

European Court finds that Asian companies have been unfairly treated

Author: Marjorie C. Holmes, Partner, London
Author: Edward S. Miller, Partner, London
Author: Katherine Holmes, Consultant, London
Author: Angela Gregson, Associate, London
Author: Sophie Hay, Trainee, London

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There has been a perception that Asian companies have received unfair treatment at the hands of the European Commission over the years. Three recent appeal cases brought by Mitsubishi Electric Corp. ("Mitsubishi"), Toshiba Corp. ("Toshiba") and Fuji Electric Co., Ltd. ("Fuji") appear to confirm this as fact. However, the wrong caused by the European Commission's unequal or unfair treatment of Mitsubishi, Toshiba and Fuji was fully rectified on appeal when the European General Court (the "Court") completely removed (and in Fuji's case reduced) the unfairly inflated fines that the European Commission had imposed on the three companies.

In 2007 the European Commission (the "Commission") imposed fines of €750.71 million on twenty European and Japanese companies for their participation in a cartel on the market for gas insulated switchgear.

Nine companies brought appeals against the Commission's decision. On 12 July 2011, the Court handed down judgments in appeals brought by the Japanese companies, Mitsubishi, Toshiba, Fuji and Hitachi Ltd. In the appeal cases brought by Mitsubishi and Toshiba respectively, the Court found that, by using a different basis for calculating the level of fine to that used in respect of the European producers, the European Commission had breached the principle of equal treatment.

Mitsubishi - Case T-133/07

Mitsubishi appealed against the Commission's decision that it had been a party to the cartel, and the fine of €118,575,000 imposed by the Commission. The court rejected the arguments raised by Mitsubishi in relation to its participation in the cartel, but removed the fine because it found that the Commission had breached the principle of equal treatment in setting the level of the fine.

In setting the level of fines, the principle of equal treatment requires that comparable situations are not treated differently unless objectively justified. Where reliance is placed on the turnover of undertakings involved in the same infringement, the period to be taken into account must be ascertained in such a way as to mean the turnovers are as comparable as possible.

Mitsubishi argued that, by using its 2001 turnover for gas insulated switchgear as the basis for the fines imposed on it, while using 2003 turnover as the basis for the fines imposed on the European producers, the Commission infringed the principle of equal treatment without any objective justification for treating the producers differently.

The Court agreed with Mitsubishi that the Commission had not treated Mitsubishi and the European producers equally in terms of its choice of reference year and there was no objective justification for this. As such, the Commission had infringed the principle of equal treatment; and that infringement directly invalidated the calculation of the fine imposed on Mitsubishi. The Court, therefore, removed the fine imposed on Mitsubishi by the Commission's decision.

Toshiba - Case T-113/07

Toshiba, likewise, appealed against the decision finding that it had been a party to the cartel, and the fine of €90 million imposed by the Commission.

As in the appeal by Mitsubishi, the Court upheld the Commission's findings in relation to the infringement, but removed the fine because of the Commission's unequal treatment, again in using Toshiba's 2001 turnover as a basis for the fine imposed but using 2003 turnover for calculating the fines levied on the European producers.

Fuji Electric Co., Ltd. - Case T-132/07

In Fuji's appeal, the Court reduced the level of fine from €2.4 million to €2.2 million, since the company had provided essential information relating to the cartel to the Commission and this should have been taken into account under the leniency provisions when the Commission set the level of fine.

It is very important to the reputation of European competition authorities that they are viewed as being even handed. The European General Court has performed an important function in this case, of ensuring equal treatment. Non-European companies should be reassured by this decision, and hopefully the Commission will be vigilant to prevent this unfortunate situation from reoccurring.

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