concludes that, although both decisions have as their subject matter infringements by the same international cartel, they are otherwise based on different facts.

She states in that regard, first, that in cartel offences the material acts necessarily always include **the period of time and the territory in which the cartel agreement had anti-competitive effects or could have had those effects**. In that context, the *ne bis in idem* principle prevents more than one competition authority or court from imposing penalties for the anti-competitive consequences of one and the same cartel within the EU in relation to the same territory and the same period of time. That principle does not, however, prohibit several competition authorities or courts within the EU from penalising one and the same cartel in different territories or for different periods of time.

That being the case, the Advocate General considers that the *ne bis in idem* principle cannot apply in the present case, **because the Commission decision and the Czech authority's decision do not relate to the same territories**. The Commission's decision is to be interpreted as not penalising any infringements of competition on the territory of the Czech Republic before its accession to the European Union, thus before 1 May 2004. First, the Commission refers specifically to the effects of the cartel within the EU and refers specifically to the Member States at that time. Second, the turnover of the cartel members in the EU for 2003, thus before the extension on 1 May 2004, were the basis for calculating the fines. Finally, Article 81 EC (now Article 101 TFEU), the legal basis for the Commission's decision, was not applicable on the territory of the Czech Republic before 1 May 2004.

All in all, Advocate General Kokott concludes that the Commission's decision and the decision of the Czech competition authority do not relate to the same material acts, which means that the Czech competition authority did not infringe the prohibition against punishing the same offence twice (*ne bis in idem* principle).

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355