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Toshiba v Commission: Do two Wrongs Make a Right? The CJEU Takes Another Step Away From Allianz Hungaria

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There are few distinctions more important in EU competition law than that between the notion of a restriction "by object" – where a regulator need not demonstrate that conduct had anti-competitive effects – and the notion of a restriction "by effect," where a regulator actually has to prove that conduct was anti-competitive. Unfortunately, as readers of this blog will doubtless be aware, a flawed, and much-criticised, 2013 judgment of the CJEU in *Allianz Hungaria*[1] threatened to render meaningless the distinction between restrictions by object and restrictions by effect. As a result, ever since the CJEU handed down its *Allianz Hungaria* judgment, the EU Courts have been engaged in a painstaking attempt to show deference to it, while, at the same time, moving further and further away from it. The CJEU's judgment of 20 January 2016 in *Toshiba v Commission*[2] represents the latest chapter in this excruciating and confusing journey.

Background

Toshiba v Commission arises out of the power transformers cartel case in which the Commission fined seven European and Japanese manufacturers in relation to a so-called "Gentlemen's Agreement" pursuant to which Japanese manufacturers agreed not to compete for business in Europe.

The Japanese manufacturers argued before the Commission that their conduct in refraining from competing for business in Europe should not be classed as a restriction of competition by object as the barriers to entering the European markets were such that they would anyway never have competed in Europe. The Commission and the General Court[3] rejected the Japanese manufacturers' arguments, so Toshiba brought its appeal before the CJEU.

In essence, Toshiba argued before the CJEU that the assessment of what constituted a restriction by object ought to have involved – in its case – a more detailed assessment of the legal and economic context around the Gentlemen's Agreement. According to Toshiba, such a detailed assessment would have demonstrated that Toshiba was not capable of competing for business in Europe, with the result that its conduct could not possibly be deemed restrictive of competition by object.

Toshiba was therefore arguing in favour of a more detailed assessment under the third limb of the test for determining when an agreement restricts competition by object. Under that test, in order for an agreement to be considered restrictive of competition by object, regard must be had to: (i) the content of the agreement's provisions; (ii) its objectives; and (iii) the economic and legal context of which it forms part.

Such a detailed assessment under the third limb of the by object test is precisely what the CJEU in *Allianz Hungaria* thought necessary. Specifically, the CJEU in *Allianz Hungaria* ruled (in error)[4] that the assessment of the legal and economic context of an agreement should entail an examination of: *"the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question."*

In *Allianz Hungaria*, the detailed assessment of legal and economic context rendered a finding of restriction by object more likely. In Toshiba's case, a detailed examination of the *"real conditions of the functioning and structure of the market or markets in question"* would have been more likely to yield the result that Toshiba wanted – i.e., that the Gentlemen's Agreement could not be deemed restrictive of competition by object because Toshiba could anyway not have competed for business in Europe.

The CJEU's approach in *Toshiba v Commission*

In essence, and leaning heavily on the earlier Opinion from Advocate General Wathelet,[5]

the CJEU concludes in *Toshiba v Commission* that, where it is obvious that an agreement has the object of restricting competition (such as the market-sharing agreements at issue in the case at hand), *"the analysis of the economic and legal context of which the practice forms part may* {…} *be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object."*[6]

So, for the CJEU in *Toshiba v Commission*, the examination of legal and economic context can be limited where an agreement is clearly restrictive of competition by object, but it must be more detailed where an agreement is less clearly restrictive of competition by object. Which means we now have three main categories of agreements that breach the prohibition in Article 101(1) TFEU: (i) those that are so obviously restrictive of competition that they can be deemed restrictive of competition by object without the need for any real assessment of their legal or economic context; (ii) those that might be restrictive of competition by object but in relation to which it is necessary to conduct a detailed assessment of legal and economic context in order to arrive at a conclusion either way; and (iii) those that are not restrictive by object but nonetheless breach the prohibition in Article 101(1) TFEU because they can be shown to have anti-competitive effects.

This threefold classification might represent a workable solution. But it is clear that the Advocate General thought the judgment in *Allianz Hungaria* more than a little awkward when suggesting that Toshiba's appeal should be rejected. So much so, in fact, that after observing in his Opinion how the judgment of the CJEU in *Allianz Hungaria* did not seem to fit with the rest of the Court's jurisprudence on restrictions of competition by object, he dedicated some 25 paragraphs of his Opinion to the following proposition: *"I think, however, that it is possible to reconcile the consistent case-law of the Court, as outlined above, and the judgment in Allianz Hungária."* The authors of this blog suggest that if the *Allianz Hungaria* judgment looks wrong on its face, and if it

runs counter to the prior jurisprudence, and if it takes 25 paragraphs to construct a theory pursuant to which it might not be wrong, it probably is wrong.

Implications

Evidently, if the CJEU wished to reject Toshiba's appeal, the best solution would have been for the Court to state in clear terms that *Allianz Hungaria* was wrong. In the authors' view, the CJEU was wrong not to do so.

But, assuming, as appears to be the case, that the CJEU is reluctant to call out the judgment in *Allianz Hungaria*, Advocate General Wathelet's solution – to create the three categories of agreement outlined above – may be the best way out. To that extent, it may be that the judgment is to be welcomed. But that depends on how it is applied in practice. It may be that regulators wanting to claim that an agreement is restrictive of competition by object simply rely on the judgment in *Toshiba v Commission* as support for the proposition that they need not necessarily undertake a detailed assessment of the legal and economic context of an agreement. That would be a mistake – and not what either Advocate General Wathelet or the CJEU intended – but given an inch, regulators have been known to take a mile. Only time will tell if the judgment in *Toshiba v Commission* represents a neat way out of the *Allianz Hungaria* problem, or simply compounds the CJEU's earlier mistake.

References[+]

?6 *Toshiba v Commission*, judgment, paragraph 29.

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