

Final Report of the Hearing Officer ⁽¹⁾**Optical Disk Drives****(AT.39639)**

(2016/C 484/09)

Introduction

- (1) The draft decision concerns a cartel involving certain global suppliers of optical disk drives ('ODDs'). According to the draft decision, these suppliers coordinated their behaviour in respect of ODD bidding events organised by two manufacturers of personal computers, Dell Inc. ('Dell') and Hewlett Packard ('HP').
- (2) The undertakings or joint ventures found in the draft decision to have participated in the cartel are: Philips ⁽²⁾, Lite-On ⁽³⁾, Philips-Lite-On ⁽⁴⁾, Hitachi-LG ⁽⁵⁾, Toshiba-Samsung ⁽⁶⁾, Sony ⁽⁷⁾, Sony Optiarc ⁽⁸⁾ and Quanta Storage Inc.

Investigation phase

- (3) The case stems from an application for immunity from fines submitted jointly by Philips, Lite-On and Philips & Lite-On. The Commission subsequently received a leniency application from Hitachi-LG. None of the other parties concerned applied for leniency.
- (4) The Commission did not carry out inspections. In June 2009, the Commission addressed targeted requests for information to several undertakings involved in the ODD sector.

The Commission's statements of objections

- (5) The Commission adopted a statement of objections on 18 July 2012 (the 'SO'). This was notified to certain entities of the undertakings that are the subject of the draft decision, as well as to one other undertaking.
- (6) On 18 February 2014, the Commission adopted two supplementary statements of objections (the 'SSOs of February 2014'): one addressed to Koninklijke Philips N.V., Lite-On IT Corporation and Philips & Lite-On Digital Solutions Corporation, and the other to a different undertaking. The purpose of the SSOs of February 2014 was to clarify, amend and supplement the objections made against their addressees in the SO as regards their liability for the alleged infringement.
- (7) On 1 June 2015, the Commission adopted another supplementary statement of objections ⁽⁹⁾. The sole purpose of this (the 'SSO of June 2015') was to supplement the SO and the SSOs of February 2014 by addressing the same objections to additional legal entities whose parent companies (or their predecessors) were already addressees of the SO. The SSO of June 2015 was also addressed to the parent companies of these additional legal entities. Other addressees of the SO were not concerned by the SSO of June 2015, which did not amend or extend the objections raised against them in the SO.

⁽¹⁾ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29).

⁽²⁾ The Philips entities to whom the draft decision is addressed are Koninklijke Philips N.V. and Philips Electronics North America Corporation.

⁽³⁾ The Lite-On entities to whom the draft decision is addressed are Lite-On Technology Corporation and Lite-On Sales & Distribution, Inc.

⁽⁴⁾ The Philips-Lite-On entities to whom the draft decision is addressed are Philips & Lite-On Digital Solutions Corporation and Philips & Lite-On Digital Solutions USA, Inc.

⁽⁵⁾ The Hitachi-LG entities to whom the draft decision is addressed are Hitachi-LG Data Storage, Inc., Hitachi-LG Data Storage Korea, Inc.

⁽⁶⁾ The Toshiba-Samsung entities to whom the draft decision is addressed are Toshiba Samsung Storage Technology Corporation and Toshiba Samsung Storage Technology Korea Corporation.

⁽⁷⁾ The Sony entities to whom the draft decision is addressed are Sony Corporation and Sony Electronics Inc.

⁽⁸⁾ The Sony Optiarc entities to whom the draft decision is addressed are Sony Optiarc Inc. and Sony Optiarc America Inc.

⁽⁹⁾ This was addressed to Koninklijke Philips N.V., Philips Electronics North America Corporation, Philips Taiwan Ltd, Lite-On Technology Corporation, Lite-On Sales & Distribution, Inc., Philips & Lite-On Digital Solutions Corporation and Philips & Lite-On Digital Solutions USA, Inc.

- (8) In their written responses to the SO, two parties concerned criticised general references to an annex to the SO in which specific instances of suspected collusive contacts were set out in a table. I reviewed the SO and the annex in question. Contrary to what those parties contended, that annex allowed the addressees of the SO to identify specific events and pieces of evidence held against them and to infer from them the conclusions that the Commission envisaged drawing from each of the contacts listed in the annex. This assessment is corroborated by the parties concerned having been able to run defence arguments in respect of all the allegations in the SO. Since the SO and the SSO of June 2015 are, apart from the list of addressees, virtually identical, including with respect to the annex in question, a similar assessment suggests itself as regards the SSO of June 2015.

Time periods for responding in writing to the SO and to subsequent supplementary statements of objections

- (9) The Directorate-General for Competition ('DG Competition') granted several addressees of the SO extensions of the 8-week period it initially set for responding in writing to the SO. I received reasoned requests from two other addressees of the SO for extensions of this period, DG Competition having earlier refused these requests. I granted extensions of one week and one working day.
- (10) The addressees of the SSOs of February 2014 replied within the period (four weeks from receipt) set for their written submissions.
- (11) DG Competition set a time period in which to reply to the SSO of June 2015 of almost five weeks from receipt of that supplementary statement of objections. All addressees replied within that period.

Access to the investigation file

- (12) Following receipt of the SO, the addressees of the SO made use of their opportunity to access those parts of the Commission file that were only available at the Commission's premises. DG Competition provided the rest of the accessible file to those addressees on an electronic storage device.
- (13) DG Competition dealt with some requests for additional access.
- (14) In a letter accompanying the SSOs of February 2014, DG Competition explained that the evidence relied on against the respective addressees of these supplementary statements of objections had either been provided by these addressees or had been available to them as part of access-to-file following adoption of the SO. Hence, DG Competition did not deem further access-to-file necessary following adoption of the SSOs of February 2014.
- (15) The addressees of the SSO of June 2015 made use of their right to access the Commission's file.

Letter of facts of June 2015

- (16) On 13 March 2015, DG Competition sent a letter to the parties concerned, enclosing additional documents received from Dell and HP. By a letter of facts dated 3 June 2015, DG Competition provided these parties with information concerning the Commission's envisaged use of these documents in the present case.
- (17) DG Competition set a time period for any written submissions in response to that letter of facts of two weeks from its receipt by email. All but one of the parties concerned responded within this period. DG Competition in effect granted the remaining party an extension of one week of the period in which to reply.

Interested third person: Dell

- (18) On 31 October 2012, I received Dell's reasoned request to be heard as an interested third person pursuant to Article 27 of Regulation (EC) No 1/2003 ⁽¹⁾ and Article 13 of Regulation (EC) No 773/2004 ⁽²⁾. In accordance with Article 5(2) of Decision 2011/695/EU, I found that Dell had demonstrated a 'sufficient interest' within the meaning of these provisions. I therefore admitted Dell as an interested third person.

⁽¹⁾ In accordance with Article 27(3) of 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 (OJ L 1, 4.1.2003, p. 1) and with Article 13.

⁽²⁾ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty (OJ L 123, 27.4.2004, p. 18).

- (19) In accordance with Article 13(1) of Regulation (EC) No 773/2004, DG Competition informed Dell in writing of the nature and subject matter of the procedure and Dell subsequently made known its views in writing.

Oral hearing

- (20) The oral hearing took place over a day and a half, on 29 and 30 November 2012. All but one of the undertakings to which the SO was addressed took part. There were no closed sessions.
- (21) I rejected Dell's request to participate in the oral hearing. In application of Article 6 of Decision 2011/695/EU, I did not consider this 'appropriate' ⁽¹⁾. First, Dell's presence would have been likely to deter the applicants for immunity or leniency from participating fully and actively in the oral hearing. Secondly, and more generally, allowing a potential damages claimant to participate in an oral hearing might have had a chilling effect on the Commission leniency programme. Thirdly, Dell's presence could have diminished the openness of exchanges between the Commission and the addressees of the SO, and thus would have risked undermining the ability of the parties concerned to present an effective defence. Fourthly, I considered it unlikely that Dell, from whom the suspected collusion had been concealed, would have been in a position to make a significant contribution to the clarification of the facts of the case at the oral hearing ⁽²⁾. Fifthly, Dell had not received access to the SO or to the investigation file, whereas discussions at the hearing appeared likely to focus on the interpretation of the SO and of the evidence in that file. Finally, it had to be borne in mind – even if this was not a decisive reason for my decision – that applications from third persons such as Dell at an advanced stage of preparation for the oral hearing would have been likely to disrupt the organisation of the oral hearing ⁽³⁾.
- (22) During the hearing, DG Competition put a question to a joint venture on a statement made in the merger control notification (Form CO) submitted by its parent undertakings pursuant to the EU merger control rules in force at the time of the formation of this joint venture. I alerted the relevant party that this question amounted in my view to a procedural irregularity and that this party could choose not to respond to it. Under EU merger control rules, the Commission cannot use information obtained in the context of merger control proceedings in separate (cartel) proceedings ⁽⁴⁾. Since the relevant party decided to respond to the question, I concluded that the effective exercise of its rights of defence was not compromised.
- (23) In their written responses to the SSOs of February 2014 and to the SSO of June 2015, the addressees concerned did not request to develop their arguments in an oral hearing ⁽⁵⁾.

The draft decision

- (24) After hearing the parties concerned, the Commission dropped its case in respect of one undertaking. As regards two undertakings and a joint venture, the decision does not maintain the objections set out in the SO, the SSOs of February 2014 and the SSO of June 2015 (together, the 'Statements of Objections') to the extent that these objections concerned conduct related to one of the two ODD customers in question.
- (25) In contrast to the Statements of Objections, no aggravating circumstances are held against the addressees of the draft decision.
- (26) The draft decision indicates that the addressees of that decision were involved in a cartel that lasted from 23 June 2004 until 25 November 2008. This overall duration period is shorter than that alleged in the Statements of Objections. The duration of the periods for which individual addressees of the draft decision are held liable are all shorter than the corresponding periods set out in the Statements of Objections. Reductions in the duration of liability for entities held liable range from approximately seven months to just over four years and eight months.

⁽¹⁾ See Article 13(2) of Regulation (EC) No 773/2004.

⁽²⁾ See recital 13 of Decision 2011/695/EU.

⁽³⁾ Dell had long been aware of the present proceedings and yet it applied for the status of interested third person a mere month before the oral hearing. Its formal request to attend the oral hearing arrived less than a week before the oral hearing.

⁽⁴⁾ See Article 17(1) of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1). An identical provision was contained in the previously applicable merger control rules.

⁽⁵⁾ See Article 12(1) of Regulation (EC) No 773/2004.

(27) In addition, the Statements of Objections provided the parties concerned, in accordance with paragraph 85 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU ⁽¹⁾, with an opportunity to comment on the envisaged method for determining fines. In the light of comments received by the Commission in this regard, the draft decision uses a modified approach for estimating the value of sales for the purposes of calculating fines.

Final remarks

(28) Pursuant to Article 16 of Decision 2011/695/EU, I have examined whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known its views. I conclude that it does so.

(29) Overall, I conclude that the effective exercise of procedural rights has been respected in this case.

Brussels, 9 October 2015.

Wouter WILS

⁽¹⁾ OJ C 308, 20.10.2011, p. 6.