Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 July 2019*

(Competition — Agreements, decisions and concerted practices — Market for optical disk drives — Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Collusive agreements relating to bidding events concerning optical disk drives for notebook and desktop computers — Infringement by object — Rights of the defence — Obligation to state reasons — Principle of good administration — Fines — Single and continuous infringement — 2006 Guidelines on the method of setting fines)

In Case T-762/15,

Sony Corporation, established in Tokyo (Japan),

Sony Electronics, Inc., established in San Diego, California (United States),

represented by R. Snelders, lawyer, N. Levy and E. Kelly, Solicitors,

applicants,

v

European Commission, represented initially by M. Farley, A. Biolan, C. Giolito, F. van Schaik and L. Wildpanner, and subsequently by M. Farley, F. van Schaik, L. Wildpanner and A. Dawes, acting as Agents,

defendant,

ACTION under Article 263 TFEU seeking, principally, annulment in part of Commission Decision C(2015) 7135 final of 21 October 2015 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives), or, in the alternative, a reduction of the amount of the fine imposed on the applicants,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, I. Labucka and I. Ulloa Rubio (Rapporteur), Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 2 May 2018,

gives the following

* Language of the case: English.

Judgment [1]

Background to the dispute

1 According to Decision C(2015) 7135 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives) ('the contested decision'), concerning collusive agreements relating to bidding events concerning optical disk drives for notebook and desktop computers organised by two computer manufacturers, the Sony group manufactures audio, video, communications and information technology products for the consumer and professional markets and is a provider of entertainment content, products and services (contested decision, recital 15).

2 The first applicant, Sony Corporation, which is a stock corporation governed by Japanese law, is the group's ultimate parent company. The second applicant, Sony Electronics, Inc., is a wholly-owned indirect subsidiary of Sony Corporation and is established in the United States. Sony Electronics, which is governed by the laws of Delaware (United States), carries out research and development, design, engineering, sales, marketing, distribution, and customer service activities (contested decision, recital 16).

3 Sony Corporation and Sony Electronics (together 'the applicants' or 'Sony'), are jointly referred to as 'Sony' in the contested decision (contested decision, recital 17).

4 Sony Electronics was, together with Sony Corporation, the legal entity participating on behalf of Sony in the procurement events organised by Dell and continued to do so until 1 April 2007 (contested decision, recital 18).

5 Sony Optiarc, Inc., is a stock corporation governed by Japanese law. It was established on 3 April 2006 as a joint venture of Sony Corporation and NEC Corporation under the business name Sony NEC Optiarc Inc. Each parent company contributed its respective optical disk drive ('ODD') business to Sony NEC Optiarc. Sony Corporation acquired 55% of the voting shares of the joint venture, and NEC Corporation the remaining 45% (contested decision, recital 19).

6 Between May 2003 and March 2007, Lite-On designed and manufactured ODD products ultimately sold under the Sony brand on the basis of revenue-sharing arrangements. Under the arrangements, sales responsibility was in general conferred upon Sony, while Lite-On was responsible for quality and engineering issues (contested decision, recital 26).

7 The infringement concerns ODDs used in personal computers (desktops and notebooks) ('PCs') produced by Dell and Hewlett Packard ('HP'). ODDs are also used in a wide range of other consumer appliances such as compact disc ('CD') or digital versatile disc ('DVD') players, game consoles and other electronic hardware devices (contested decision, recital 28).

8 ODDs used in PCs differ according to their size, loading mechanisms (slot or tray) and the types of discs that they can read or write. ODDs can be split into two groups: 'half-height' ('HH') drives for desktops and slim drives for notebooks. The slim drive sub-group includes drives that vary by size. Both HH and slim drives differ by type depending on their technical functionality (contested decision, recital 29).

9 Dell and HP are the two most important original equipment manufacturers on the global market for PCs. Dell and HP use standard procurement procedures carried out on a global basis which involve, inter alia, quarterly negotiations over a worldwide price and overall purchase volumes with a limited

1 Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

number of pre-qualified ODD suppliers. Generally, regional issues did not play any role in ODD procurement other than that related to forecasted demand from regions affecting overall purchase volumes (contested decision, recital 32).

10 The procurement procedures included requests for quotations, electronic requests for quotations, internet negotiations, e-auctions and bilateral (offline) negotiations. At the close of a procurement event, customers would allocate volumes to participating ODD suppliers (to all or at least most of them, unless there was an exclusion mechanism in place) depending on their quoted prices. For example, the winning bid would receive 35 to 45% of the total market allocation for the relevant quarter, the second best 25 to 30%, the third 20% and so on. These standardised procurement procedures were used by customers' procurement teams with the purpose of achieving efficient procurement at competitive prices. To this end, they used all possible practices to stimulate the price competition between the ODD suppliers (contested decision, recital 33).

11 As regards Dell, it mainly carried out bidding events by internet negotiation. That negotiation could last for a specific period of time or end after a defined period, for example 10 minutes after the last bid, when no ODD supplier continued bidding. In certain circumstances, internet negotiations could last several hours if the bidding was more active or if the duration of the internet negotiation was extended in order to incentivise ODD suppliers to continue bidding. Conversely, even where the length of the internet negotiation was indefinite and depended on the final bid, Dell could announce at some point that the internet negotiation had closed. Dell could decide to change from a 'rank-only' to a 'blind' procedure. Moreover, Dell could cancel the internet negotiation if the bidding or its result were found to be unsatisfactory and run a bilateral negotiation instead. The internet negotiation process was monitored by Dell's responsible Global Commodity Managers (contested decision, recital 37).

12 With respect to HP, the main procurement procedures used were requests for quotations and electronic requests for quotations. Both procedures were carried out online using the same platform. As regards (i) the requests for quotations, they were quarterly. They combined online and bilateral offline negotiations spread over a period of time, usually two weeks. ODD suppliers were invited to a round of open bidding for a specified period of time to submit their quote to the online platform or by email. Once the first round of bidding had elapsed, HP would meet with each participant and start negotiations based on the ODD supplier's bid to obtain a better bid from each supplier without disclosing the identity or the bid submitted by any other ODD supplier. As regards (ii) the electronic requests for quotations, they were normally run in the format of a reverse auction. In that format, bidders would log onto the online platform at the specified time and the auction would start at a price set by HP. Bidders entering progressively lower bids would be informed of their own rank each time a new bid was submitted. At the end of the allotted time, the ODD supplier having entered the lowest bid would win the auction and other suppliers would be ranked second and third according to their bids (contested decision, recitals 41 to 44).

Administrative procedure

13 On 14 January 2009, the Commission received a request for immunity under its Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17) ('the 2006 Leniency Notice') from Philips. On 29 January and 2 March 2009 that request was supplemented to include, alongside Philips, Lite-On and their joint venture Philips & Lite-On Digital Solutions Corporation ('PLDS') (contested decision, recital 54).

14 On 29 June 2009, the Commission sent a request for information to undertakings active in the ODD sector (contested decision, recital 55).

15 On 30 June 2009, the Commission granted conditional immunity to Philips, Lite-On and PLDS (contested decision, recital 56).

16 On 18 July 2012, the Commission sent a statement of objections to 13 suppliers of ODDs, including the applicants ('the statement of objections'). It stated that those companies had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a cartel concerning ODDs from 5 February 2004 until 29 June 2009 consisting in orchestrating their behaviour in bidding events organised by two computer manufacturers, Dell and HP.

17 On 29 October 2012, in reply to the statement of objections, the applicants submitted their written comments.

18 On 23 November 2012, Dell replied to the request for information that the Commission had addressed to it (contested decision, recital 61).

19 An oral hearing was held on 29 and 30 November 2012, in which all the addressees of the statement of objections participated (contested decision, recital 60).

20 On 14 December 2012, the Commission requested all the parties to provide the relevant documents received from Dell and HP. All the parties replied to those requests and each was granted access to the replies provided by the other ODD suppliers (contested decision, recital 62).

21 On 21 October 2015, the Commission adopted the contested decision.

Contested decision

22 In the contested decision, the Commission considered that the cartel participants had coordinated their competitive behaviour, at least between 23 June 2004 and 25 November 2008. It specified that that coordination took place through a network of parallel bilateral contacts. It stated that the cartel participants sought to accommodate their volumes on the market and ensure that the prices remained at levels higher than they would have been in the absence of those bilateral contacts (contested decision, recital 67).

23 The Commission specified, in the contested decision, that the coordination between the cartel participants concerned the customer accounts of Dell and HP, the two most important original equipment manufacturers on the global market for PCs. According to the Commission, in addition to bilateral negotiations with their ODD suppliers, Dell and HP applied standardised procurement procedures, which took place at least on a quarterly basis. The Commission stated that the cartel members used their network of bilateral contacts to manipulate those procurement procedures, thus thwarting their customers' attempts to stimulate price competition (contested decision, recital 68).

24 According to the Commission, regular exchanges of information in particular enabled the cartel members to possess a very complex knowledge of their competitors' intentions even before they had entered the procurement procedure, and therefore to foresee their competitive strategy (contested decision, recital 69).

25 The Commission added that, on a regular basis, the cartel members exchanged pricing information regarding specific customer accounts as well as information unrelated to pricing, such as existing production and supply capacity, inventory status, the qualification status, and timing of the introduction of new products or upgrades. The Commission stated that, in addition, the ODD suppliers monitored the final results of closed procurement events, that is the rank, the price and the volume (contested decision, recital 70).

26 The Commission further stated that, whilst taking into account that they must keep their contacts secret from customers, to contact each other suppliers used the means they deemed sufficiently appropriate to achieve the desired result. The Commission specified that in fact an attempt to convene a kick-off meeting to hold regular multilateral meetings between ODD suppliers had failed in 2003 after having been revealed to a customer. According to the Commission, instead, there were bilateral contacts, mostly via phone calls and, from time to time, also via emails, including private (hotmail) addresses and instant messaging services, or meetings, mostly at the level of global account managers (contested decision, recital 71).

27 The Commission found that the cartel participants contacted each other regularly and that the contacts, mainly by telephone, became more frequent around the procurement events, amounting to several calls per day between some pairs of cartel participants. It stated that, generally, contacts between some pairs of cartel participants were significantly higher than between other pairs (contested decision, recital 72).

28 When calculating the amount of the fine imposed on the applicants, the Commission relied on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines').

29 First of all, in order to determine the basic amount of the fine, the Commission considered that, in view of the considerable differences in the duration of the suppliers' participation and in order better to reflect the actual impact of the cartel, it was appropriate to use an annual average calculated on the basis of the actual value of sales made by the undertakings during the full calendar months of their respective participation in the infringement (contested decision, recital 527).

30 The Commission thus explained that the value of sales was calculated on the basis of sales of ODDs for notebooks and desktops and invoiced to HP and Dell entities located in the EEA (contested decision, recital 528).

31 The Commission further considered that, since the anticompetitive conduct with regard to HP had begun later and in order to take the evolution of the cartel into account, the relevant value of sales would be calculated separately for HP and for Dell, and that two duration multipliers would be applied (contested decision, recital 530).

32 As regards the applicants, as it had not been established that Sony had participated in the contacts concerning HP, the Commission found them liable only for their coordination with respect to Dell (contested decision, recital 531).

33 Next, the Commission decided that, since price coordination agreements are by their very nature among the worst kind of infringements of Article 101 TFEU and Article 53 of the EEA Agreement, and since the cartel covered at least the whole of the EEA, the percentage for gravity used in this case would be 16% for all addressees of the contested decision (contested decision, recital 544).

34 Furthermore, the Commission stated that, given the circumstances of the case, it had decided to add an amount of 16% for deterrence (contested decision, recitals 554 and 555).

35 In addition, the Commission reduced the amount of the fine imposed on the applicants by 3% in order to take into account the fact that they had not been aware of the part of the single and continuous infringement concerning HP, in order to reflect in an adequate and sufficient manner the less serious nature of their conduct (contested decision, recital 561).

36 Lastly, the Commission considered that, as Sony had had a worldwide turnover of EUR 59 252 000 000 during the business year preceding the adoption of the contested decision, it was appropriate to apply a multiplier of 1.2 to the basic amount (contested decision, recital 567).

37 The operative part of the contested decision, in so far as it concerns the applicants, reads as follows:

'Article 1

The following undertakings infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement, which consisted of several separate infringements, in the optical disk drives sector covering the whole of the EEA, which consisted of price coordination arrangements:

...

(f) [the applicants] from 23 August 2004 to 15 September 2006, for their coordination with regards to Dell.

...

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

...

(f) [the applicants], jointly and severally liable: EUR 21 024 000'.

Procedure and forms of order sought

38 By application lodged at the Court Registry on 31 December 2015, the applicants brought the present action.

39 The Commission lodged its defence on 25 May 2016.

40 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 91 of its Rules of Procedure, requested the Commission to lodge certain documents relating to confidential statements. The Commission stated that it was unable to produce the transcripts of those confidential statements, which had been lodged in the context of its leniency programme.

41 By order of 23 April 2018, adopted pursuant (i) to the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and (ii) to Article 91(b) and Article 92(3) of the Rules of Procedure, the Court (Fifth Chamber) ordered the Commission to produce those transcripts, which could be consulted by the applicants' lawyers at the Court Registry before the hearing.

42 The Commission produced those transcripts on 24 April 2018 and the applicants' representatives consulted them at the Court Registry on 30 April 2018.

43 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 2 May 2018.

44 The applicants claim that the Court should:

– annul the contested decision in so far as it concerns them;

– in the alternative, reduce the amount of the fine imposed on them;

– order the Commission to pay the costs.

45 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

46 The applicants raise two pleas in support of this action, the first relating, in essence, to the existence of an infringement of Article 101(1) TFEU, and the second, raised in the alternative, to the calculation of the fine imposed on them.

…

Second plea, raised in the alternative: the setting of the fine is vitiated by errors of fact and of law and by an insufficient statement of reasons

…

Third part: a multiplier for deterrence was imposed only on Sony

…

292 It should be recalled that the need to ensure that the fine has a sufficient deterrent effect requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality (see judgment of 13 July 2011, *General Technic-Otis and Others* v *Commission*, T-141/07, T-142/07, T-145/07 and T-146/07, EU:T:2011:363, paragraph 239 and the case-law cited).

293 The size and overall resources of an undertaking are relevant criteria in view of the objective pursued, namely ensuring that the fine is effective by adjusting its amount having regard to the overall resources of the undertaking and its capacity to raise the funds necessary to pay that fine. The setting of the rate of increase of the starting amount in order to ensure that the fine has a sufficiently deterrent effect is intended more to ensure the effectiveness of the fine than to reflect the harmfulness of the infringement to normal competition and thus the gravity of the infringement (see judgment of 13 July 2011, *General Technic-Otis and Others* v *Commission*, T-141/07, T-142/07, T-145/07 and T-146/07, EU:T:2011:363, paragraph 241 and the case-law cited).

294 In the present case, the applicants do not dispute the amount, indicated in recital 567 of the contested decision, of the worldwide turnover generated by Sony during the business year preceding the adoption of that decision, namely EUR 59 252 000 000.

295 The applicants' only argument is that the turnover of the parent companies of some of the other addressees of the contested decision is comparable to or higher than that of Sony, which recorded heavy losses in 2014, at a time when parent companies, such as Samsung, TSST's parent company, and Hitachi, HLDS's parent company, were allegedly recording significant profits.

296 It should be pointed out that, although Sony Corporation was held liable for the infringement of its subsidiary, Sony Electronics (recitals 507 and 569 of the contested decision), to the extent that the Commission refers to them jointly as 'Sony' in the contested decision (see paragraph 3 above), the infringement in which TSST and HLDS participated was not imputed to Samsung and Hitachi, respectively (recitals 11 to 14 and 569 of the contested decision).

297 The Commission cannot therefore be criticised for having applied a multiplier for deterrence to the applicants whereas it did not increase the amount of the fines imposed on TSST and HLDS in the light of the turnover and profits generated by Samsung and Hitachi.

298 It is therefore necessary to reject that argument of the applicants as well as the third part of the second plea and, therefore, the second plea in its entirety.

…

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Sony Corporation and Sony Electronics, Inc. to bear their own costs and pay the costs incurred by the European Commission.**

Gratsias Labucka Ulloa Rubio

Delivered in open court in Luxembourg on 12 July 2019.

E. Coulon
Registrar

D. Gratsias
President