

Current Intelligence

Siemens AG and others v Commission (Gas Insulated Switchgear): the difficulties faced by appellants seeking to challenge leniency evidence

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Joined Cases C-239/11 P, C-489/11 P, and C-498/11 P
Siemens AG, Mitsubishi Electric Corp. and Toshiba Corp. v Commission.

This judgment highlights the high probative value accorded to evidence provided by leniency applicants and the considerable difficulty faced by parties seeking to challenge such evidence.

Legal context

On 19 December 2013, the Court of Justice dismissed the appeals of Siemens, Mitsubishi, and Toshiba relating to the European Commission's 2007 Gas Insulated Switchgear decision (Case COMP/F/38.899 Gas Insulated Switchgear).

Facts

In its decision of 24 January 2007 ('Decision'), the European Commission ('Commission') found that Siemens AG ('Siemens'), Mitsubishi Electric Corp. ('Mitsubishi') and Toshiba Corp. ('Toshiba') (together the 'Appellants'), and several other European and Japanese companies had participated in a cartel regarding gas-insulated switchgear (GIS). The cartel was found to be worldwide in scope and comprised various practices, including market sharing; allocation of GIS projects and maintenance of historic market shares; bid-rigging; and price fixing. In particular, the Commission concluded that there was a written agreement (the 'GQ Agreement') establishing rules for the allocation of GIS projects to

either Japanese or European producers; and, additionally, that there was an unwritten agreement (the 'common understanding') according to which GIS projects in Japan were reserved to the Japanese members of the cartel and GIS projects in Europe were reserved to the European members of the cartel.

The Decision was appealed to the General Court by, inter alia, the Appellants. The General Court delivered its judgments in Cases T-110/07 *Siemens AG v Commission* [2011] (ECR II – 477), T-113/07 *Toshiba Corp. v Commission* [2011] (ECR II – 3989) and T-133/07 *Mitsubishi Electric Corp. v Commission* [2011] (ECR II – 4219). The General Court rejected Siemens' appeal, but partially annulled the Decision as regards Mitsubishi and Toshiba, on the basis that the Commission had infringed the principle of equal treatment when calculating the fines of the Japanese producers (it used a different reference year in its fine calculation, to that used for the European producers). The remainder of the Decision was, however, upheld and the Commission has subsequently adopted a new decision imposing re-calculated fines on Mitsubishi and Toshiba for their participation in the GIS cartel. This new decision is currently under a separate appeal (Cases T-404/12 *Toshiba v Commission* and T-409/12 *Mitsubishi Electric v Commission*).

The Appellants appealed the General Court judgments to the Court of Justice. The appeals were joined before the Court of Justice, which subsequently dismissed the appeals in their entirety.

Analysis

The Appellants advanced numerous arguments in support of their appeals. This case note focuses on the grounds of appeal alleging that the General Court committed various errors of law regarding its assessment of the evidence relied upon by the Commission in the Decision. Many of the arguments put forward by the Appellants (and in particular, Mitsubishi and Toshiba) sought to challenge the probative value of evidence submitted by the immunity applicant, ABB, and, in particular, the witness statement of a former ABB employee, Mr M.

In this regard, the Court of Justice recalled the principle of the unfettered evaluation of evidence: provided that evidence has been obtained lawfully, it cannot be challenged before the General Court. The only relevant criterion

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ion for the purpose of assessing the probative value of evidence relates to its credibility (paragraph 128). The Court of Justice further recalled that the appraisal by the General Court of the probative value of evidence cannot be challenged before the Court of Justice, although the question of whether the General Court observed the rules relating to the burden of proof and the taking of evidence is a question of law amenable to judicial review by the Court of Justice (paragraphs 129–130). However, in this case, the Court of Justice concluded that the General Court had not infringed these principles (paragraph 132).

Mitsubishi and Toshiba had also argued that the General Court had committed errors of law regarding the principle that high probative value must be granted to statements which run counter to the declarant (paragraph 151). Mitsubishi, in particular, had argued that a statement made in immunity proceedings did not necessarily run counter to the declarant's own interests, as the declarant (in this case ABB) had the incentive to consolidate the Commission's case regarding the infringement and thereby improve ABB's own case for immunity. The Court of Justice disagreed. Although it acknowledged that an immunity applicant has the incentive to submit as much incriminating evidence as possible (paragraph 138), it noted that the submission of inaccurate evidence could also lead to the loss of immunity. Evidence submitted by an immunity applicant was clearly likely to run counter to its interests, since this evidence would be relied upon by the Commission when establishing its case (and the immunity applicant was party to the infringement) (paragraph 139). Finally (at paragraph 140), the Court of Justice also recalled its own case law, which noted that immunity applicants admitting the existence of an infringement faced considerable legal and economic risks (eg private damages actions).

The Court of Justice went on to consider arguments that the General Court had committed an error of law in deeming the witness statement of Mr M. to be of high probative value as evidence of the common understanding and that the General Court should have instead accepted that the witness statement was of weak probative value on the basis that it did not satisfy the six criteria set out in its own case law for identifying statements of particularly high probative value (Joined Cases T-67/00, T-68/00, T-71/00, and T-78/00 *JFE Engineering and Others v Commission* [2004] (ECR II – 2501)) ('the six JFE Engineering criteria'). This case law identifies statements of particularly high probative value as being: (i) reliable; (ii) made on behalf of an undertaking; (iii) made by a person under a professional obligation to act in the interests of that undertaking; (iv) against the interests of the person making the statement; (v) made

by a direct witness of the circumstances to which they relate; and (vi) provided in writing and after mature reflection.

The Court of Justice noted that the General Court did not refer to the six JFE Engineering criteria when assessing the probative value of Mr M's witness statement (paragraph 164). However, the Court of Justice concluded that even if these criteria were not satisfied, the General Court was correct to consider Mr M's statement as being of high probative value, since it had concluded that it was credible (even though it still needed to be corroborated by other evidence) (paragraph 167). This finding of credibility was sufficient to deem the statement to be of high probative value, given the prevailing principle of the unfettered evaluation of evidence (paragraphs 163 and 167). The Court of Justice also found that the fact that Mr M. was not present when the common understanding was concluded did not undermine the probative value of the witness statement (paragraph 170). Consequently, the Court of Justice rejected Mitsubishi and Toshiba's arguments concerning the six JFE Engineering criteria and the assessment and weighing of evidence (paragraph 178).

The Court of Justice also dismissed arguments that the General Court had committed errors of law regarding the principle of corroboration of evidence (paragraph 203). In particular, Mitsubishi and Toshiba had argued that evidence submitted by the immunity applicant ABB regarding the common understanding was not corroborated. The Court of Justice recalled that: (i) a statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence; and (ii) the only relevant criterion for assessing the probative value of the statement is that of credibility (paragraph 189). However, it noted that there were no specific rules regarding the type or source of evidence capable of corroborating other evidence (paragraph 190) and that, in particular, leniency statements did not have to be corroborated by contemporaneous evidence (paragraph 192). In other words, the Court of Justice found that statements made by other leniency applicants could be used to corroborate evidence provided by the immunity applicant. The Court of Justice went on to conclude that the General Court did not err in law in finding that a statement by one of the other cartelists, Fuji, could be used to corroborate the ABB witness statement even though this was 'relatively vague' (paragraph 193) and was in fact silent on the issue of the existence of a common understanding (paragraph 198).

Practical significance

This judgment highlights the up-hill struggle faced by addressees of Commission cartel decisions in challenging evidence submitted by leniency applicants. Such evidence is highly persuasive, notwithstanding the fact that the leniency applicant clearly has an interest in providing as much incriminating evidence as possible to secure immunity or a reduction from fines and that this interest may directly conflict with the interests of the other addressees of the Commission cartel decision. Nevertheless, the judgment is not entirely surprising. Essentially,

the Appellants were seeking to challenge the General Court's factual assessment: a difficult exercise given the Court of Justice's more limited powers of review.

This is not, however, the end of the GIS story: Mitsubishi and Toshiba have appealed the Commission's decision of 27 June 2012 amending the Decision and re-imposing a fine and these appeals are currently pending (Cases T-404/12 *Toshiba v Commission* and T-409/12 *Mitsubishi Electric v Commission*).

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