



Reports of Cases

Case T-341/18

(publication in extract form)

Nec Corp.

v

European Commission

Judgment of the General Court (Ninth Chamber, Extended Composition), 29 September 2021

(Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Attribution to the parent company of the infringement committed by its subsidiary – 2006 Guidelines on the method of setting fines – Gravity of the infringement – Increase in the amount of the fine for repeated infringement – Proportionality – Unlimited jurisdiction)

1. *Competition – Fines – Amount – Determination – Discretion of the Commission – Judicial review – Unlimited jurisdiction of the EU judicature – Scope – Substitution of grounds for the contested decision*
(Arts 101, 102, 261 and 263 TFEU; Council Regulation No 1/2003, Art. 31)

(see paragraphs 44, 45)

2. *Competition – EU rules – Infringements – Attribution – Parent company and subsidiaries – Economic unit – Criteria for assessment – Presumption of decisive influence exercised by parent company over its wholly owned or almost wholly owned subsidiaries – Rebuttable*
(Art. 101 TFEU)

(see paragraphs 49-57)

3. *Competition – Fines – Amount – Determination – Adjustment of the basic amount – Aggravating circumstances – Repeated infringement – Concept*
(Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, point 28, first indent)

(see paragraphs 75-77)

4. *Competition – Fines – Amount – Determination – Adjustment of the basic amount – Aggravating circumstances – Repeated infringement – Attribution to the parent company of the infringing conduct of its subsidiary – Separate fine imposed only on the parent company – Repeated infringement by the parent company alone*
(Art. 102 TFEU; EEA Agreement, Art. 54; Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02, point 28)

(see paragraphs 81-90)

5. *Competition – Fines – Amount – Determination – Adjustment of the basic amount – Aggravating circumstances – Repeated infringement – Discretion of the Commission*
(Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02, point 28)

(see paragraphs 103-108)

6. *Competition – Fines – Amount – Determination – Adjustment of the basic amount – Aggravating circumstances – Repeated infringement – Similar infringements committed successively and resulting from the conduct of the parent company and its subsidiary respectively – Breach of the principle of proportionality – None*
(Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02, point 28)

(see paragraphs 114-124)

7. *Competition – Fines – Amount – Determination – Adjustment of the basic amount – Aggravating circumstances – Repeated infringement – Criteria for application*
(Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02, point 28)

(see paragraphs 129, 134, 135)

8. *Competition – Fines – Amount – Determination – Discretion of the Commission – Judicial review – Unlimited jurisdiction of the EU judicature – Scope – Not subject to the Guidelines on the method of setting fines – Obligation to comply with the principle of equal treatment*
(Art. 101 TFEU; Council Regulation No 1/2003, Art. 31; Commission Notice 2006/C 210/02)

(see paragraphs 150-154)

Résumé

Nec Corp. is a company established in Japan which manufactures and sells tantalum electrolytic capacitors. From 1 August 2009 to 31 January 2013, Nec Corp. held 100% of the capital of Tokin Corp. ('Tokin').

By decision of 21 March 2018¹ ('the contested decision'), the Commission found that Nec Corp. and Tokin had infringed Article 101 TFEU by participating in agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors. In that regard, the Commission held Tokin liable on account of its direct participation in that cartel from 29 January 2003 to 23 April 2012, and Nec Corp. liable in its capacity as a parent company for the period from 1 August 2009 to 23 April 2012. The contested decision imposed, first, a fine on Tokin jointly and severally with Nec Corp. and, second, individual fines on Tokin and Nec Corp. respectively.

In order to calculate the amount of the fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines² ('the 2006 Guidelines').

In the first place, the Commission determined the basic amount by reference to the value of sales of the electrolytic capacitors during the last full business year of participation in the infringement and by applying multipliers on the basis of the duration of the infringement. Considering that horizontal price coordination arrangements are, by their very nature, among the most serious infringements of Article 101 TFEU, the Commission then set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. To ensure that the fines imposed would have a sufficiently deterrent effect, the Commission also applied an additional amount of 16%.

In the second place, as regards the adjustments to the basic amount of the fines, first, the Commission granted Tokin and Nec Corp. a 3% reduction in the basic amount of the fine, on the ground that their participation in certain meetings was not established, and, second, increased the basic amount of the fine to be imposed on Nec Corp. by 50% on account of the aggravating circumstance of repeated infringement, pursuant to point 28 of the 2006 Guidelines.

In accordance with point 28, the basic amount of the fine may be increased by up to 100% for each infringement where the Commission finds that an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has already made a finding that the undertaking infringed Article 101 TFEU or Article 102 TFEU.

In that regard, the Commission noted, more specifically, that Nec Corp. had already been held liable for anticompetitive conduct amounting to price coordination in respect of 'major PC/server [original equipment manufacturers (OEMs)]', which gave rise to Commission Decision C(2011) 180/09 final of 19 May 2010 ('the DRAMs decision').³

In the third place, the Commission granted Tokin and Nec Corp., for their cooperation under the 2006 Leniency Notice,⁴ a 15% reduction in the amount of any fine which would otherwise have been imposed on them for the infringement.

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

² 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).

³ Commission Decision of 19 May 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38.511 – DRAMs).

⁴ Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

Nec Corp. brought an action for annulment of the contested decision, which is, however, dismissed by the Ninth Chamber (Extended Composition) of the General Court. In its judgment, the General Court clarifies the circumstances in which a fine may be increased for repeated infringement.

Findings of the General Court

In its action, Nec Corp. contests, inter alia, the increase in the fine for repeated infringement that was applied to it.

Recalling that its liability was purely derivative of Tokin's liability, Nec Corp. submits, first, that the Commission's decision to increase the amount of its fine for repeated infringement had the consequence of imputing to it liability exceeding that of its subsidiary, which was not a repeat offender.

In that regard, the General Court recalls that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary. However, factors specific to the parent company may justify its liability being assessed differently to that of the subsidiary, even if the liability of the former is based exclusively on the unlawful conduct of the latter. A factor specific to the situation of the parent company which may lead to its liability being assessed differently to that of its subsidiary is precisely that of repeated infringement.

In the light of those observations, the General Court finds that, in the present case, the increase in the amount of the fine imposed on Nec Corp. corresponds to a circumstance specific to its situation and which does not apply to its subsidiary, namely repeated infringement. It was therefore open to the Commission to assess Nec Corp.'s liability and that of its subsidiary differently.

Second, Nec Corp. submits that the increase in its fine for repeated infringement is vitiated by an error of law in so far as that increase covered the entirety of the infringement period from 1 August 2009 to 23 April 2012 and, consequently, a period prior to the DRAMs decision, which had been notified on 19 May 2010.

In that regard, the General Court notes that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion as regards the choice of factors to be taken into account for the purpose of determining the amount of fines. The Commission may therefore, in each individual case, take into consideration the indicia which have demonstrated a tendency on the part of an undertaking towards infringing the competition rules, including, for example, the time that has elapsed between the infringements in question.

Even though Nec Corp.'s first infringement was penalised after the beginning of the new cartel, its continued participation, for almost two years, in the new cartel after it had been notified of the DRAMs decision, shows a tendency on its part not to draw the appropriate conclusions therefrom. In those circumstances, the Commission's decision to apply the increase for repeated infringement to the basic amount of the fine which, in turn, was calculated taking into account the entirety of the infringement period, was not vitiated by an error of law.

Third, Nec Corp. alleges infringement of the principle of proportionality, in so far as the increase in the amount of the fine for repeated infringement covered a period prior to the DRAMs decision and in view of the fact that its own liability resulted from its subsidiary's participation in the infringement.

As regards the proportionality of the increase in the fine, the General Court recalls that, when fixing the amount of each fine, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose. In addition, repeated infringement justifies a significant increase in the basic amount of the fine, which may be up to 100% of the amount. Moreover, the principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account in assessing the undertaking's tendency to infringe those rules.

In the light of those observations, the General Court confirms that Nec Corp.'s continuation of the unlawful conduct at issue for almost two years after it had been notified of the DRAMs decision clearly shows a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules. In so far as the increase for repeated infringement may result in an increase of up to 100% of the basic amount of the fine, the Commission did not infringe the principle of proportionality by setting the increase in the basic amount of the fine to be imposed on Nec Corp at 50%.

As regards the applicant's argument based on the fact that its own liability resulted from its subsidiary's participation in the infringement and based on the short period of time that elapsed between the time when that subsidiary was acquired and the adoption of the DRAMs decision, the General Court finds, first, that the applicant is presumed to exercise decisive influence over that subsidiary. Second, the General Court recalls that the objective of suppressing conduct that infringes the competition rules would be jeopardised if an undertaking concerned by a first infringement were able, by altering its legal structure (through the acquisition of a subsidiary against which proceedings cannot be brought on the basis of that first infringement, but which is involved in the commission of the new infringement), to make the imposition of a penalty impossible or particularly difficult, and therefore avoid a penalty for repeated infringement.