

Form of order sought

The appellant claims that the Court should:

- Set aside the judgment insofar as it dismisses Melco's application before the General Court,
- Annul those articles of the decision which have not already been annulled by the judgment, to the extent that they apply to Melco and to TMT&D for the period for which Melco shares joint and several liability with Toshiba for the activities of TMT&D,
- In any event, order that the Commission pays its own costs and Melco's costs in connection with these proceedings and those before the General Court.

Pleas in law and main arguments

The appellant submits that the General Court has made significant legal errors in assessing the evidence regarding the existence of the alleged 'common understanding':

- The General Court distorts the information in relation to the existence of the 'common understanding'.
- The General Court has failed to apply the correct standard for review of evidence and misapplied the case law principle that statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable.
- The General Court has misapplied the case law on standard and weighting of evidence in concluding that Mr. M's statement is credible and of probative value.
- The General Court misapplies the law on corroboration to Fuji's reply to the Statement of Objections.
- The General Court has failed to consider the overall effect of the individual breaches by the Commission of Melco's rights of defence and right to a fair hearing.
- The General Court has breached Melco's rights of defence, in particular the presumption of innocence, by requiring Melco to prove a negative to show that it did not commit an infringement.
- The General Court has breached the presumption of innocence and misapplied legal principles by refusing to consider the alternative plausible explanation.

The appellant also submits that the General Court has made serious legal errors in assessing the purported duration of the alleged infringement:

- The General Court has failed to prove the purported duration of the alleged infringement to the requisite legal standard.

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Reference for a preliminary ruling from the Giudice di Pace di Mercato San Severino (Italy) lodged on 26 September 2011 — *Ciro Di Donna v Società imballaggi metallici Salerno Srl (SIMSA)*

(Case C-492/11)

(2011/C 347/25)

Language of the case: Italian

Referring court

Giudice di Pace di Mercato San Severino

Parties to the main proceedings

Applicant: *Ciro Di Donna*

Defendant: *Società Imballaggi Metallici Salerno Srl (SIMSA)*

Questions referred

Do Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000, as adopted at Strasbourg on 12 December 2007, Directive 2008/52/EC⁽¹⁾ of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, the general European Union law principle of effective judicial protection and, in general, European Union law as a whole prevent the introduction in a Member State of the European Union of a set of rules such as that established in Italy by Legislative Decree No 28/2010 and Ministerial Decree No 180/2010, as amended by Ministerial Decree No 145/2011, under which:

- a court hearing subsequent legal proceedings may infer evidence against a party who, without valid reason, has failed to participate in compulsory mediation;
- where legal proceedings brought after the rejection of a settlement proposal are concluded by a judgment in precisely the same terms as those of the rejected proposal, the court must disallow recovery of the costs sustained by a successful party who rejected the settlement proposal in respect of the period following the making of the proposal and must order that party to pay the costs of the unsuccessful party in respect of the same period and to make a further payment to the state treasury in the same amount as that already paid in respect of fees (*contributo unificato*) (*lump sum payment in respect of court fees relating to the case payable on instituting proceedings*);

- where there are serious and exceptional reasons, a court may disallow recovery of the costs incurred by the successful party in respect of the remuneration paid to the mediator and the fees of any expert, even where the judgment concluding legal proceedings is not in exactly the same terms as those of the settlement proposal;
- the court must order any party who has failed without valid reason to participate in mediation to pay to the state treasury a sum equal to the *contributo unificato* payable in respect of the proceedings;
- the mediator may, or must, make a proposal for conciliation even in the absence of any agreement between the parties and even where the parties fail to participate in mediation;
- the period within which the attempt at mediation must be completed may be up to four months;
- an action may be proceeded with, even after expiry of the period of four months from the commencement of the mediation procedure, only after a report confirming that no agreement has been reached has been obtained from the secretariat of the mediation body concerned, drafted by the mediator and setting out the proposal that has been rejected;
- there may be more than one attempt at mediation — and the period allowed for resolving the dispute will be multiplied accordingly — whenever a new application is legitimately made in the course of legal proceedings that have, in the meantime, been instituted;
- the costs of compulsory mediation are at least twice those of the legal proceedings that mediation is designed to avoid, a disparity which increases exponentially as the amount involved in the case increases (to such an extent that the costs of mediation may reach more than six times those of legal proceedings) and the complexity of the case increases (such as to require the appointment of an expert, paid by the parties to the mediation, to assist the mediator in disputes that call for specific technical knowledge, even though any technical report prepared by the expert and the information he has obtained may not be used in any subsequent legal proceedings)?

Appeal brought on 23 September 2011 by United Technologies Corp. against the judgment of the General Court (Eighth Chamber) delivered on 13 July 2011 in Case T-141/07: United Technologies Corp. v European Commission

(Case C-493/11 P)

(2011/C 347/26)

Language of the case: English

Parties

Appellant: United Technologies Corp. (represented by: A. Winckler, avocat, J. Temple Lang, solicitor, C.J. Cook, advocate, D. Gerard, avocat)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

- set aside the Judgment,
- based on the elements available to it, partially annul the Decision and reduce the amount of the fines set forth therein or, as it finds it appropriate, set aside the Judgment and remand the case to the General Court for reconsideration of the relevant elements of facts;
- order the Commission to pay the costs of these proceedings and of the proceedings before the General Court.

Pleas in law and main arguments

By its first plea, the Appellant disputes the General Court's conclusion that the Commission was entitled to impute liability to UTC for the conduct of GTO and the Otis subsidiaries. The plea is divided into three limbs. First, the General Court committed an error of substantive law by failing to comply with the legal test provided for the rebuttal of the presumption of imputability arising from 100 % ownership of subsidiaries by a parent company. Second, the General Court's interpretation of the legal test for the rebuttal of the presumption of imputability violates the Charter of Fundamental Rights of the European Union. Third, the General Court failed to provide adequate reasoning in addressing the specific rebuttals of the presumption of imputability raised by UTC.

By its second plea, the Appellant claims that the General Court failed to provide adequate reasoning and committed an error of law by omitting to address UTC's claim of breach of equal treatment with MEC.

(¹) OJ L 136, p. 3.