General Court of the European Union
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Judgments in Cases T-341/18 NEC v Commission, T-342/18 Nichicon Corporation v Commission, T-343/18 Tokin v Commission, T-344/18 Rubycon and Rubycon Holdings v Commission, T-363/18 Nippon Chemi-Con Corporation v Commission

Press and Information

The General Court maintains the fines imposed by the Commission on several undertakings by reason of their participation in a cartel on the market for aluminium electrolytic capacitors and tantalum electrolytic capacitors

By decision of 21 March 2018, [1] the Commission imposed a total fine of approximately € 254 million on nine Japanese undertakings or groups of undertakings on account of their participation, during various periods between 1998 and 2012, in a cartel on the market for aluminium electrolytic capacitors and tantalum electrolytic capacitors ('the contested decision'). In the present case, those undertakings or groups of undertakings were Elna, Hitachi AIC, Holy Stone, Matsuo, Nichicon, Nippon Chemi-Con, Rubycon, Sanyo, NEC and Tokin.

Electrolytic capacitors are used in almost all electronic products, such as personal computers, tablets, telephones, air conditioners, refrigerators, washing machines, automotive products and industrial appliances.

The Commission's investigation found, in essence, that the infringement at issue covered the whole European Economic Area (EEA) and had consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the products at issue. The undertakings participated in numerous multilateral meetings and established contacts in order to exchange commercially sensitive information, inter alia regarding their future pricing, regarding their pricing intentions, and regarding future supply and demand, with the aim of coordinating their future conduct and avoiding price competition.

Certain undertakings – NEC, Nichicon, Tokin, Rubycon and Nippon Chemi-Con – brought actions before the General Court of the European Union for annulment of the contested decision or a reduction of their respective fines.

By its judgments delivered today, **the General Court rejects all the arguments put forward by the undertakings and maintains the fines imposed by the Commission.**

Undertaking	Amount (rounded) of the fine imposed by the Commission (€)	Decision of the General Court
Nec Corp.	2.60 million	Action dismissed Fine maintained
Nec Corp. and Tokin Corp.	5.04 million/jointly and severally	Action dismissed Fine maintained
Nichicon Corporation	72.90 million	Action dismissed Fine maintained
Tokin Corp.	8.81 million	Action dismissed Fine maintained
Rubycon Corp.	706 000	Action dismissed Fine maintained
Rubycon Holdings Co. Ltd and Rubycon Corp.	27.72 million/jointly and severally	Action dismissed Fine maintained

[1] Commission Decision C(2018) 1768 final of 21 March 2018 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors).

Nippon Chemi-Con Corporation	97.92 million	Action dismissed Fine maintained

In Case T-341/18, the Commission **held NEC liable** in its capacity as a parent company, holding the entirety of the capital of Tokin, for the period from 1 August 2009 to 23 April 2012. When calculating the amount of the fine, the Commission found that the basic amount of the fine should be increased on account of the aggravating circumstance of repeated infringement. NEC had already been held liable for anticompetitive conduct by the Commission's 'DRAMs decision' of 19 May 2010, which concerned an infringement committed between 1 July 1998 and 15 June 2002. [2]

The Commission found that, notwithstanding the fact that that first infringement had been penalised when the infringement found in the contested decision was ongoing, it was necessary to apply an increase in the basic amount of the fine on account of repeated infringement, and, consequently, to take into account the entire period of NEC's liability for the infringement, including a period of almost nine months preceding the adoption of the DRAMs decision.

The General Court considers that **the Commission did not err in law in finding that the fact that NEC had already been found to have committed an infringement and that, despite that finding and the penalty imposed, it had continued to participate for almost two years in another similar infringement constituted a repeat infringement.**

In **Case T-344/18,** the General Court recalls the conditions required for an undertaking to benefit from a reduction in the amount of the fine imposed on it by way of partial immunity from fines, [3] in particular the condition that the undertaking must submit evidence which makes it possible for the Commission to establish additional facts which increase either the gravity or the duration of the infringement.

In that case, the General Court confirms the Commission's conclusion that the evidence submitted by Rubycon, concerning a particular group of meetings, had had no impact on the gravity of the infringement. In essence, the General Court observes that, although that evidence shows that, during that group of meetings, the undertakings concluded price agreements, together with a monitoring mechanism to ensure that those agreements were implemented, the fact remains that those elements were not independent components of the infringement liable to have an impact on its gravity. First, those agreements formed part of the complex infringement at issue, which covered, with no need for precise characterisation, both agreements and concerted practices. Second, the monitoring mechanism was not a feature peculiar to the infringement, since monitoring activity was also carried on outside that mechanism.

In Case T-344/18, the applicants also submit that the Commission treated some of the cartel participants more favourably, inasmuch as it granted them a 3% reduction in the basic amount of the fine on the ground that their participation in certain meetings was not established, whereas it did not grant an equivalent reduction to Rubycon on the ground that the latter revealed the existence of some of those meetings.

According to the General Court, that argument is based on an incorrect comparison of the concept of 'partial immunity from fines', as provided for in the 2006 Leniency Notice, [4] and the mitigating circumstances which must be taken into account by the Commission, such as those set out in the 2006 Guidelines, [5] since the two situations are not comparable, either from a factual or from a legal point of view.

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[2] Commission Decision C(2011) 180/09 final of 19 May 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38.511 – DRAMs).

[3] Point 26, third paragraph, of the Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8 December 2006.

[4] Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8 December 2006.

[5] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU].

In Cases T-342/18 and T-363/18, the applicants contested **the Commission's territorial jurisdiction** on the ground that the anticompetitive conduct was Asia-oriented and was not implemented in the EEA; nor did it have a significant effect there.

The General Court recalls that the conditions for the territorial application of Article 101 TFEU are satisfied in two situations: in the first place, where the practices covered by that article are implemented in the territory of the internal market, irrespective of the place where they were formed, the criterion of the implementation of the cartel being satisfied by, inter alia, mere sale within the European Union of the product that is the subject of the cartel, irrespective of the location of the sources of supply and the production plants, and, in the second place, where it is foreseeable that those practices will have an immediate and substantial effect in the internal market. In the present case, the cartel participants exchanged, inter alia, information concerning customers with their headquarters in the EEA or customers with manufacturing plants in the EEA and also coordinated their commercial policy, depending on fluctuations in currency exchange rates, including the euro. Accordingly, **although the cartel participants were undertakings with their headquarters in Japan and the anticompetitive contacts took place in Japan, those contacts had a global reach, so that they included the EEA.**

The General Court concludes that **the criterion of the implementation of the cartel as a factor linking it to EU territory is satisfied in the present case and that the Commission was fully entitled to find that it had jurisdiction.**

In Case T-342/18, the applicant submits that, in view of the fact that the cartel participants had already been given fines in non-member countries, the Commission has infringed the principle *ne bis in idem* and the principle of proportionality by imposing additional fines.

The General Court considers that the principle ***ne bis in idem*** cannot apply in circumstances such as those of this case, where the proceedings conducted and penalties imposed by the Commission, on the one hand, and by the authorities of non-member States, on the other, do not pursue the same objectives. Whereas, in the former scenario, it is a question of preserving undistorted competition in the EEA, the protection sought, in the latter scenario, concerns the market of the non-member country. **The condition of unity of the legal interest protected, which is necessary for the application of the principle *ne bis in idem*, is therefore lacking.**

As regards an **alleged infringement of the principle of proportionality**, the General Court observes that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of EU competition law. Accordingly, although it cannot be ruled out that **the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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