EUROPEAN COMMISSION

Brussels, 27.6.2012
C(2012) 4381 final

COMMISSION DECISION

of 27.6.2012

amending Decision C(2006)6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation (COMP/39.966 - Gas Insulated Switchgear - fines)

(Only the English text is authentic)

TABLE OF CONTENTS

COMMISSION DECISION

of 27.6.2012

amending Decision C(2006)6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation (COMP/39.966 - Gas Insulated Switchgear - fines)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,[1] and in particular Article 23(2) thereof,

Having regard to Commission Decision C(2006)6762 final of 24 January 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement in Case COMP/38.899 — Gas Insulated Switchgear [2],

Having regard to the judgments of the General Court of 12 July 2011 in Case T-113/07 *Toshiba Corp. v European Commission*[3] and Case T-133/07 *Mitsubishi Electric Corp. v European Commission*[4],

Having given the undertakings concerned, Mitsubishi Electric Corporation and Toshiba Corporation, the opportunity to make known their views on the intention of the Commission to amend Decision C(2006)6762 final to the extent it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation and on the circumstances, parameters and method of calculation relevant for setting the fines against Mitsubishi Electric Corporation and Toshiba Corporation,

---

1 OJ L 1, 4.1.2003, p.1.With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when and where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

2 A summary of the decision has been published in the Official Journal, OJ C 5, 10.1.2008, p. 7.

3 Not yet reported.

4 Not yet reported.

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

1. BACKGROUND

1.1. The GIS Decision

(1) On 24 January 2007 the Commission adopted Decision C(2006)6762 in Case COMP/38.899 — Gas Insulated Switchgear (the "GIS Decision"). In Article 1 of the GIS Decision, the Commission found, pursuant to Article 7(1) of Regulation (EC) No 1/2003, that:

(a) Mitsubishi Electric Corporation ("Melco") had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 15 April 1988 to 11 May 2004, in a complex of agreements and concerted practices in the Gas Insulated Switchgear sector in the EEA;[5]

(b) Toshiba Corporation ("Toshiba") had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 15 April 1988 to 11 May 2004, in a complex of agreements and concerted practices in the Gas Insulated Switchgear sector in the EEA;[6]

(2) Melco was held (i) solely liable for its involvement in the infringement between 15 April 1988 and 1 October 2002, and (ii) jointly and severally liable with Toshiba for the infringement committed by TM T&D[7] between 1 October 2002 and 11 May 2004;[8]

(3) Toshiba was held (i) solely liable for its involvement in the infringement between 15 April 1988 and 1 October 2002, and (ii) jointly and severally liable with Melco for the infringement committed by TM T&D[9] between 1 October 2002 and 11 May 2004;[10]

(4) In Articles 2(g), (h) and (i) of the GIS Decision and based on considerations expressed in sections 8.2.-8.7. of that Decision, the Commission imposed the following fines on Melco and Toshiba under Article 23(2) of Regulation (EC) No 1/2003:

---

5 Article 1(l) of the GIS Decision.

6 Article 1(s) of the GIS Decision.

7 TM T&D Corporation was a 50/50 joint venture between Melco and Toshiba. It was responsible for the production and sales of GIS. It started operations on 1 October 2002. It was subsequently dissolved on 30 April 2005 and its assets were acquired by Melco and Toshiba.

8 Recitals 404 to 407 of the GIS Decision.

9 See footnote 7.

10 Recitals 427 to 435 of the GIS Decision.

(a) Melco: EUR 113 925 000,[11]

(b) Toshiba: EUR 86 250 000,[12]

(c) Melco jointly and severally with Toshiba: EUR 4 650 000.[13]

(5) Both Melco and Toshiba filed actions for annulment of the GIS Decision before the General Court.

1.2. The judgments of the General Court in Case T-113/07 *Toshiba Corp. v European Commission* and Case T-133/07 *Mitsubishi Electric Corp. v European Commission*

(6) In its judgments in Case T-113/07 *Toshiba Corp. v European Commission* and Case T-133/07 *Mitsubishi Electric Corp. v European Commission*, the General Court:

(a) upheld the Commission's finding under Article 7(1) of Regulation (EC) No 1/2003, made in Articles 1(l) and (s) of the GIS Decision, that Toshiba and Melco infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 15 April 1988 to 11 May 2004, in a complex of agreements and concerted practices in the Gas Insulated Switchgear sector in the EEA; and

(b) annulled the Commission's decision under Article 23(2) of Regulation (EC) No 1/2003, expressed in Article 2(g), (h) and (i) of the GIS Decision, imposing fines on Toshiba and Melco for the violation established in Article 1 of that Decision.

(7) The Commission's finding under Article 7 of Regulation (EC) No 1/2003 that Toshiba and Melco infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 15 April 1988 to 11 May 2004, in a complex of agreements and concerted practices in the Gas Insulated Switchgear sector in the EEA, therefore remains in effect.

(8) As regards the fines for the infringement imposed on Melco and Toshiba in Article 2(g), (h) and (i) of the GIS Decision, the General Court dismissed Toshiba's plea that the Commission was incorrect to classify the conduct of Toshiba and other Japanese undertakings participating in the infringement, including Melco, as a "very serious" infringement.[14] However, the General Court also held that the Commission had violated the principle of equal treatment by using a different reference year for the Japanese companies and for the European companies involved in the cartel.[15]

(9) Specifically, the General Court held that:

"[i]t is evident that the Commission could have used other methods to achieve its objective [to compare the capacity of Melco and Toshiba to harm competition during

---

11 Article 2(g) of the GIS Decision.
12 Article 2(i) of the GIS Decision.
13 Article 2(h) of the GIS Decision.
14 Case T-113/07 *Toshiba Corp. v European Commission*, paragraph 262.
15 Case T-133/07 *Mitsubishi Electric Corp. v European Commission,* paragraph 278; Case T-113/07 *Toshiba Corp. v European Commission,* paragraph 293.

the period prior to the creation of their joint venture TM T&D] *without treating the Japanese producers and the European producers unequally in its choice of reference year. By way of example, when determining the fines for the applicant and Melco for the period prior to the creation of TM T & D, the Commission could have taken the starting amount of TM T & D's fine, calculated on the basis of its turnover for 2003 and divided it between the applicant and Melco in accordance with the proportion of GIS sales made by them during the year prior to the creation of the joint venture, namely 2001.*"[16]

(10) As a result of the General Court's judgments, the Commission's finding of an infringement of Article 101 TFEU and Article 53 EEA by Melco and Toshiba, made by a decision under Article 7(2) of Regulation (EC) No 1/2003, remains in effect, while the fines for that infringement, imposed by a decision under Article 23(2) of Regulation (EC) No 1/2003, were annulled by the General Court on account of violation of the principle of equal treatment in the choice of a reference year for the purpose of calculating the fine imposed on Melco and Toshiba.[17]

(11) That situation, whereby the Commission's finding of an infringement remains in effect, while the fines for that infringement have been annulled, is remedied by this Decision.

2. PROCEDURE

(12) On 15 February 2012, the Commission sent letters of facts to Melco and Toshiba respectively.

(13) On 7 March 2012, Toshiba submitted observations on the procedural issues.

(14) On 15 March 2012, the Commission replied to Toshiba's letter dated 7 March 2012.

(15) On 15 March 2012, Toshiba addressed a letter to the Hearing Officer regarding issues of procedure.

(16) On 16 March 2012, the Hearing Officer replied to Toshiba's letter dated 15 March 2012.

(17) On 16 March 2012, Melco submitted observations on matters of procedure as well as on the substance of the Commission's letter of facts dated 15 February 2012.

(18) On 23 March 2012, Toshiba submitted observations regarding the substance of the Commission's letter of facts dated 15 February 2012.

(19) On 12 June 2012, the Commission held a meeting with Toshiba's representatives regarding the substance of the Commission's letter of facts dated 15 February 2012.

---

16 Case T-113/07, *Toshiba Corp. v European Commission*, paragraph 291, and similarly in Case T-133/07 *Mitsubishi Electric Corp. v European Commission*, paragraph 276.

17 Case T-133/07 *Mitsubishi Electric Corp. v European Commission,* paragraph 278; Case T-113/07 *Toshiba Corp. v European Commission*, paragraph 293.

(20) On 8 June 2012, the Commission held a meeting with Melco's representatives regarding the substance of the Commission's letter of facts dated 15 February 2012.

(21) The Advisory Committee expressed unanimously its consent in this case in a meeting on 19 June 2012.

(22) The Hearing Officer adopted his final report in this case on 20 June 2012.

2.1. Letter of Facts

(23) On 15 February 2012, the Commission sent a letter of facts to each of Melco and Toshiba informing them that the Commission intended to adopt a decision pursuant to Article 23 of Regulation (EC) No 1/2003 imposing fines on each of them for their infringement of Article 101 TFEU.

(24) The letters of facts described the circumstances, parameters and method of calculation relevant for setting the fines to be imposed on Melco and Toshiba and invited Melco and Toshiba to submit their views on those matters.

2.2. Parties' submissions on the procedural issues

2.2.1. Toshiba's submissions

(25) In a letter dated 7 March 2012, Toshiba submitted observations on the procedure which it considered should have been followed by the Commission.[18]

(26) In this regard, Toshiba submitted that the Commission should have issued a statement of objections rather than a letter of facts for the following reasons:

(i) a recalculation of the fine imposed on Toshiba would entail a fresh characterisation of the facts. That new characterisation of the facts could only be done through the mechanism of a statement of objections. As held by the Court of Justice in Joined cases C-322/07 P *Papierfabrik August Koehler and others v Commission, "[t]hat principle [of Community law which requires the observance of the rights of defence] requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it. It follows from that principle that a competition decision in which the Commission imposes a fine on an undertaking without first having informed it of the objections relied on against it cannot be held to be lawful."*[19] ;

(ii) a letter of facts cannot be used to replace a statement of objections. If additional objections are issued after the statement of objections, the Commission is obliged to

---

[18] Toshiba's substantive observations on the matters set out in the Commission's letter dated 15 February 2012, were submitted in a letter to the Commission a letter dated 23 March 2012. Recitals (64) to (68) describe Toshiba's main submissions in this regard and the Commission's views in relation thereto.

[19] Joined cases C-322/07 P, *Papierfabrik August Koehler and others v Commission* [2009] ECR I-7191 paragraphs 36 and 37.

issue a new statement of objections. The objective of a letter of facts is to set out certain facts not explicitly referred to in the statement of objections. No new evidence or facts have come to light in this case. Rather, the Commission intends to re-calculate the fine on the basis of a new fine methodology, which entails a new characterisation of the facts. That new characterisation of facts cannot be addressed to Toshiba in a letter of facts;

(iii) a letter of facts would not be appropriate where it included new facts which were detrimental to the interests of the undertaking concerned. A new fine is clearly to Toshiba's detriment. The fine methodology proposed by the Commission could even result in a larger fine being imposed on Toshiba than the one imposed in the GIS Decision. Therefore, the procedure that triggers the same procedural rights as a statement of objections should be followed.

(iv) the Commission's Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[20] ("Commission Notice on Best Practices") requires that the Commission provide information about the parameters of the fine in a statement of objections and not in a letter of facts, to allow the parties to respond to the Commission's proposed fine calculation;[21]

(v) the issuance of a new statement of objections is consistent with the Commission's practice in other cases where the Commission issued a new statement of objections before re-adopting a decision which had been previously annulled by the Court of Justice or the General Court;[22]

(vi) the GIS case should be distinguished from other cases where the Commission adopted a new decision without issuing a statement of objections[23] because the annulment of the original decision in those cases was only due to procedural irregularities.

(27) Toshiba also submitted that since it has appealed the findings of the General Court to the Court of Justice, in the interests of good administration and general administrative efficiency, the Commission should wait until the Court of Justice renders final judgment, otherwise the Decision whereby the Commission imposes new fines on Toshiba would become open to appeal in its own right while Toshiba's appeal relating to the GIS Decision will still be pending and this would result in two parallel proceedings before the Union courts.

(28) In a letter dated 23 March 2012, Toshiba submitted observations regarding the substance of the Commission's letter of facts. In its letter, Toshiba also requested a state of play meeting with the Commission.

---

20 OJ C 308, 20.10.2011, p.6.

21 Paragraphs 82, 84 and 85.

22 Case COMP/38.907 Steel Beams, Commission Decision of 16 February 1994, re-adopted on 8 November 2006; Case COMP/39.234 Alloy Surcharge, Commission Decision of 21 January 1998, re-adopted on 20 December 2006; and Case COMP/36.212 Carbonless paper, Commission Decision of 20 December 2001, re-adopted on 23 June 2010.

23 Case COMP/37.956, Commission Decision of 17 December 2002, re-adopted on 30 September 2009 and Case COMP/31.865, Commission Decision of 21 December 1988, re-adopted on 27 July 1994.

2.2.2. Commission's assessment of Toshiba's submissions

(29) In a letter dated 15 March 2012, the Commission took note of Toshiba's submissions regarding procedure and indicated its view that a statement of objections was not required in this case since imposition of new fines on Melco and Toshiba in the case at hand does not involve the raising of new objections against Toshiba.

(30) Article 27(1) of Regulation (EC) No 1/2003 provides for the parties' right to be heard on matters to which the Commission has "*taken objection*".

(31) Article 27(1) of Regulation (EC) No 1/2003 also establishes that the Commission must base its decisions only on objections on which the parties concerned have been able to comment.

(32) Paragraph 81 of the Commission Notice on Best Practices states that the opportunity to be heard is granted through the adoption of a statement of objections.

(33) As stated in paragraph 82 of the Commission Notice on Best Practices, a statement of objections sets out the preliminary position of the Commission on the alleged infringement of Article 101 of the Treaty, after an in-depth investigation. Its purpose is to inform the parties concerned of the "*objections raised against them*" with a view to enabling them to exercise their rights of defence.

(34) Toshiba has, in the context of the proceedings leading up to the adoption of the GIS Decision against Toshiba, been given and availed itself of the opportunity to be heard on the matters to which the Commission took objection. The fact that Toshiba's rights of defence were respected in the proceedings leading up to the adoption of the GIS Decision was acknowledged by the Hearing Officer's report in that case.[24]

(35) Moreover, the fact that Toshiba's rights of defence were respected in the proceedings leading up to the adoption of the GIS Decision, in so far as it has been contested in Toshiba's appeal against the GIS Decision, has also been confirmed by the General Court.[25]

(36) The letter of facts addressed to Toshiba merely presented the new developments since the Commission's adoption of the GIS Decision, essentially, the General Court's judgments in Case T-113/07, *Toshiba Corp. v European Commission* and Case T-133/07 *Mitsubishi Electric Corp. v European Commission* and set out the facts relevant to the calculation of the fine in the light of the General Court's judgment in Case T-113/07, *Toshiba Corp. v European Commission.*

(37) The Commission considers that the amendment of the GIS Decision to impose new fines on Toshiba pursuant to Article 23(2) of Regulation (EC) No 1/2003 does not involve any new objections against Toshiba, nor does it involve the modification of the intrinsic nature of the infringement with which Toshiba was charged. The reason for this is that the purpose of this Decision is to remedy the situation created as a result of the General Court judgments whereby the Commission's finding of an infringement of Article 101 TFEU and Article 53 EEA by Toshiba, made by a

---

24 OJ C 5, 10.1.2008, p. 4.

25 Case T-113/07, *Toshiba Corp. v European Commission,* paragraphs 30-77.

decision under Article 7(2) of Regulation (EC) No 1/2003, remained in effect, while the fines for that infringement, imposed by a decision under Article 23(2) of Regulation (EC) No 1/2003, were annulled. Indeed, this Decision is limited to imposing a fine.

(38) The Commission considers that the dictum in *Papierfabrik August Koehler and others v Commission* on which Toshiba relies is to be understood in the context of the objections raised against an undertaking, which remain unchanged in the case at hand.

(39) Therefore, the Commission considers that a statement of objections was not required for the purposes of this case.

(40) In any event, even in the context of the procedure leading up to the adoption of this Decision, Toshiba has been afforded and has availed itself of the opportunity to effectively exercise its procedural rights.

(41) In its letters of 15 February 2012 and 15 March 2012, the Commission invited and encouraged Toshiba to submit its views on the circumstances, parameters and method of calculation relevant for setting the fines to be imposed on Toshiba. Toshiba eventually submitted its substantive observations in a letter dated 23 March 2012.

(42) As regards Toshiba's submissions regarding the timing of this Decision, the Commission considers that by virtue of this Decision, the Commission is exercising its discretion under Article 23(2) of Regulation (EC) No 1/2003 to impose fines on undertakings which have intentionally infringed Article 101 TFEU. The Commission does not consider that a delay in imposing fines in relation to a breach of the Treaty resulting from participation in a cartel is opportune, especially in a context where the General Court has upheld the Commission's finding of such infringement.

2.2.3. The Hearing Officer's assessment of Toshiba's submissions

(43) On 15 March 2012, Toshiba addressed a letter to the Hearing Officer submitting that the Commission should have issued a statement of objections rather than a letter of facts and that Toshiba should be entitled to reply to that statement of objections.

(44) In a letter dated 16 March 2012, the Hearing Officer indicated that he shared the view of the Directorate-General for Competition that a statement of objections was not required in this case.

(45) The Hearing Officer indicated that, as the Directorate-General for Competition had stated in its letter, the Commission was not raising any new objections against Toshiba, beyond those on which Toshiba had already been heard in the procedure leading to the adoption of the GIS Decision against Toshiba. Rather, the Commission's letter of facts set out the facts relevant for the calculation of the fine in the light of the General Court's judgment and adopted the methodology suggested by the Court.

(46) Furthermore, the Hearing Officer indicated that Toshiba had been given the opportunity and indeed been encouraged by the Commission[26] to submit its views and was thus able to effectively exercise its procedural rights. The Hearing Officer concluded that Toshiba's right to be heard had not been infringed.

2.2.4. Melco's submissions regarding procedure

(47) In its reply to the letter of facts Melco submitted, among others, that the Commission should wait until the Court of Justice has delivered judgment in the appeal filed by Melco against the General Court's judgment in Case T-133/07 *Mitsubishi Electric Corp. v European Commission,* since:

(i) Melco might bring separate annulment proceedings against the 'new' Commission Decision; this would lead to multiple sets of proceedings at different stages of evolution on appeal to different Union courts all arising from the same case;

(ii) if the Court of Justice finds in favour of Melco, it might annul the GIS Decision in its entirety, rendering any adoption of new fines invalid; this would, in turn, mean the Commission would have to return the fine plus interest accrued to Melco;

(iii) imposing a new fine on Melco before the Court of Justice has delivered judgment in the appeal filed by Melco would unnecessarily and unfairly deprive Melco of funds pending a final decision of the Court of Justice.

(48) In its letter, Melco requested that the Commission inform Melco of its view on the points raised in Melco's letter dated 16 March 2012 and of the Commission's intended steps in the proceedings.

2.2.5. The Commission's assessment of Melco's arguments regarding procedure

(49) As a result of the General Court's judgment in Case T-133/07 *Mitsubishi Electric Corp. v European Commission*, the Commission's finding of an infringement of Article 101 TFEU and Article 53 EEA by Melco, made by a decision under Article 7(2) of Regulation (EC) No 1/2003, remains in effect, while the fine for that infringement, imposed by a decision under Article 23(2) of Regulation (EC) No 1/2003, was annulled.[27]

(50) The Commission considers that by virtue of this Decision, it is exercising its discretion under Article 23(2) of Regulation (EC) No 1/2003 to impose fines on undertakings which have intentionally infringed Article 101 TFEU. The Commission does not consider that a delay in imposing fines in relation to a breach of the Treaty resulting from participation in a cartel is opportune, especially in a context where the General Court has upheld the Commission's finding of such infringement.

---

26 Letters to Toshiba dated 15 February 2012 and 15 March 2012.

27 Case T-133/07 *Mitsubishi Electric Corp. v European Commission,* paragraph 278.

3. REMEDIES

3.1. Article 23(2) of Regulation (EC) No 1/2003 – Fines

(51) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(52) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission sets the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement is assessed on an individual basis. In particular, the Commission reflects in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.

(53) In setting the amount of the fines to be imposed, the Commission refers to the principles laid down in the Commission's Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty ("1998 Guidelines").[28] It is worth noting that in its response to the letter of facts Melco expressly accepts the applicability of the 1998 Guidelines. Finally, the Commission will apply, as appropriate, the provisions of the Commission notice on immunity from fines and reduction of fines in cartel cases (the "2002 Leniency Notice")[29], which is applicable in this case.

3.1.1. Basic amount of the fine

(54) The basic amount of the fine to be imposed is determined according to the gravity and duration of the infringement.

3.1.1.1. Gravity

(55) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

(56) In view of the facts established in the GIS Decision, the Commission considers that the infringement committed by Melco and Toshiba was "very serious" within the meaning of the 1998 Guidelines.[30] In reaching this conclusion, the Commission took into account, in particular:

(a) the nature of the infringement, which involved allocation of GIS projects worldwide according to agreed rules, thereby respecting quotas largely reflecting estimated historic market shares and fixing price levels, while

---

28 OJ C 9, 14.1.1998, p. 3.

29 OJ C 45, 19.2.2002, p. 3.

30 The General Court dismissed Toshiba's plea against the Commission's classification of the infringement as very serious (Case T-113/07 *Toshiba Corp. v European Commission,* paragraph 262).

reserving some territories to certain producers[31]; these kinds of restrictions are, by their very nature, among the worst kinds of infringements of competition rules; the case law has confirmed that agreements or concerted practices involving the kinds of restrictions that were found in this case may warrant the classification 'very serious' solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or to have a particular impact;[32]

(b) the fact that Melco and Toshiba were or should have been aware of the illegal nature of their activities; the measures taken to conceal the cartel show that the participants were fully aware of the illicit nature of the activities;[33]

(c) the fact that the cartel arrangements were effectively implemented, as established in the GIS Decision; moreover, the cartel lasted for more than 16 years and the participants were willing to incur substantial costs (time of executives, travelling expenditure, communications, the risk of substantial fines for infringement anti-cartel laws) in contribution to its continued existence; the long adherence to a costly scheme demonstrates that the cartel was profitable for its members and hence had an impact;[34]

(d) the fact that the illegal activities covered the whole territory of the EEA;[35] that being said, it was demonstrated in the GIS Decision that the agreement was worldwide.

3.1.1.2. Differential treatment

(57) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of differences in their effective economic capacity to cause significant damage to competition. This is appropriate where, as in this case, there are considerable disparities between the respective market shares of the undertakings participating in the infringement. For this purpose, the undertakings concerned can be divided into different categories, established according to their relative importance in the relevant market.

(58) Given the global character of the cartel arrangements whose existence was established in the GIS Decision, the worldwide sales figures give the most appropriate picture of the participating undertakings' capacity to cause significant damage to other operators in the EEA. This approach is supported by the fact that the object of the cartel was, *inter alia*, to allocate markets on a worldwide level. Thus, the worldwide turnover of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the

---

31 Section 6.1 of the GIS Decision.

32 Joined Cases T-49/02 to T-51/02 *Brasserie nationale a.o. v Commission*, ECR 2005 II – 03033, paragraphs 178 and179; Case T-38/02 *Groupe Danone v Commission*, ECR 2005 II – 04407, in particular paragraphs 147, 148 and 152 and Case T-241/01 *SAS v Commission*, ECR 2005 II – 02917, in particular paragraphs 84, 85, 122, 130 and 131.

33 Recitals 170-176 of the GIS Decision.

34 Section 6 and Annex 1 to the GIS Decision.

35 Section 6 and Annex 1 to the GIS Decision.

instability which would have affected the cartel had it not participated. In fact, since it is concluded that a common understanding existed that the Japanese undertakings would refrain from competing on the European market, the Commission would substantially underestimate the role of the Japanese participants in the cartel if it were to rely on turnover data pertaining only to the EEA. The comparison is made on the basis of the worldwide product turnover in the last full year of the infringement for each undertaking. Accordingly, all the participant undertakings in the cartel can be subdivided into several categories according to their worldwide sales of the product which forms the subject matter of the infringement.

(59) For the purpose of differential treatment, the Commission used the year 2003 as a reference year for the determination of the value of sales of Melco and Toshiba. This approach is in line with the findings of the General Court in the judgments in Case T-133/07 *Mitsubishi Electric Corp. v European Commission* and Case T-113/07 *Toshiba Corp. v European Commission.*

(60) Given that in 2003, as established in the GIS Decision, Melco and Toshiba participated in the cartel via their joint venture T&M TD, the Commission used the world-wide GIS turnover of TM T&D in 2003[36] to establish a starting amount, which was used for the purpose of calculating the fine to be imposed on Melco and Toshiba for the period between 1 October 2002 and 11 May 2004 (hypothetical JV starting amount). The Commission did not, however, impose the hypothetical JV starting amount as a separate fine but merely uses it (i) as a basis for calculating the increase for duration in the period between 1 October 2002 and 11 May 2004, and (ii) as a basis for the determination of the individual starting amounts of Toshiba and Melco for the period of their individual participation in the cartel (15 April 1988 until 1 October 2002).

(61) For the purpose of categorisation of undertakings based on their GIS turnover in the year 2003, the Commission used the same groupings as those established in the GIS Decision.[37] TM T&D's world-wide GIS turnover in 2003 places it in the second largest group, and accordingly, the hypothetical JV starting amount should be EUR 31 000 000.

(62) In order to properly reflect the capacity of Melco and Toshiba to harm competition during the period prior to the creation of their joint venture TM T&D, which was recognized by the General Court as a legitimate goal, separate starting amounts should be established for Melco and Toshiba in order to calculate the amount of the fine to be imposed on each undertaking for the period prior to the creation of TM T&D (15 April 1988 until 1 October 2002). To do so, the hypothetical JV starting amount should be divided between Melco and Toshiba in accordance with the proportion of GIS sales made by each of them during the year prior to the creation of the joint venture, namely 2001.[38] This leads to individual starting amounts for Melco and Toshiba, which are used to calculate the amount of the fine to be imposed on each of them respectively for the period between 15 April 1988 and 1 October 2002.

---

36 As provided in Melco and Toshiba submissions of 29 November 2006 within the context of the investigation leading up to the adoption of the GIS Decision.

37 Recitals 484-488 of the GIS Decision.

38 As provided in Melco and Toshiba submissions of 29 November 2006 within the context of the investigation leading up to the adoption of the GIS Decision.

(63) Dividing the hypothetical JV starting amount of EUR 31 000 000 between Melco and Toshiba based on the proportion of their world-wide GIS sales in 2001[39] results in the starting amounts of [...] for Melco and [...] for Toshiba.

The Commission's assessment of Melco's and Toshiba's arguments regarding differential treatment

(64) In their replies to the letter of facts both Melco and Toshiba argued that, for the purpose of establishing the hypothetical JV starting amount, the Commission should take only the 2003 turnover of TM T&D and not the combined turnover of Melco, Toshiba and TM T&D. As explained in recital (60) the Commission used only the turnover of TM T&D in 2003 to establish the hypothetical JV starting amount.

(65) As to the establishment of separate starting amounts for Melco and Toshiba for the purpose of calculating the amount of the fines to be imposed on them for the period prior to the creation of TM T&D, Toshiba argued that the Commission should not use as a starting point the hypothetical JV starting amount but, rather, TM T&D sales in 2003 and divide them between Melco and Toshiba. Melco argued that the Commission should either (i) split the hypothetical JV starting amount between Melco and Toshiba according to the percentages of shares held by Melco and Toshiba in TM T&D (each 50%), rather than according to the proportion of Melco's and Toshiba's GIS sales in 2001, or, in the alternative, (ii) divide TM T&D sales in 2003 between Melco and Toshiba in the correct ratio (presumably again 50/50).

(66) As to what amount should be divided between Melco and Toshiba for the purpose of establishing their separate starting amounts, the Commission considers the method described in recital (62), whereby the hypothetical JV starting amount is divided between Melco and Toshiba, as the most appropriate in this situation (rather than following Toshiba's suggestion and dividing TM T&D sales in 2003 between Toshiba and Melco). Contrary to Toshiba's arguments, this method fully complies with the General Court's judgments in Case T-133/07 *Mitsubishi Electric Corp. v European Commission* and Case T-113/07 *Toshiba Corp. v European Commission* in that it is based on 2003 as a reference year for the purposes of applying differential between the undertakings that participated in the infringement. In 2003 Melco and Toshiba participated in the infringement via their joint venture TM T&D and hence it is TM T&D turnover in 2003 that is compared to the 2003 turnover of other participating undertakings in order to arrive at a starting amount (the hypothetical JV starting amount) that properly reflects TM T&D's weight in the infringement. The Commission considers that this element of comparison with other participating undertakings in the relevant reference year (2003) would be lost were the Commission to take, as Toshiba suggests, TM T&D turnover in 2003 and divide it between Melco and Toshiba on the basis of their sales in 2001 and then compare the resulting amounts with the turnovers of the other undertakings achieved in 2003. Such a method would be inappropriate in that it would involve comparing the 2001 virtual turnovers of Melco and Toshiba with the 2003 turnovers of the other undertakings. Also, the method applied by the Commission, whereby the JV turnover is divided between Melco and Toshiba to arrive at their separate starting amounts fully corresponds to a method considered appropriate by the General Court in its

---

[39] Melco [...] (reply of 29 November 2006) and Toshiba [...] (reply of 29 November 2006).

judgments in Case T-133/07 *Mitsubishi Electric Corp. v European Commission* and Case T-113/07 *Toshiba Corp. v European Commission.*

(67) With respect to what ratio should be used to divide the hypothetical JV starting amount between Melco and Toshiba in order to arrive at their separate starting amounts, the Commission recalls that the General Court in its judgments in Case T-133/07 *Mitsubishi Electric Corp. v European Commission* and Case T-113/07 *Toshiba Corp. v European Commission* recognized the Commission's objective to take account of the uneven competitive position of Melco and Toshiba in the period prior to the creation of TM T&D as legitimate. In order to do so, the Commission considers the ratio suggested by the General Court in the said judgments as the most appropriate, that is to say, the ratio between Melco's and Toshiba's world-wide GIS sales in 2001, which is the last full year preceding the creation of TM T&D. Such a comparison allows for a more accurate reflection of the uneven economic capacity of Melco and Toshiba prior to the creation of TM T&D than their respective shareholdings in TM T&D. Moreover, the sales and the shareholding ratio differ to a significant extent and as such the shareholding ratio does not accurately reflect the market reality existing prior to the creation of TM T&D. Accordingly, the Commission used the proportion of Melco's and Toshiba's world-wide GIS sales to divide the JV starting amount between them (see recital (62)).

(68) Both Melco and Toshiba further argued that the Commission should not impose the hypothetical JV starting amount as a fine in addition to the increase for duration in the joint venture period. As explained in recital (60), the Commission did not impose the hypothetical JV starting amount as a separate fine in addition to the 15% increase for duration for participation in the joint venture period.

3.1.1.3. Sufficient deterrence

(69) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking to be fined and the particular circumstances of the case. It is considered that for undertakings that have a particularly large turnover compared to other players a multiplier is warranted to ensure sufficient deterrence.

(70) While for the purpose of carrying out the comparison the Commission generally takes the turnovers achieved in the last full business year before the decision,[40] in this particular case, the Commission considers it more appropriate to use the same year as that used in the GIS Decision, namely 2005. In this way the Commission can compare the turnovers of all participating undertakings achieved in the same year and as such ensure equal treatment between the undertakings sanctioned for their participation in the GIS cartel.[41] Moreover, this method is more favourable to both

---

40 See also Case T-279/02 Degussa v Commission, paragraph 285.

41 In the recital 493 of the GIS Decision the Commission held the following: "...the undertaking ABB with a turnover of EUR 18 038 million should have a multiplier of 1.25. The undertaking Melco with a turnover of EUR 26 336 million should have a multiplier of 1.5. The undertaking Toshiba with a turnover of EUR 46 353 million should have a multiplier of 2. The undertaking Hitachi with a turnover of EUR 69 161 million should have a multiplier of 2.5. The undertaking Siemens with a turnover of EUR 75 445 million should have a multiplier of 2.5".

Melco and Toshiba as they both achieved a higher total turnover in 2011, which is a year that could otherwise be taken.[42] It should also be noted that in its reply to the letter of facts Toshiba suggests that 2005 should be taken as a year of comparison.

(71) Accordingly, using 2005 as a year of comparison, that is to say, the same year as in the GIS Decision, the Commission applied multipliers identical to those used in the GIS Decision: a multiplier of 1.5 for Melco and a multiplier of 2 for Toshiba.

The Commission's assessment of Melco's arguments regarding sufficient deterrence

(72) In its response to the letter of facts, Melco argued that the Commission should not apply to it a multiplier higher than 1.25 for the reasons set out in its application in Case T-133/07 *Mitsubishi Electric Corp. v European Commission.* The Commission considers that a multiplier of 1.5 is appropriate as it results from a direct comparison of Melco's turnover to the turnover of the other undertakings in respect of which a multiplier was applied. As such, were the Commission to apply a multiplier lower than 1.5 on Melco, it would result in inequality of treatment.

3.1.1.4. Duration of the infringement

(73) In accordance with the 1998 Guidelines, for infringements lasting longer than one year, the starting amount of the fine to be imposed is increased by 10% for each full year and by 5% for each additional period of at least six months but less than a year.

(74) Melco and Toshiba infringed Article 101 TFEU and Article 53 EEA by participating, from 15 April 1988 to 11 May 2004, in a complex of agreements and concerted practices in the Gas Insulated Switchgear sector in the EEA.

(75) As established in the GIS Decision, Melco and Toshiba are solely liable for the infringement in the period between 15 April 1988 and 1 October 2002, and jointly and severally liable for the infringement in the period between 1 October 2002 and 11 May 2004.[43]

(76) For the period between 15 April 1988 and 1 October 2002 Melco and Toshiba are each liable for an infringement of 14 years and 5 months, which justifies an increase

---

42 Melco and Toshiba provided the Commission with total turnovers for financial year (FY) 2010 (1 April 2010 - 31 March 2011) on 23 January 2012. Toshiba's total turnover in FY 2010 was EUR 56 533 million (Toshiba's letter of 23 January 2012). Melco's total turnover in the same year was EUR 31 360 million (Melco's letter of 23 January 2012). The companies' total turnovers in FY 2011 (1 April 2011 – 31 March 2012) are similar to those in FY 2010, which the Commission verified from reports accessible on Melco's and Toshiba's respective websites. In FY 2011 Melco's total turnover was JPY 3 639 400 million (source: Melco's announcement No. 2675 of 27 April 2012, accessible at http://www.mitsubishielectric.com/news/2012/0427.pdf), which is EUR 33 449 million (conversion from JPY to EUR on the basis of exchange rate of 108.804, which is an average of JPY/EUR exchange rates in the relevant period published by the European Central Bank, accessible at http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html). Toshiba's total turnover in FY 2011 was JPY 6 100 300 million (source: Toshiba's announcement of 8 May 2012, accessible at http://www.toshiba.co.jp/about/ir/en/finance/er/er2011/q4/ter2011q4e.pdf), which is EUR 56 066 million (using the same exchange rate as for Melco).

43 Recitals 404-407 and 427-435 of the GIS Decision.

of 140% in the starting amounts of the fines to be imposed on Melco and Toshiba in respect of that first period.

(77) For the period between 1 October 2002 and 11 May 2004, Melco and Toshiba are jointly and severally liable for an infringement of 1 year and 7 months. This justifies an increase of 15% in the hypothetical JV starting amount. As explained in recital (60) the Commission did not impose the hypothetical JV starting amount as a separate fine in respect of that period.

(78) In view of the fact that multipliers should applied to the fines to be imposed on both Melco and Toshiba for the purposes of deterrence, those multipliers should be applied in respect of both periods, that is to say, the period between 15 April 1988 and 1 October 2002 as well as the period between 1 October 2002 and 11 May 2004. For the latter period Melco's and Toshiba's respective multipliers should be applied to the 15% increase for duration and each of them should be held solely liable for the resulting amount corresponding to the deterrence multiplier.

3.1.2. Mitigating and aggravating circumstances

(79) No facts have been established in the GIS Decision that would justify the existence of any attenuating and/or aggravating circumstances for Melco or Toshiba.

(80) Accordingly, there should be no adjustment of the fine to be imposed on Melco or on Toshiba on account of attenuating or aggravating circumstances.

3.1.3. Application of the 10% of turnover limit

(81) In accordance with Article 23(2) of Regulation (EC) No 1/2003, the fine imposed on Melco or Toshiba must not exceed 10% of their respective worldwide annual turnover.

(82) In financial year 2010 (1 April 2010 - 31 March 2011), Melco's annual worldwide turnover was EUR 31 360 million and Toshiba's was EUR 56 533 million.[44] In neither Melco's nor Toshiba's case, the fine reaches 10% of their respective world-wide turnovers. The same applies with respect to Melco's and Toshiba's turnovers in financial year 2011.[45]

3.1.4. Application of the 2002 Leniency Notice

(83) On 4 November 2004 Melco wrote to the Commission under the 2002 Leniency Notice. In its letter, it described [...]. As stated in recital 546 of the GIS Decision, the Commission already knew all of this since ABB's immunity application. Moreover Melco challenged the Commission findings, notably that the cartel concerned the EEA and that there existed a 'common understanding' between the European and Japanese suppliers for the Japanese producers not to sell in Europe and vice versa and therefore, the existence of an infringement of Article 101 TFEU in their regard. It also ambiguously contests the continuation of the cartel after 1999 (for example, see recital 292 of the GIS Decision).

---

44 Toshiba's letter of 23 January 2012. Melco's letter of 23 January 2012.

45 See footnote 42 above.

(84) In conclusion, the information provided by Melco does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the 2002 Leniency Notice. Accordingly, no reduction under the Leniency Notice should be granted to Melco. It is worth noting that Melco, in its application to the General Court against the GIS Decision (Case T-133/07) did not contest the identical finding made in that Decision.

3.1.5. Conclusion: The amounts of the fines imposed in this proceeding

(85) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

(a) Mitsubishi Electric Corporation, solely liable: EUR 74 817 000,

(b) Toshiba Corporation, solely liable: EUR 56 793 000,

(c) Mitsubishi Electric Corporation and Toshiba Corporation, jointly and severally liable: EUR 4 650 000,

HAS ADOPTED THIS DECISION:

Article 1

In Article 2 of Decision C(2006)6762 final of 24 January 2007, the following points (g), (h) and (i) are inserted :

"(g) Mitsubishi Electric Corporation solely liable: EUR 74 817 000;

(h) Mitsubishi Electric Corporation and Toshiba Corporation jointly and severally liable: 4 650 000 EUR;

(i) Toshiba Corporation solely liable: EUR 56 793 000;"

The fines shall be paid in euro within three months of the date of the notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1–2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI / COMP/39966

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 85a(1) of Commission Regulation (EC, Euratom) No 2342/2002.[46]

Article 2

This Decision is addressed to:

TOSHIBA CORPORATION
1-1, Shibaura 1-Chome
Minato-Ku
Tokyo 105-8001
Japan

MITSUBISHI ELECTRIC CORPORATION
2-7-3 Marunouchi
Chiyoda-ku
Tokyo 100-8310
Japan

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 27.6.2012

For the Commission
Joaquín ALMUNIA
Vice-President

[46] OJ L 357, 31.12.2002, p. 1.