Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

6 July 2017 *

[Text rectified by order of 12 July 2017]

(Appeal — Competition — Agreements, decisions and concerted practices — Market in gas insulated switchgear projects — Decision taken by the European Commission following annulment in part of the initial decision by the General Court of the European Union — Amendment of fines — Rights of the defence — No adoption of a new statement of objections — Equal treatment — Joint venture — Calculation of the starting amount — Extent of contribution to the infringement — Res judicata)

In Case C-180/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 March 2016,

Toshiba Corp., established in Tokyo (Japan), represented by J. F. MacLennan, Solicitor, S. Sakellariou, dikigoros, A. Schulz, Rechtsanwalt, and J. Jourdan, avocat,

appellant,

the other party to the proceedings being:

European Commission, represented by N. Khan, acting as Agent,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, A. Rosas and C. Toader, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2017,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Toshiba Corp. ('Toshiba') asks the Court to set aside the judgment of the General Court of the European Union of 19 January 2016, *Toshiba* v *Commission* (T-404/12, EU:T:2016:18; 'the judgment under appeal'), by which the General Court dismissed its action seeking the annulment of Commission Decision C(2012) 4381 of 27 June 2012 amending Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 [EC (now Article 101 TFEU)] and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation (Case COMP/39.966 — Gas Insulated Switchgear — Fines) ('the decision at issue').

Background to the dispute and the decision at issue

2 In paragraphs 1 to 20 of the judgment under appeal, the background to the dispute is set out as follows:

'1 The applicant, [Toshiba], is a Japanese company active in various sectors, in particular the sector for gas insulated switchgear ("GIS"). Between October 2002 and April 2005, its GIS business was carried on within a joint venture, TM T&D Corp., jointly owned in equal shares with Mitsubishi Electric Corp. ("Mitsubishi") and dissolved in 2005.

2 On 24 January 2007, the Commission of the European Communities adopted Decision C(2006) 6762 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear) ("the 2007 decision").

3 In the 2007 decision, the Commission found there to have been a single and continuous infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area ... on the GIS products market between 15 April 1988 and 11 May 2004 and imposed on the addressees of that decision, which were European and Japanese GIS producers, fines …

4 The infringement at issue in the 2007 decision comprised three essential components:

— an agreement signed in Vienna on 15 April 1988 ("the GQ Agreement"), which established rules allowing the allocation of worldwide GIS projects according to agreed rules in order to maintain quotas largely reflecting "estimated historic market shares"; the agreement, which was applicable worldwide, except in the United States, Canada, Japan and 17 western European countries, was based on the allocation of "a joint Japanese quota" to Japanese producers and a "joint European quota" to European producers;

— a parallel agreement ("the common understanding"), under which, first, GIS projects in Japan and in the countries of the European members of the cartel were reserved to the Japanese members and the European members of the cartel respectively and, second, GIS projects located in the other European countries were also reserved for the European group, since the Japanese producers had undertaken not to submit bids for GIS projects in Europe; however, in exchange for that commitment, such projects had to be notified to the Japanese group and charged to the "joint European quota" set under the GQ Agreement;

— an agreement signed in Vienna on 15 April 1988, entitled "E-Group Operation Agreement for GQ Agreement" ("the EQ Agreement"), signed by the members of the European group of producers and aimed at distribution of GIS projects allocated to that group under the GQ Agreement.

5 In Article 1 of the 2007 decision, the Commission found that [Toshiba] had participated in the infringement from 15 April 1988 to 11 May 2004.

6 For the infringement found in Article 1 of the 2007 decision [Toshiba] was fined, in Article 2 of that decision, EUR 90 900 000, of which EUR 4 650 000, which corresponded to the infringement committed by TM T&D, was to be paid jointly and severally with [Mitsubishi].

7 On 18 April 2007, [Toshiba] brought an action against the 2007 decision.

8 By judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), the Court, first, dismissed [Toshiba's] action in so far as it sought the annulment of Article 1 of the 2007 decision. Second, it annulled Article 2(h) and (i) of the 2007 decision in so far as it concerned [Toshiba], on the ground that the Commission had infringed the principle of equal treatment by choosing, when calculating the fine, a reference year for [Toshiba] which was different from that chosen for the European participants in the infringement.

9 On 23 September 2011, [Toshiba] lodged an appeal before the Court of Justice against the judgment [of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343)].

10 On 15 February 2012, the European Commission sent [Toshiba] a letter of facts, in which it stated that it intended to adopt a new decision imposing a fine on the applicant ("the letter of facts"). The Commission set out the facts which, in its view, were relevant for the calculation of that fine, account being taken of the judgment [of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343)].

11 On 7 and 23 March 2012, [Toshiba] submitted its comments on the letter of facts.

12 On 12 June 2012, a meeting was held between [Toshiba's] representatives and the Commission team responsible for the case.

13 By [the decision at issue], Article 2 of the 2007 decision was amended by the addition of two new points, (h) and (i). Under Article 2(h), a fine of EUR 4 650 000 was imposed on [Toshiba], to be paid jointly and severally with [Mitsubishi]. Under Article 2(i), a fine of EUR 56 793 000 was imposed on [Toshiba], for which it was solely liable.

14 In order to remedy the unequal treatment criticised by the Court in its judgment [of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343)], the Commission used, in [the decision at issue], the worldwide turnover for GIS products in 2003. In so far as, in that year, the GIS activities of [Toshiba] and of [Mitsubishi] were carried out by TM T&D, the Commission took into consideration that company's turnover in 2003 (recitals 59 and 60 of the [decision at issue]).

15 Thus, first, in the context of the differential treatment aimed at reflecting the respective contributions of the various participants in the cartel, the Commission calculated TM T&D's GIS market share in 2003 (15% to 20%) and placed it in the second group in accordance with the categorisation established in recitals 482 to 488 of the 2007 decision. Consequently, a hypothetical starting amount of EUR 31 000 000 was allocated to TM T&D (recital 61 of the [decision at issue]).

16 Second, in order to reflect the [Toshiba's] and [Mitsubishi's] unequal capacity to contribute to the infringement during the period prior to the creation of TM T&D, the starting amount determined for the latter was divided between its shareholders in accordance with their respective GIS sales in 2001, which was the last full year prior to the creation of TM T&D. Consequently, starting amounts of EUR 10 863 199 and EUR 20 136 801 were allocated to [Toshiba] and [Mitsubishi] respectively (recitals 62 and 63 of the [decision at issue]).

17 Third, in order to ensure the deterrent effect of the fine, the Commission applied a deterrence multiplier of 2 to [Toshiba], on the basis of its turnover in 2005 (recitals 69 to 71 of the [decision at issue]).

18 Fourth, with a view to reflecting the duration of the infringement during the period prior to the creation of TM T&D, the starting amount attributed to [Toshiba] was increased by 140% (recitals 73 to 76 of the [decision at issue]).

19 Fifth, in order to reflect the duration of the infringement during TM T&D's period of operation, a sum corresponding to 15% of the hypothetical starting amount of TM T&D was imposed on [Toshiba] and [Mitsubishi] jointly and severally (recital 77 of the [decision at issue]).

20 Sixth and finally, the fine imposed jointly and severally was multiplied by [Toshiba's] deterrence multiplier and the amount resulting from that multiplication, minus the amount of the fine imposed jointly and severally, was imposed on the applicant on an individual basis (recital 78 of the [decision at issue]).'

3 By judgment of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866), the Court of Justice dismissed the appeal brought by Toshiba against the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343).

The procedure before the General Court and the judgment under appeal

4 By application lodged at the Registry of the General Court on 12 September 2012, Toshiba brought an action seeking the annulment of the decision at issue and, in the alternative, a reduction in the amount of the fine imposed on it.

5 In support of its action, Toshiba relied on five pleas in law, alleging (i) an infringement of the principles of good administration and proportionality, (ii) an infringement of its rights of defence, (iii) an infringement of the principle of equal treatment as regards the starting amount of the fine, (iv) an infringement of the obligation to state reasons and (v) an infringement of the principle of equal treatment as regards the determination of the level of culpability of the applicant compared to the European participants in the infringement.

6 By the judgment under appeal, the General Court dismissed that action.

Forms of order sought by the parties

7 By its appeal, Toshiba claims that the Court of Justice should:

— set aside the judgment under appeal;

— annul the decision at issue, or

— reduce the fine imposed on Toshiba, in application of Article 261 TFEU; or

— refer the case back to the General Court for determination in accordance with the judgment of this Court as to points of law, and, in any event

— order the Commission to pay the costs of the present appeal and of the proceedings at first instance.

8 The Commission contends that the Court should:

— dismiss the appeal and

— order Toshiba to pay the costs of the appeal.

The appeal

9 In support of its appeal, Toshiba raises three grounds, alleging (i) a breach of its rights of defence, in that a new statement of objections was not issued before the adoption of the decision at issue, (ii) an infringement of the principle of equal treatment in relation to the starting amount of the fine and (iii) an infringement of the principle of equal treatment regarding Toshiba's level of culpability compared to the European participants in the infringement.

The first ground of appeal, alleging a breach of the rights of the defence in that a new statement of objections was not issued before the adoption of the decision at issue

Arguments of the parties

10 By its first ground of appeal, Toshiba complains that the General Court dismissed, in paragraphs 34 to 47 of the judgment under appeal, the first part of the second plea in its action by which it argued that, following the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), the Commission was required to send it a new statement of objections prior to the adoption of the decision at issue and that, by merely sending it a letter of facts, the Commission breached its rights of defence and, in particular, its right to be heard.

11 In Toshiba's view, the statement of objections of 20 April 2006 ('2006 statement of objections') relates only to the 2007 decision. The General Court was therefore wrong to find, in paragraph 42 of the judgment under appeal, that the fact that the decision at issue amended the 2007 decision means that the procedure for the adoption of the decision at issue 'amounts to an extension of the procedure which led to the 2007 decision'.

12 As the General Court rightly stated, in paragraph 74 of the judgment under appeal, in relation to the imposition of the additional amount of the fine, the Commission was in particular obliged to provide Toshiba with additional information as to how it intended to ensure the deterrent effect of the fine, so as to enable it to make known its views. However, that statement cannot be reconciled with the finding, contained in the same paragraph of the judgment under appeal, that the Commission was not obliged to send it a new statement of objections containing those elements.

13 Toshiba argues that, given that the letter of facts does not have any particular procedural status, as the General Court noted in paragraph 75 of the judgment under appeal, and that the statement of objections is the only procedural mechanism foreseen in EU competition law for providing it the necessary information in a manner that ensured that it had an opportunity to be heard by the Commission, respect of its right to be heard in respect of the calculation of the fine the Commission had intended to impose on it required in the circumstances a new statement of objections to be sent.

14 The Commission replies that, if the first ground of appeal were to be understood as claiming that a fine could be imposed only at the end of a new proceeding, including the sending of a statement of objections setting out all the facts establishing the infringement, it would be inadmissible, it not having been raised before the General Court.

15 That ground of appeal is, in any case, manifestly unfounded.

16 First, the General Court was right, in paragraph 42 of the judgment under appeal, to accept that the procedure that resulted in the adoption of the decision at issue amounts to an extension of the procedure which led to the 2007 decision. According to well-established case-law, an illegality vitiates a decision only as from the point at which the illegality occurs.

17 Next, although, in the present case, the Commission sent a letter of facts before the adoption of the decision at issue, it was not required to do so, since the requirement, established in the settled case-law of the Court, that companies should be informed of the Commission's intention to impose a fine in advance of the adoption of a decision, had already been met by the 2006 statement of objections.

18 Last, paragraph 74 of the judgment under appeal is vitiated by an error of law. The case-law cited by the General Court concerned only the requirement that an undertaking under investigation must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the rules of the FEU Treaty in the area of competition. However, that case-law does not concern the calculation of the fine imposed following the finding of such an infringement.

Findings of the Court

19 As a preliminary point, the plea of inadmissibility raised by the Commission must be rejected.

20 In so far as, by its first ground of appeal, Toshiba essentially criticises the General Court for having rejected its line of argument that the Commission could not adopt the decision at issue without sending it a new statement of objection, arguing, in particular, that, contrary to what the General Court held, the procedure leading to the adoption of the decision at issue did not amount to an extension of the procedure which led to the 2007 decision, it is clearly not a new ground of appeal.

21 As regards the merits, the General Court was right, in paragraphs 40 and 41 of the judgment under appeal, to rely on the principle, established in the settled case-law of the Court, that, in order to fulfil its obligation to respect the right of undertakings to be heard, the Commission is required to indicate expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and to set out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and whether it has been committed intentionally or negligently. It is also apparent from that case-law that the Commission is not, however, required, once it has indicated the main factual and legal criteria on which it will base its calculation of the amount of the fines, to specify the way in which it will use each of those elements in order to determine their level (see, inter alia, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 428 and 437).

22 The General Court was also right to consider, in paragraph 42 of the judgment under appeal, that, given that the adoption of the 2007 decision was preceded by the 2006 statement of objections and that the decision at issue states explicitly that it constitutes a decision which amends the 2007 decision, its adoption procedure amounts to an extension of the procedure which led to the 2007 decision.

23 The General Court was consequently entitled to conclude, in the same paragraph of the judgment under appeal, without erring in law, that the content of the 2006 statement of objections may be taken into consideration in assessing whether Toshiba's rights of defence were respected in the

procedure which led to the adoption of the decision at issue, in so far as that content was not called into question in the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343).

24 In that regard, it is to be recalled that the annulment of an EU act does not necessarily affect preparatory measures, since the procedure for replacing the annulled measure may, in principle, be resumed at the very point at which the illegality occurred. The annulment of the act does not, in principle, affect the validity of the measures preparatory to that measure, which were taken before the stage at which the defect was observed. If it is found that the annulment does not affect the validity of the prior procedural measures, the Commission is not, as a result of that annulment alone, required to present the undertakings concerned with a new statement of objections (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 73 to 75 and 80 and 81).

25 Moreover, after having found, in paragraphs 43 and 44 of the judgment under appeal, that the 2006 statement of objections contained factual and legal elements regarding the calculation of the amount of the fines required by the case-law recalled in paragraph 40 of that judgment and, in paragraphs 45 and 46 of the judgment, and that the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) had not called into question the veracity, relevance or validity of those elements — factual findings not, moreover, disputed by Toshiba — the General Court correctly inferred, in paragraph 47 of the judgment under appeal, that that same judgment of the General Court of 12 July 2011 did not preclude the taking into account of those elements when reviewing whether Toshiba's rights of defence had been respected in the procedure which led to the adoption of the decision at issue.

26 Furthermore, given that the defect identified by the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) occurred at the time of the 2007 decision's adoption, the annulment of that decision did not affect the validity of the measures preparatory to it which were taken before the stage at which that defect occurred, in accordance with the principle established by the case-law recalled in paragraph 24 of the present judgment.

27 It should also be pointed out that, in response to Toshiba's argument that the defect identified concerned a substantive error of law which inevitably affected the validity of the measures preparatory to the 2007 decision, the General Court found, in paragraph 62 of the judgment under appeal, that Toshiba had failed to state how exactly those measures were vitiated by the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), and added, in paragraph 63 of the judgment under appeal, that, in any event, the General Court's criticism in that judgment of 12 July 2011 did not pertain to the identification of facts and the legal assessment of the infringement committed by Toshiba or to the determination of the factors to be taken into account when calculating the fine, but merely to the choice of reference data to be used for the detailed calculation and consequently to an element which did not have to be set out in the statement of objections.

28 It follows that the General Court, in the exercise of its, in principle, exclusive jurisdiction to assess the facts and evidence, found, without Toshiba having invoked any distortion of that evidence, that Toshiba had not shown that the annulment by the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) of the 2007 decision affected the validity of the 2006 statement of objections and that that was moreover not the case given that the defect identified did not concern the objections raised against Toshiba or the factors to be taken into account when calculating the amount of its fine.

29 That conclusion cannot be called into question, contrary to what Toshiba argues, in the light of the principle said to arise from the case-law cited in paragraph 71 of the judgment under appeal and on the basis of which the General Court concluded, in paragraph 74 of that judgment, that the

Commission was required, following the communication of the statement of objections, to provide the undertaking concerned with additional information as to how it intended to ensure the deterrent effect of the fine, so as to enable it properly to make known its views in that regard.

30 It must be pointed out that such a principle does not arise from the case-law of the Court of Justice cited by the General Court in paragraph 71 of the judgment under appeal, namely that resulting from paragraph 66 of the judgment of 7 January 2004, *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), nor, moreover, from other cases of the Court of Justice, in so far as, in that case-law, the Court merely recalls the principle that respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.

31 Although, as is apparent from the foregoing, paragraph 74 of the judgment under appeal is vitiated by an error of law, that does not affect the validity of the judgment under appeal since its operative part is sufficiently well founded on other legal grounds (see, to that effect, inter alia, judgment of 29 March 2011, *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 136).

32 Indeed, as is apparent from the preceding paragraphs of the present judgment, the General Court, based on reasoning set out in paragraphs 40 to 65 of the judgment under appeal, rightly held that, even though the Commission did not send Toshiba a new statement of objections, Toshiba's rights of defence were not infringed.

33 It may also be recalled that, although, in certain circumstances, in particular where the Commission intends to apply new guidelines on the method of setting fines, and provided that that does not mean that it anticipates its decision on the objections in an inappropriate manner, it may be desirable that the Commission should specify the way in which it proposes to employ the imperative criteria of the gravity and the duration of the infringement when determining the amount of the fines, the fact remains that the right to be heard does not cover such elements related to the method for determining the amount of the fines (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 438 and 439).

34 Last, although, in the present case, the Commission, by sending the letter of facts, intended to inform Toshiba of the new elements of the method for determining the amount of its fine which the Commission considered necessary following the partial annulment of the 2007 decision by the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), and although it is undisputed that Toshiba could state its position both in writing and during a meeting on those elements, as the decision at issue confirms, the fact remains that, by their nature, those elements, under the case-law recalled in paragraph 21 of the present judgment, did not have to be included in a new statement of objections.

35 Having regard to all the foregoing, the first ground of appeal must be rejected.

The second ground of appeal, alleging an infringement of the principle of equal treatment in relation to the starting amount of the fine

Arguments of the parties

36 By its second ground of appeal, Toshiba argues that the General Court, in rejecting the third plea of its action by which it argued that the Commission, in order to implement the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), should have calculated the fine imposed on it on the basis of TM T&D's turnover for 2003 and not on the basis of the starting amount of the fine assigned to TM T&D, infringed the principle of equal treatment.

37 Toshiba recalls that, before the Commission and the General Court, it argued, first, that the method for calculating the fine imposed on it infringed the principle of equal treatment since it did not reflect Toshiba's individual weight in the infringement before the creation of TM T&D, which is required by the General Court in paragraph 290 of the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), which corresponds to the approach adopted for the European undertakings. Second, it argued that the Commission should have calculated the starting amount of the fine imposed on it on the basis of its 2003 turnover, that is to say, by assigning it 35% of the turnover achieved by TM T&D in 2003.

38 Toshiba argues that paragraph 115 of the judgment under appeal is vitiated by a failure to state reasons in so far as the fact — in itself indisputable — that the fine imposed on it could not have been calculated in 'the exact same manner' as that of the European undertakings cannot explain why Toshiba's methodology was less appropriate than that of the Commission in order to achieve equal treatment between Toshiba and the European undertakings.

39 In addition, the fact on which the General Court relied, in paragraphs 116, 117 and 123 to 125 of the judgment under appeal, to reject the method for calculating the fine proposed by Toshiba, namely that TM T&D was a joint venture wholly responsible for the production and sale of GIS in 2003 that constituted a separate entity from its shareholders, while not disputable, is irrelevant in this context.

40 Using TM T&D's starting amount of the fine reflected only TM T&D's weight in the infringement, as found in paragraph 66 of the decision at issue and in paragraph 128 of the judgment under appeal, and was rightly used by the Commission to calculate the fine owed by the joint venture. However, that amount did not reflect Toshiba's individual weight for the period prior to the creation of that joint venture.

41 By contrast, determining the starting amount of Toshiba's fine on the basis of its notional 2003 turnover, amounting to 35% of the turnover achieved by TM T&D in 2003, would have been an objective criterion giving a proper measure of the harm caused by Toshiba's prior restrictive practice to the creation of TM T&D.

42 That methodology would allow for Toshiba to be treated in the same manner as the European producers when calculating the fines. First of all, turnover specific to Toshiba should have been calculated. Next, based on Toshiba's market share calculated on the basis of that turnover, it would have been placed into one of the starting amount categories of the 2007 decision, namely the category assigning a starting amount of EUR 9 million.

43 However, the Commission's method led to it not applying that methodology for calculating the fine. Due to the assignment of a share of the starting amount of TM T&D's fine, Toshiba was assigned an artificial starting amount of EUR 10 863 199, which did not correspond to any of the categories of starting amount set out in the 2007 decision.

44 The calculation method proposed by Toshiba would not have been more artificial than the one applied by the Commission. The calculation of the amount of Toshiba's fine required, in any event, specific rules. The General Court failed to explain, in particular in paragraph 128 of the judgment under appeal, why the Commission's method involving the dividing up of TM T&D's starting amount was less artificial than the method proposed by Toshiba consisting in dividing up TM T&D's turnover.

45 Although, as the General Court indicated in paragraph 121 of the judgment under appeal, the Commission followed the method suggested by the General Court in the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) as an appropriate example of an alternative method compatible with the principle of equal treatment, it does not follow that that method was more appropriate than the one proposed by Toshiba and did not breach that principle. Similarly, the fact that Toshiba had initially suggested another calculation method based on the joint venture's starting amount does not make such a method lawful.

46 The Commission argues that the methodology advocated by Toshiba in its appeal is more artificial than the one used in the decision at issue since it requires the artifice of imputing turnover to it in a year in which it had no turnover.

47 In any event, given that the joint venture was owned in equal shares with Mitsubishi, any 'turnover' of Toshiba for 2003 in the GIS sector could be calculated only by assigning it 50% of the joint venture's turnover, amounting to EUR 176.61 million, which corresponds to a market share slightly higher than 8% and not turnover of EUR 123.6 million, corresponding to 35% of the joint venture's turnover, and a corresponding market share of 5.6%, as Toshiba argues.

48 Even if the Court were to find that the Commission could have calculated the fine in the manner now advocated by Toshiba, that would not demonstrate any error of law on the part of the Commission.

49 The debate centres not on the best possible method, but on the lawfulness of the one implemented in the decision at issue. In that regard, the Commission notes that the method now advocated by Toshiba is different from the one it initially proposed which consisted in splitting equally between Toshiba and Mitsubishi the starting amount of the joint venture's fine calculated on its 2003 turnover, and from the one advocated by the General Court in the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343). It therefore cannot be argued that that method is the only one that may be used to set Toshiba's fine by reference to the turnover for 2003.

50 The Commission thus concludes that no error of law was committed by the General Court since it did not depart from the principle of comparability of the turnover of the 'various undertakings', as the relevant undertaking with turnover in 2003 could only be the joint venture.

Findings of the Court

51 The General Court, relying in particular on recitals 62 and 66 of the decision at issue, rightly found, essentially for the reasons set out in paragraphs 114 to 117 and 123 to 125 of the judgment under appeal, that the Commission was entitled to infer from the fact that Toshiba had not made any GIS sales during the 2003 reference year that it would be inappropriate to calculate a virtual turnover for that undertaking for that year by artificially dividing up TM T&D's turnover for 2003 and disregard the fact that that joint venture was active on the market during the reference year as a separate operator from its shareholders.

52 The fact that, in 2003, Toshiba had no turnover of its own in the GIS sector is a factor which objectively differentiates its situation from that of other undertakings that participated in the cartel, in particular the European undertakings, from which it follows that the fine that was imposed on it had to be calculated from the actual turnover achieved by TM T&D in 2003 and not from a virtual turnover obtained by splitting TM T&D's turnover.

53 As the General Court notes, in paragraph 125 of the judgment under appeal, the approach advocated by Toshiba would essentially amount to departing from the Commission's intention to take the turnover generated during 2003 as a basis for determining the fines.

54 The calculation method proposed by Toshiba, to the extent that it would lead to a virtual turnover for Toshiba being compared with the actual turnovers of the European undertakings, would not moreover enable a starting amount of the fine to be determined for Toshiba and Mitsubishi that appropriately reflects their weight in the infringement in 2003, more particularly the combined weight that those undertakings exerted through TM T&D, as the Commission indicated, essentially, in recital 66 of the decision at issue.

55 As the Advocate General notes in point 102 of his Opinion, it is also doubtful that that alternative method allows for a more direct use of TM T&D's turnover for 2003 or provides a more accurate picture of Toshiba's position on the market in the same year, given that it necessitates that two additional steps be taken, namely the calculation of Toshiba's notional turnover for 2003 and, on that basis, its notional market share for the same year.

56 Last, although, in the decision at issue, Toshiba was assigned a starting amount that did not correspond to any of the starting amounts assigned to the groups defined in the 2007 decision, that circumstance is the mere consequence of the fact that, in that decision, Toshiba's starting amount was calculated by using a share of TM T&D's starting amount. In so far as Toshiba does not argue that, by placing TM T&D in the second group defined in that decision, the Commission infringed the principle of equal treatment, it cannot argue that it was assigned a higher starting amount than that assigned to undertakings of a comparable size.

57 Having regard to the foregoing, the second ground of appeal must be rejected.

The third ground of appeal, alleging an infringement of the principle of equal treatment regarding Toshiba's level of culpability compared to the European participants in the infringement

Arguments of the parties

58 By its third ground of appeal, Toshiba criticises the General Court for committing an error of law in holding, in paragraphs 141 and 142 of the judgment under appeal, that the Commission had not infringed the principle of equal treatment in rejecting, in the decision at issue, its request that a lower fine be imposed on it given that its level of culpability for the infringement is less than that of the European participants in the cartel.

59 According to Toshiba, it follows from the case-law that, after having established the existence of a cartel and identified its participants, the Commission is required, when imposing fines, to examine the relative seriousness of the participation of each undertaking and to adjust the penalty to the individual conduct and specific characteristics of the relevant undertaking's participation in the single and continuous infringement.

60 The General Court was thus wrong to find, in paragraph 142 of the judgment under appeal, that '[Toshiba's] contribution to the infringement is comparable to that of the European undertakings', which implies that the Commission did not infringe the principle of equal treatment, on the ground, set out in paragraph 141 of that judgment, that the implementation of the common understanding was a 'necessary contribution' to the objectives of the infringement as a whole or a 'prerequisite' to the allocation of projects between the European producers.

61 In the present case, it is clear that the Japanese undertakings did not inflict on the EEA market the same harm as the European producers and contributed less to the overall infringement, the European producers having gone further and allocated EU projects through active collusion.

62 The Commission argues that the third ground of appeal is inadmissible as it goes beyond Toshiba's case at first instance.

63 The ground is a challenge to the decision at issue's confirmation of the findings as to the gravity of Toshiba's infringement contained in the 2007 decision. Those findings, although challenged under the fifth plea raised before the General Court in the case that give rise to the judgment under appeal, were not part of its case, as its reply at first instance accepted. Indeed, in that reply, Toshiba abandoned its arguments relating to that issue of the gravity of its infringement.

64 In the alternative, the Commission argues that the third ground of appeal is inadmissible because it calls into question an issue that is *res judicata*.

65 In the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), the General Court linked its assessment of the gravity of Toshiba's infringement to the issue of a single and continuous infringement. However, as that issue is now *res judicata*, it cannot be called into question in the present proceedings.

66 Last, the Commission argues that, were the Court to declare the third ground admissible, it would have to be rejected as unfounded. It refers, in that regard, to the principle arising from the case-law according to which the fact that an undertaking has not participated directly in all the elements constituting an overall cartel cannot absolve it from liability for the infringement if it is established that it must necessarily have known, first, that the collusion in which it was participating was part of an overall plan, and, second, that that overall plan included all the constituent elements of the cartel.

Findings of the Court

– *Admissibility*

67 The two pleas of inadmissibility relied on by the Commission must be rejected.

68 First, as regards the argument that the issue considered under the third ground of appeal had not been raised before the General Court, it must be stated that that was indeed the case. Under the fifth plea of its action, Toshiba argued that the Commission did not take into account its alleged contribution to the cartel when setting the fine, in particular when it set the amount of its starting fine, which was an infringement of the principle of equal treatment. Moreover, in its reply before the General Court, Toshiba did not withdraw that fifth plea.

69 In the second place, as regards the Commission's objection relating to the principle of *res judicata*, it must be pointed out that it is based on the premiss that, in its appeal, Toshiba disputes the existence of a single and continuous infringement.

70 Such is not the case given that the third ground of appeal is limited to the separate issue of the determination of the amount of the fine imposed on Toshiba in view of the gravity of the infringement of which it is accused.

71 However, that latter issue, relating not to the existence of the single and continuous infringement established against Toshiba but to the determination of the amount of the fine in view of the gravity of the infringement of which it is accused, underwent a specific examination by the General Court in the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343).

72 In paragraphs 258 to 261 of that judgment, the General Court rejected the first part of Toshiba's fourth plea by which it had argued that the Commission had not taken account of the fact that the relative gravity of its participation in the infringement was less than that alleged against the European producers, in so far as Toshiba had taken part only in the common understanding by which it had undertaken not to submit bids for GIS projects in Europe, whereas the European producers had participated also in the GQ Agreement aimed at sharing those projects.

73 Next, it must be noted that the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) was appealed to the Court of Justice.

74 Following the dismissal of that appeal by the judgment of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P,C-489/11 P and C-498/11 P, not published, EU:C:2013:866), the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) — specifically its operative part and the grounds constituting its *ratio decidendi* — became final (see, to that effect, judgment of 19 February 2009, *Gorostiaga Atxalandabaso* v *Parliament*, C-308/07 P, EU:C:2009:103, paragraph 57).

75 It is true that, in its appeal against the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), Toshiba did not challenge paragraphs 258 to 262 of that judgment.

76 Nevertheless, under Article 169 of the Rules of Procedure of the Court of Justice, an appeal is to seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision.

77 It follows that, in its appeal against the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), Toshiba could not challenge the grounds contained in paragraphs 258 to 262 of that judgment without calling into question its operative part in so far as, by that operative part, the General Court had annulled the fine imposed on it.

78 Toshiba cannot be criticised for failing to challenge those grounds in its appeal before the Court of Justice but limiting its appeal to the grounds of the judgment of the General Court of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) concerning the infringement that was alleged against it.

79 A party cannot be compelled to act against its own interests in order to safeguard its procedural rights, including the right to bring an appeal before the Court of Justice.

80 Thus, in examining, in paragraphs 139 to 141 of the judgment under appeal, the issue of the conformity with the principle of equal treatment of the determination of the amount of the fine imposed on Toshiba in view of the gravity of the infringement alleged against it compared to that found for the European producers, the General Court did not disregard the fact that the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343) is *res judicata*.

– *Substance*

81 [As rectified by order of 12 July 2017] In paragraphs 141 and 142 of the judgment under appeal, the General Court held, without erring in law, that, given that the participation of the Japanese undertakings in the common understanding was a 'prerequisite' for the effective implementation of the EQ Agreement in which only the European undertakings participated and that the Japanese undertakings' honouring of their commitments therefore made a 'necessary contribution' to the functioning of the infringement, it had to be concluded that Toshiba's contribution to the infringement was comparable to that of the European undertakings.

82 [As rectified by order of 12 July 2017] Furthermore, in paragraph 141 of the judgment under appeal, the General Court referred to paragraph 261 of the judgment of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343), in which the General Court also rightly held that, since Toshiba undertook under the common understanding not to operate on the EEA market, its participation also in the EQ Agreement — whose purpose was the sharing of GIS projects on the EEA market — was unnecessary. The fact that Toshiba did not participate in the EQ Agreement was irrelevant and not the result of its choice.

83 [As rectified by order of 12 July 2017] In other words, as the Advocate General noted in point 134 of his Opinion, the General Court correctly held that the fact that Toshiba did not participate in the EQ Agreement was a mere consequence of its participation in the common understanding and thus does not mean that its conduct was less serious than that of the European producers.

84 [As rectified by order of 12 July 2017] In those conditions, Toshiba could not criticise the Commission for not granting it a reduction in the amount of its fine on account of the fact that it did not participate in the EQ Agreement.

85 Having regard to the foregoing, the third ground of appeal is unfounded and must be rejected.

86 Accordingly, as none of the grounds of appeal raised by Toshiba can be upheld, the appeal must be dismissed.

Costs

87 In accordance with 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, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

88 Since the Commission has applied for costs and Toshiba has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Seventh Chamber) hereby

1. Dismisses the appeal;

2. Orders Toshiba Corp. to pay the costs.

Prechal Rosas Toader

Delivered in open court in Luxembourg on 6 July 2017.

A. Calot Escobar
Registrar

A. Prechal
President of the Seventh Chamber