Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

20 January 2016*

(Appeal — Competition — Agreements, decisions and concerted practices — Article 101(1) TFEU — Power transformers market — Oral market-sharing agreement ('Gentlemen's Agreement') — Restriction of competition 'by object' — Barriers to entry — Presumption of participation in an unlawful cartel — Fines — Guidelines on the method of setting fines (2006) — Point 18)

In Case C-373/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 31 July 2014,

Toshiba Corporation, established in Tokyo (Japan), represented by J. MacLennan, Solicitor, A. Schulz, Rechtsanwalt, and by J. Jourdan and P. Berghe, avocats,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Ronkes Agerbeek, J. Norris-Usher and K. Mojzesowicz, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça (Rapporteur), A. Arabadjiev, C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 April 2015,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2015,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Toshiba Corporation ('Toshiba') asks the Court to set aside the judgment of the General Court of the European Union of 21 May 2014 in *Toshiba* v *Commission* (T-519/09, EU:T:2014:263, 'the judgment under appeal'), whereby the General Court dismissed its action for annulment of Decision C(2009) 7601 final of the European Commission of 7 October 2009 relating to a proceeding under Article 81 EC (Case COMP/39.129 — Power Transformers) ('the decision at issue').

Legal context

2 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 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) reads as follows:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 [EC] or Article 82 [EC] …

…'

3 Point 4 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') provides:

'… Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 [EC] and 82 [EC] (general deterrence).'

4 Point 13 of the 2006 Guidelines provides:

'In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the [European Economic Area (EEA)]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement ...'

5 Point 18 of the 2006 Guidelines states the following:

'Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.'

Background to the dispute and the decision at issue

6 The present case relates to the sector for power transformers, auto transformers and shunt reactors with a voltage range of 380 kV and above. A power transformer is a major electrical component whose function is to reduce or increase the voltage in an electrical circuit.

7 Toshiba is a Japanese company active essentially in three sectors: digital products, electronic devices and components and infrastructure systems.

8 It is necessary to distinguish two phases of that company's activities, in the power transformers sector, during the period taken into account by the Commission for the purposes of its investigation, namely the period from 9 June 1999 until 15 May 2003. First, between 9 June 1999 and 30 September 2002, Toshiba was active in that sector through its subsidiary, Power System Co. Second, from 1 October 2002, Toshiba's activity was carried out through TM T&D, a joint venture between Toshiba and Mitsubishi Electric in which those two undertakings combined their power transformer production.

9 On 30 September 2008, the Commission decided to initiate proceedings in relation to the power transformers market. The statement of objections was adopted on 20 November 2008. Toshiba responded to it on 19 January 2009. The hearing took place on 17 February 2009.

10 By the decision at issue, the Commission found that Toshiba had participated, from 9 June 1999 to 15 May 2003, in an unlawful cartel covering the entire EEA and Japan. That cartel consisted of an oral agreement between European producers of power transformers and Japanese producers to respect the markets in the territories of each of those two groups of producers of transformers and to refrain from selling in those markets ('the Gentlemen's Agreement').

11 The Commission characterised the Gentlemen's Agreement as a 'restriction of competition by object'. In recitals 165 to 169 to the decision at issue, the Commission examined, and rejected, the argument, put forward by certain undertakings covered by the proceedings at issue, that the cartel had no impact on competition, as the Japanese and European producers were not competitors owing to insurmountable barriers to entry to the EEA market.

12 As regards the organisation set up by the Gentlemen's Agreement, the Commission found that each group of producers had to nominate a secretary undertaking. It also found that the market-sharing agreement was supplemented by an agreement to notify the secretary of each group of any enquiries from the territory of the other group, so that they could be reallocated.

13 Furthermore, the Commission found that, during the relevant period, namely from 9 June 1999 to 15 May 2003, the undertakings met once or twice a year. Those meetings took place in Malaga (Spain) from 9 to 11 June 1999, in Singapore on 29 May 2000, in Barcelona (Spain) from 29 October to 1 November 2000, in Lisbon (Portugal) on 29 and 30 May 2001, in Tokyo on 18 and 19 February 2002, in Vienna (Austria) on 26 and 27 September 2002 ('the Vienna meeting') and in Zurich (Switzerland) on 15 and 16 May 2003 ('the Zurich meeting'). According to the Commission, those meetings were used in particular to confirm the Gentlemen's Agreement.

14 In the light of all of those considerations, the Commission found that Toshiba had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) and therefore imposed on it a fine of EUR 13.2 million. TM T&D and Mitsubishi Electric were not the subject of the decision at issue.

The proceedings before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 23 December 2009, Toshiba brought an action for annulment of the decision at issue, relying on four pleas in law.

16 Having rejected all those pleas in law, the General Court declared the action unfounded in its entirety.

Form of order sought by the parties before the Court of Justice

17 Toshiba claims that the Court should:

— principally, set aside the judgment under appeal and annul the decision at issue;

— in the alternative, refer the case back to the General Court; and

— order the Commission to pay the costs both at first instance and on appeal.

18 The Commission contends that the Court should:

— dismiss the appeal; and

— order Toshiba to pay the costs of the proceedings.

The appeal

The first ground of appeal

Arguments of the parties

19 By its first ground of appeal, concerning paragraphs 230 and 231 of the judgment under appeal, Toshiba maintains that the General Court erred in law in characterising the Gentlemen's Agreement as a 'restriction of competition by object', relying in that regard on the potential competitive relationship between the Japanese and European producers. However, since the parties to the cartel were not potential competitors, the General Court could not have established the existence of a restriction of competition by object. According to Toshiba, the General Court wrongly inferred the existence of such a potential competitive relationship, first, from the absence of insurmountable barriers to entry to the EEA market and, secondly, from the actual existence of the Gentlemen's Agreement.

20 As regards an absence of insurmountable barriers to entry to the EEA market, Toshiba claims that that criterion is inappropriate for establishing the existence of a potential competitive relationship between the Japanese and European producers. To that end, the General Court ought to have established, in the present case, that the Japanese producers had real and specific possibilities of entering the EEA market and that such entry constituted an economically viable strategy for them. However, in the present case, the characteristics and functioning of the power transformers market make any entry to the EEA market economically unviable.

21 In respect of the Gentlemen's Agreement, Toshiba submits that, by relying on its existence as evidence of potential competition between the Japanese and European producers, the General Court established an irrebuttable presumption that, if two undertakings conclude any kind of agreement, they are automatically regarded as potential competitors, thereby relieving the Commission of the associated burden of proof.

22 The Commission submits that the appellant's arguments must be rejected as unfounded.

Findings of the Court

23 In paragraph 228 of the judgment under appeal, the General Court found that the Commission rightly held that, as a market-sharing agreement, an agreement such as the Gentlemen's Agreement had to be classified as a 'restriction by object'.

24 In that regard, it should be noted that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement must have as its 'object or effect' the prevention, restriction or distortion of competition within the internal market. According to the settled case-law of the Court of Justice since the judgment in *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', means that it is first necessary to consider the precise object of the agreement (judgment in *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 30).

25 Thus, where the anticompetitive object of the agreement is established, it is not necessary to examine its effects on competition (see, to that effect, judgments in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 28 and 30, and *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55).

26 With regard to the classification of a practice as a restriction by object, it is clear from the case-law of the Court that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that there is no need to examine their effects (judgment in *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 31). That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50).

27 The Court's case-law has also established that, in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a 'restriction of competition by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part (judgment in *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 33).

28 Thus, the Court has already held that market-sharing agreements constitute particularly serious breaches of the competition rules (see, to that effect, judgments in *Solvay Solexis* v *Commission*, C-449/11 P, EU:C:2013:802, paragraph 82, and *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 26). The Court has also held that agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned (judgment in *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 218).

29 In respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.

30 In the present case, Toshiba maintains that the General Court erred in law in characterising the Gentlemen's Agreement as a 'restriction of competition by object', without ascertaining beforehand whether any entry to the EEA market represented an economically viable strategy for Japanese producers.

31 In that regard, it should be observed that the General Court examined Toshiba's argument that the Gentlemen's Agreement was not capable of restricting competition within the EEA due to the fact that the European and Japanese producers were not competitors on the European market. It is in that context that the General Court found, first, in paragraph 230 of the judgment under appeal, that, since Article 101 TFEU also concerns potential competition, the Gentlemen's Agreement was capable of restricting competition, unless insurmountable barriers to entry to the European market existed that ruled out any potential competition from Japanese producers.

32 Secondly, in paragraphs 232 and 233 of the judgment under appeal, the General Court held that those barriers could not be classified as insurmountable, which was shown by the fact that Hitachi had accepted projects coming from customers situated in Europe.

33 The General Court also held, in paragraph 231 of the judgment under appeal, that the Gentlemen's Agreement represented a 'strong indication that a competitive relationship existed' between the two categories of producers, which, as the Advocate General observes in point 100 of his Opinion, constitutes an element of the relevant economic and legal context.

34 The analysis which the General Court thus carried out is in accordance with the criteria set out in paragraphs 24 to 29 of this judgment in order to establish an infringement of Article 101(1) TFEU as a restriction by object, without a more detailed analysis of the relevant economic and legal context being necessary.

35 In any event, it must be held that, in so far as Toshiba claims that the General Court erred in finding that the barriers to entry to the European market were not insurmountable and that, consequently, there was potential competition between European and Japanese producers on that market, such arguments criticise the General Court's assessment of the facts, which, in the absence of a clear distortion of the facts, and subject to the analysis to be carried out within the context of the second ground of appeal of this judgment, is not subject to review by the Court of Justice on appeal.

36 Toshiba's first ground of appeal must therefore be dismissed.

The second ground of appeal

Arguments of the parties

37 By its second ground of appeal, directed against the findings of the General Court set out in paragraph 233 of the judgment under appeal, Toshiba claims that the General Court misinterpreted the content of the Hitachi letter. According to Toshiba, although Hitachi merely produced a general statement by which it was no longer disputing the existence of the Gentlemen's Agreement, the General Court inferred from this that Hitachi acknowledged having accepted three projects coming from European customers for its transformers.

38 Without such a distortion of the meaning of the Hitachi letter, the General Court could not have concluded that the barriers to entry to the EEA market were not insurmountable, with the result that, in the present case, an infringement of Article 101(1) TFEU could not have been established.

39 The Commission contends that the Court of Justice should reject that ground of appeal.

Findings of the Court

40 It should be observed that, according to the settled case-law of the Court of Justice, the General Court has exclusive jurisdiction to find and assess the facts and, in principle, to examine the evidence it accepts in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice.

41 In order to be considered unlawful by the Court of Justice, such distortion must be obvious from the documents in the case, without it being necessary to undertake a fresh assessment of the facts and evidence.

42 As the Advocate General observed in point 108 of his Opinion, it is not apparent on examining the Hitachi letter that the General Court distorted the relevant facts which emerge from it.

43 By its letter, Hitachi does not merely withdraw any challenge concerning the existence of the Gentlemen's Agreement, as Toshiba claims. On the contrary, it follows from the wording of the Hitachi letter that Hitachi accepted 'the [Commission's] findings as to the existence and the scope of the Gentlemen's Agreement as set out in the statement of objections'. As the Advocate General observed in point 108 of his Opinion, the question of Hitachi's acceptance of three projects in the EEA had in fact already been raised in the statement of objections.

44 It follows that the General Court's interpretation in paragraph 233 of the judgment under appeal in no way stems from a clear distortion of the Hitachi letter.

45 In any event, even if the General Court had distorted the content of the Hitachi letter, that would not be capable of calling into question the conclusion that the Commission demonstrated to the requisite legal standard that the barriers to entry to the European market were not insurmountable.

46 That conclusion is not based exclusively on the Hitachi statements mentioned in paragraph 37 of this judgment, but also on other evidence. Thus, the General Court stated, in paragraph 225 of the judgment under appeal, that the Commission set out, in paragraph 168 of the decision at issue, the reasons why the barriers to entry to the market were not insurmountable, namely that the Korean undertaking Hyundai had recently entered the European market, and that the Japanese producers had recorded considerable sales in the United States, the undertakings concerned not having produced any evidence showing that the barriers to entry to the US market were very different to the barriers to entry to the European market. Those findings have not been challenged by the appellant in the context of the present appeal.

47 Moreover, in paragraph 231 of the judgment under appeal, the General Court held that the very existence of the Gentlemen's Agreement constituted an argument which seriously calls into question the plausibility of the appellant's argument that the barriers to entry to the European market were insurmountable. As the General Court correctly noted in the same paragraph, it is unlikely that the Japanese and European producers would have entered into a market-sharing agreement if they had not considered themselves to be at least potential competitors.

48 In the light of the foregoing, the second ground of appeal must be dismissed.

The third ground of appeal

Arguments of the parties

49 The third ground of appeal comprises three parts. By the first part, Toshiba claims that the judgment under appeal is based on contradictory reasoning so far as concerns the analysis of its participation in the cartel and that the General Court distorted the evidence which it used in that context, namely the minutes of the Vienna meeting, the internal memorandum from Mr M., belonging to the company Fuji, and the explanatory note on that meeting drawn up by Fuji (together 'the documents at issue'). According to Toshiba, although, in paragraph 208 of the judgment under appeal, the General Court rightly stated that, at the Vienna meeting, the appellant had withdrawn from taking part in future meetings following the creation of TM T&D, it nevertheless held, in paragraphs 209 and 211 of that judgment, that Toshiba's participation in the Gentlemen's Agreement remained doubtful, being dependent on whether TM T&D would be part of it. Toshiba submits that the General Court therefore contradicted itself in so far as the only element which remained unresolved after the Vienna meeting was not the participation of Toshiba as an individual undertaking, but the participation of TM T&D in future meetings and in the Gentlemen's Agreement.

50 The second part, concerning in essence the considerations set out in paragraphs 213, 218 and 220 of the judgment under appeal, alleges an incorrect application by the General Court of the 'public distancing' test, in so far as that court relied on the fact that the Gentlemen's Agreement was confirmed at the Vienna meeting in excluding any possibility that Toshiba had publicly distanced itself from that agreement at that meeting. According to Toshiba, on the contrary, Toshiba's withdrawal from the cartel as from the Vienna meeting should have been inferred by the General Court from the fact that Toshiba did not take part in the Zurich meeting.

51 By the third part, Toshiba complains that the General Court infringed the principle of personal responsibility, since that court held that the appellant had continued to participate in the cartel even after the creation of TM T&D, although Toshiba exited the relevant market after the creation of TM T&D. In that regard, Toshiba contests in particular the General Court's findings in paragraphs 218 to 221 of the judgment under appeal, in so far as that court erred in holding, in essence, that the appellant's participation in the infringement until the Zurich meeting followed from the fact that it had '[given] the impression to the other participants that it or TM T&D still participated in the Gentlemen's Agreement', without actually checking Toshiba's presence at that meeting.

52 The Commission submits that this ground of appeal must be dismissed.

Findings of the Court

– The first part of the third ground of appeal

53 As regards, in the first place, the complaint raised by Toshiba in connection with the first part of the third ground of appeal and alleging a contradiction in the grounds, it must be held that that complaint is based on a misreading of the judgment under appeal.

54 It is true that, in paragraph 208 of the judgment under appeal, the General Court accepted, on the basis of the documents at issue, that the individual participation of Toshiba in the Gentlemen's Agreement after the Vienna meeting had still to be decided, because of the creation of TM T&D. In paragraph 209 of that judgment, the General Court found, in that respect, that the documents at issue allowed the inference to be made that, following the Vienna meeting, there were 'doubts concerning

the [appellant]'s future participation in the Gentlemen's Agreement and concerning the continuation of the Gentlemen's Agreement and ... that a future meeting was to take place, during which that question was to be discussed'.

55 However, as is apparent from paragraph 208 of the judgment under appeal, the undertakings participating in the cartel were of the view that there was no longer an interest in continuing the Gentlemen's Agreement without the participation of Toshiba. Moreover, in paragraph 211 of the judgment under appeal, the General Court found that the Gentlemen's Agreement and the rules requiring notification of the projects falling within that cartel were confirmed by the participants in the Vienna meeting.

56 It follows from the above that the General Court did not contradict itself when it held essentially, in paragraph 213 of the judgment under appeal, that it could not be inferred from the documents at issue that Toshiba's intention to distance itself from the Gentlemen's Agreement was established as of the Vienna meeting and clearly understood by the other participants in that meeting, especially as it was also apparent from those documents that the continuation of the cartel would have been of no interest, given the importance attached by the parties to Toshiba's participation in that cartel. Consequently, the first part of the third ground of appeal must be dismissed in so far as it alleges a contradiction in the grounds.

57 As regards, in the second place, the argument relating to a distortion by the General Court of the scope of the documents at issue, it does not in any way follow from those documents that Toshiba left the Gentlemen's Agreement as from the Vienna meeting. As the Advocate General noted in points 119 to 121 of his Opinion, it is apparent from the internal memorandum concerning the Vienna meeting, from Mr M., belonging to the company Fuji, that Toshiba's participation in meetings after the creation of TM T&D had still to be decided. It is true that according to the explanatory note drawn up by Fuji regarding that meeting 'the possibility of Toshiba attending the meetings after TM T&D had been established (while Mitsubishi does not attend) was denied by Toshiba'. However, that note also states that, 'since Mitsubishi was no longer participating in these meetings …, a decision had to be made whether TM T&D would be allowed to attend the meetings.

58 Moreover, it is clear from the minutes of the Vienna meeting that the issue of Toshiba's participation in the future meetings was to be decided 'relatively soon' and that that issue was to constitute the main topic at the following meeting. Accordingly, it cannot be held that the General Court distorted the evidence available to it.

59 Therefore, it cannot be held that the General Court's grounds are vitiated by contradiction or that the General Court distorted the evidence available to it. Having regard to the foregoing, the first part of the third ground of appeal must be rejected.

– The second part of the third ground of appeal

60 By the second part in support of its third ground of appeal, Toshiba essentially complains that the General Court did not conclude that it distanced itself from the Gentlemen's Agreement at the Vienna meeting, notwithstanding the statements which it had made at that meeting and the fact that that company had not participated in the Zurich meeting.

61 In that regard, it should be borne in mind that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anticompetitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anticompetitive intention by demonstrating that it had indicated to its competitors that it was

participating in those meetings in a spirit that was different from theirs (judgment in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 81).

62 In order to assess whether an undertaking has actually distanced itself, it is indeed the understanding which the other participants in a cartel have of that undertaking's intention which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement (judgment in *Archer Daniels Midland* v *Commission*, C-510/06 P, EU:C:2009:166, paragraph 120).

63 In that context, it should be noted that the concept of 'public distancing' reflects a factual situation, the existence of which is found by the General Court, on a case-by-case basis, taking account of a number of coincidences and indicia submitted to it and accordingly an overall assessment of all the relevant evidence and indicia. Provided that that evidence has been properly obtained and that the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, to that effect, judgment in *Comap* v *Commission*, C-290/11 P, EU:C:2012:271, paragraph 71).

64 In the present case, it must be stated that, in paragraph 208 of the judgment under appeal, the General Court accepted, first of all, on the basis of an analysis of the documents at issue, that there were doubts concerning Toshiba's participation in the infringement after the Vienna meeting and that the parties to the cartel had no interest in continuing the Gentlemen's Agreement without the participation of the appellant.

65 Next, in paragraph 209 of the judgment under appeal, the General Court inferred from the documents at issue that the question of Toshiba's future participation in the cartel and the continuation of that cartel was to be discussed during a future meeting.

66 Lastly, in paragraph 211 of the judgment under appeal, the General Court stated that it was apparent from the documents at issue that the undertakings participating in the Vienna meeting, including Toshiba, had confirmed the Gentlemen's Agreement and the rules requiring notification of the projects falling within that cartel.

67 On the basis of its assessment of the evidence, and as has already been noted in paragraph 56 of this judgment, the General Court therefore concluded, in paragraph 213 of the judgment under appeal, that Toshiba had not distanced itself once and for all from the cartel during the Vienna meeting, taking into account, in particular, the confirmation of the rules on the notification of the projects laid down by the Gentlemen's Agreement.

68 Therefore, it must be held that, by the second part of the third ground of appeal, Toshiba is attempting, in essence, to invite the Court of Justice to substitute its own assessment of the evidence for that of the General Court in the judgment under appeal.

69 Consequently, and since, as has been noted in paragraph 58 of this judgment, the examination of the documents at issue does not reveal any clear distortion, the second part of the third ground of appeal must be dismissed.

– The third part of the third ground of appeal

70 By the third part of the third ground of appeal, Toshiba claims, in essence, that, by concluding that it participated in the Gentlemen's Agreement during the period from the Vienna meeting to the Zurich meeting, without determining whether the appellant had actually participated in that meeting, the General Court infringed the principle of personal responsibility.

71 In that regard, it should be borne in mind that an undertaking's participation in a meeting having an anticompetitive object creates a presumption of the illegality of its participation, which that undertaking must rebut through evidence of public distancing, which must be perceived as such by the other parties to the cartel (judgment in *Total Marketing Services* v *Commission*, C-634/13 P, EU:C:2015:614, paragraph 21).

72 In the present case, it should be observed that, in paragraph 218 of the judgment under appeal, the General Court found that the appellant's complaints seeking to establish its non-participation in the cartel until the Zurich meeting were ineffective.

73 In reaching that conclusion, the General Court relied, referring to its assessment contained in paragraphs 205 to 214 of the judgment under appeal, on the fact that Toshiba had not distanced itself from the cartel at the Vienna meeting and that, during the Vienna meeting, the participants had agreed to discuss at the following meeting — that is the Zurich meeting of 15 and 16 May 2003 — Toshiba's future participation in the Gentlemen's Agreement.

74 That finding is decisive because, as is apparent from paragraph 66 of the present judgment, at the Vienna meeting, the participants in that meeting, including Toshiba, confirmed the Gentlemen's Agreement and the rules requiring notification of the projects falling within that cartel.

75 In those circumstances, it must be held that the General Court did not err in law in finding that the appellant's participation in the Zurich meeting was irrelevant for the purposes of concluding that its participation in the cartel continued until the Zurich meeting.

76 Consequently, the third part of the third ground of appeal must be dismissed.

77 Therefore, the third ground of appeal must be dismissed in its entirety.

The fourth ground of appeal

Arguments of the parties

78 By its fourth ground of appeal, concerning the determination of the basic amount of the fine, Toshiba argues that the General Court did not correctly apply point 18 of the 2006 Guidelines, in particular as regards the concept of 'relevant geographic area (wider than the EEA)'. Although the cartel concerned only the territories of the EEA and of Japan, the General Court took into account, in order to adequately reflect the parties' weight in the infringement, the worldwide market shares of the power transformer producers. By contrast, since the purpose of the unlawful cartel was to protect the markets of the EEA and of Japan, Toshiba essentially submits that the General Court ought to have taken into account only the market shares in those territories in order to calculate the basic amount of the fine.

79 Toshiba claims that, contrary to the considerations set out by the General Court in paragraph 276 of the judgment under appeal, the taking into account of the market shares at worldwide level would have been justified only in the absence of barriers to entry to the EEA market. In the presence of such barriers, which is the case here, the Japanese producers could not achieve in that territory market shares equivalent to those held at worldwide level.

80 Toshiba also submits that, since each geographic market has its own specificities, the General Court erred in finding, in paragraph 288 of the judgment under appeal, that the method adopted was such as to take into account 'possible barriers to entry that may exist in the various geographic segments of the worldwide market'.

81 The Commission contends that this ground of appeal should be dismissed.

Findings of the Court

82 By its fourth ground of appeal, Toshiba essentially alleges an erroneous interpretation of point 18 of the 2006 Guidelines, in so far as the General Court confirmed the Commission's analysis that, in the present case, the 'relevant geographic area (wider than the EEA)' provided for by that provision could extend not only to the territories of the EEA and of Japan, but also to the whole world.

83 It should be observed, in the first place, that the Commission adopted the 2006 Guidelines, in connection with the application of fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, in order to ensure the transparency and impartiality of its decisions. That provision is designed, inter alia, to ensure that the fine has sufficient deterrent effect, which justifies the taking into consideration of the economic power of the undertaking concerned (judgment in *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 142). It is the intention to ensure that the fine has sufficient deterrent effect, reiterated in point 4 of the 2006 Guidelines, which justifies the taking into account of the financial capacity of the undertaking concerned (see, to that effect, judgments in *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 85, and *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 143).

84 Accordingly, the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 1/2003, the intended consequences for the undertaking in question, taking into account the turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed (see judgment in *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 144).

85 In the second place, it should be recalled that point 13 of the 2006 Guidelines, concerning infringements whose geographic scope does not extend beyond that of the EEA, provides that the value of sales to be used in determining the basic amount of the fine to be imposed is the value of the undertaking's sales of goods or services to which the infringement relates. That point pursues the objective of adopting as the starting point for the calculation of the fine to be imposed on an undertaking an amount which reflects the economic importance of the infringement and the size of the undertaking's contribution to it (see, to that effect, judgment in *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 148).

86 Similarly, where it derogates from the delimitation of the geographic sector in point 13 of the 2006 Guidelines, point 18 of those Guidelines pursues the objective of reflecting in the most appropriate way possible the weight and economic power of the undertaking at issue in the infringement, in order to ensure that the fine has sufficient deterrent effect.

87 In the present case, an interpretation of the concept of 'relevant geographic area (wider than the EEA)' which took into account only the territories affected by the unlawful cartel would run counter to the objective referred to in point 18 of the 2006 Guidelines and indeed in Article 23(2)(a) of Regulation No 1/2003.

88 As the Commission argued in its response, if only the sales in the EEA had been taken into account, Toshiba would have avoided any fine, since it did not make any sales in the EEA during the reference year used by the Commission. In addition, even if the sales in Japan had been taken into account, such an approach would have ignored the fact that the parties to the Gentlemen's Agreement are power transformer producers active at worldwide level. As the General Court observed in paragraph 275 of the judgment under appeal, 'the Gentlemen's Agreement had the result that the worldwide, competitive potential of the undertakings concerned had not been used to the advantage of the EEA market'. Therefore, limiting the relevant geographic area to those two territories would not have appropriately reflected the weight of the undertaking in the cartel and would not have ensured the deterrent effect of the fine.

89 It should also be observed that, as the Advocate General states in point 153 of his Opinion, taking into account only the territories of Japan or the EEA would have had the effect, in essence, of rewarding the participants in the Gentlemen's Agreement for having complied with the terms of the unlawful cartel, which provided specifically that the parties were to refrain from any sale in the territory of the other group of undertakings.

90 In the light of those considerations, it must be concluded that the General Court did not err in law in confirming, in paragraphs 282 and 292 of the judgment under appeal, the methodology for calculating the basic amount of fines used in the present case by the Commission.

91 Having regard to the foregoing, the fourth ground of appeal must be dismissed.

92 It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

93 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Toshiba has been unsuccessful and the Commission has applied for that company to be ordered to pay the costs, Toshiba must be ordered to pay the costs relating to the present appeal proceedings.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Toshiba Corporation to pay the costs.

Delivered in open court in Luxembourg on 20 January 2016.

[Signatures]