



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 procurement events organised by two computer manufacturers — Breach of essential procedural requirements and of the rights of the defence — Jurisdiction of the Commission — Geographic scope of the infringement — Single and continuous infringement — Principle of good administration — 2006 Guidelines on the method of setting fines)

In Case T-8/16,

Toshiba Samsung Storage Technology Corp., established in Tokyo (Japan),

Toshiba Samsung Storage Technology Korea Corp., established in Suwon-si (South Korea),

represented initially by M. Bay, J. Ruiz Calzado, A. Aresu and A. Scordamaglia-Tousis, and subsequently by M. Bay, J. Ruiz Calzado and A. Aresu, lawyers,

applicants,

v

European Commission, represented initially by N. Khan, A. Biolan and M. Farley, and subsequently by A. Biolan, M. Farley and A. Cleenewerck de Crayencour, acting as Agents,

defendant,

ACTION under Article 263 TFEU seeking, principally, annulment in whole or in part of Commission Decision C(2015) 7135 final of 21 October 2015 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 3 May 2018,

gives the following

* Language of the case: English.

Judgment¹

I. Background to the dispute

A. The applicants and the market concerned

- 1 The applicants, Toshiba Samsung Storage Technology Corp. ('TSST Japan') and Toshiba Samsung Storage Technology Korea Corp. ('TSST KR'), are manufacturers and suppliers of optical disk drives ('ODDs'). In particular, TSST Japan is a joint venture owned by Toshiba Corporation, established in Japan, and Samsung Electronics Co., Ltd, established in South Korea. During the infringement period, TSST Japan was the parent company of TSST KR.
- 2 TSST Japan and TSST KR (together, 'TSST') began operations on 1 April 2004 as two separate operating units. In December 2005, TSST Japan exited the market, remaining with reduced transitional sales activities until early 2008. TSST KR gradually assumed the sales activities of TSST Japan and was directly engaged in the development, marketing, sales and after-sales services of ODDs (contested decision, recital 14).
- 3 The infringement concerns ODDs used in personal computers (desktops and notebooks) ('PCs') produced by Dell Inc. ('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).
- 4 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 group includes drives that vary by size. Both HH and slim drives differ by type depending on their technical functionality (contested decision, recital 29).
- 5 Dell and HP are the two most important original equipment manufacturers on the global market for PCs. Those two companies 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 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).
- 6 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).
- 7 As regards Dell, it carried out bidding events mainly 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

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

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. 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, recitals 34 and 37).

- 8 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 2 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).

B. Administrative procedure

- 9 On 14 January 2009, the European 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) from Koninklijke Philips NV ('Philips'). On 29 January and 2 March 2009, that request was supplemented in order to include, alongside Philips, Lite-On IT Corporation ('Lite-On') and their joint venture Philips & Lite-On Digital Solutions Corporation ('PLDS').
- 10 On 29 June 2009, the Commission sent a request for information to undertakings active in the ODD sector.
- 11 On 30 June 2009, the Commission granted conditional immunity to Philips, Lite-On and PLDS.
- 12 On 4 and 6 August 2009, Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc. (together 'HLDS') submitted an application to the Commission for a reduction of the amount of the fine under the Commission Notice on immunity from fines and reduction of fines in cartel cases.
- 13 On 18 July 2012, the Commission initiated a proceeding and adopted a statement of objections against 13 ODD suppliers, including the applicants. In that statement of objections, the Commission stated, in essence, 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 on ODDs from 5 February 2004 until 29 June 2009, consisting in orchestrating their conduct with respect to invitations to tender organised by two computer manufacturers, Dell and HP.
- 14 On 29 October 2012, the applicants sent the Commission their comments on the statement of objections.
- 15 On 29 and 30 November 2012, all the addressees of the statement of objections took part in a hearing before the Commission.

- 16 On 14 December 2012, the Commission requested all the parties to provide the relevant documents received from Dell and HP during the infringement period. All the parties, including the applicants, replied to those requests. In addition, each of the parties was granted access to the non-confidential version of the replies provided by the other ODD suppliers.
- 17 On 27 November 2013, the applicants filed supplementary comments on the other parties' replies.
- 18 On 18 February 2014, the Commission adopted two supplementary statements of objections in order, as it stated, to supplement, amend and clarify the objections addressed to certain addressees of the statement of objections as regards their liability for the alleged infringement.
- 19 On 1 June 2015, the Commission adopted another supplementary statement of objections. The purpose of this new statement of objections was to supplement the earlier statements of objections by addressing the objections set out in those statements to additional legal entities belonging to the groups of undertakings (parent companies or predecessors) which had already been addressees of the first statement of objections.
- 20 The addressees of the statements of objections of 18 February 2014 and 1 June 2015 made known their views to the Commission in writing but did not request an oral hearing.
- 21 On 3 June 2015, the Commission issued a letter of facts to all the parties. The addressees of the letter of facts made known their views to the Commission in writing.
- 22 On 21 October 2015, the Commission adopted Decision C(2015) 7135 final relating to a proceeding pursuant to Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives) ('the contested decision').

C. Contested decision

1. The infringement at issue

- 23 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).
- 24 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).
- 25 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).

- 26 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 obtained (contested decision, recital 70).
- 27 The Commission further stated that, whilst taking into account that the cartel members 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, via emails, including private (hotmail) addresses and instant messaging services, or meetings, mostly at the level of global account managers (contested decision, recital 71).
- 28 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).

2. The applicants' liability

- 29 The applicants' liability was established owing to (i) the direct participation of TSST KR in the cartel, from 23 June 2004 to 17 November 2008, in particular for coordination with other competitors with regard to Dell and HP, and (ii) the exercise of decisive influence by TSST Japan over its subsidiary throughout the entire infringement period, as presumed by the Commission (contested decision, recital 498).

3. The fine imposed on the applicants

- 30 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').
- 31 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).
- 32 The Commission thus explained that the value of sales was calculated on the basis of sales of ODDs for PCs and invoiced to HP and Dell entities located in the EEA (contested decision, recital 528).
- 33 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).

34 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).

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

36 Lastly, since the adjusted basic amount of the fine imposed on the applicants reached the cap of 10% of their turnover, the Commission was required to make a fresh adjustment on the basis of Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) (contested decision, recitals 570 to 572).

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:

...

(e) [the applicants] from 23 June 2004 to 17 November 2008, for their coordination with regards to Dell and HP.

...

Article 2

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

...

(e) [the applicants], jointly and severally liable: EUR 41 304 000.’

II. Procedure and forms of order sought

38 By application lodged at the Court Registry on 5 January 2016, the applicants brought the present action.

39 The Commission lodged the defence on 21 July 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.
- 42 On 24 April 2018 the Commission produced those transcripts, which could be consulted by the applicants' lawyers at the Court Registry before 30 April 2018 at 17.00.
- 43 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 May 2018.
- 44 The applicants claim that the Court should:
- annul the contested decision, in whole or in part;
 - in addition, or 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.

III. Law

- 46 In support of the action, the applicants raise nine pleas in law. The first plea alleges breach of essential procedural requirements and of the rights of the defence; the second alleges lack of jurisdiction on the Commission's part to apply Article 101 TFEU and Article 53 of the EEA Agreement; the third alleges errors of fact and of law in the determination of the geographic scope of the infringement; the fourth alleges errors of fact and of law in the finding of a single and continuous infringement; the fifth alleges errors of fact and of law in respect of the applicants' alleged awareness of the whole infringement; the sixth alleges errors of fact and of law relating to the starting date of the applicants' participation in the infringement; the seventh plea alleges failure to prove the applicants' participation in concerted practices or anticompetitive agreements; the eighth alleges breach of the right to good administration owing to the excessive duration of the investigation; and the ninth plea, put forward in the alternative, alleges errors by the Commission in the calculation of the amount of the fine.

A. First plea: breach of essential procedural requirements and of the rights of the defence

...

1. First part: inconsistency between the statement of objections and the contested decision as regards the legal characterisation of the alleged conduct

...

- 56 The concept of a single and continuous infringement presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim (judgments of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraphs 125 and 126).

57 It is therefore apparent from the very concept of a single and continuous infringement that such an infringement presupposes a ‘complex of practices or infringements’. The applicants cannot therefore claim that the Commission included an additional legal characterisation in Article 1 of the contested decision by finding, in addition to a single and continuous infringement, that that infringement was composed of several ‘separate infringements’, given that those various instances of anticompetitive conduct are precisely what constitute that single infringement.

58 It must therefore be held that there is no inconsistency between the statement of objections and the contested decision when that decision states that the single and continuous infringement was composed of several ‘separate infringements’.

...

2. Second and third parts: failure to state reasons resulting from the inconsistencies in the contested decision as regards the legal characterisation of the alleged infringement

...

81 The fact that neither the operative part nor recital 352 of the contested decision identifies the ‘separate infringements’ does not constitute a failure to state reasons for that decision, since those infringements do not entail an additional legal characterisation which may be described in more detail. As is apparent from paragraphs 57 and 65 above, the only legal characterisation of the infringement at issue is that of a ‘single and continuous infringement’ which itself presupposes a ‘complex of practices or infringements’. Moreover, those alleged practices or infringements, which are composed of various contacts, were set out in detail in the main body of the contested decision itself and listed in Annex I thereto.

...

5. Sixth part: breach of the rights of the defence as regards the evidence contained in the contested decision

...

(c) Third complaint: breach of the obligation to state reasons on account of the fact that references to Annex I to the contested decision were made in that decision

...

157 Moreover, at the hearing, the applicants claimed that the references or the identification numbers used to list the contacts in the statement of objections did not correspond to the references used in the annex to that document or in the contested decision and in the annex thereto and that, therefore, their rights of defence were infringed.

158 It should be observed, as a preliminary point, that the applicants again challenge in a general manner that difference in references without providing any specific evidence whatsoever as regards the allegations made or indicating how their rights of defence may have been infringed.

159 Whilst it is true that the list of the documents setting out the contacts differs between the statement of objections and the annex thereto or the contested decision and the annex thereto, the fact remains that the items mentioned in those documents are the same and that, accordingly, those items are still identifiable. Although, for example, in the statement of objections, the document relating to the

contact which took place with TSST in June 2004 appears in the statement of objections with the reference 'ID 490 p. 70', that document is cited in Annex I thereto and in the contested decision and the annex thereto with the reference 'ID 490/70'. Moreover, the heading of the table of Annex I to the statement of objections and the heading of the table of the annex to the contested decision explain clearly that the document referenced 'ID 490 p. 70' corresponds to document 490 (ID) and that that contact is mentioned on page 70. Consequently, the applicants cannot claim that there has been a breach of their rights of defence.

160 In any event, it must be stated that both the main body of the statement of objections or that of the contested decision and their respective annexes contain sufficient information to enable the alleged contacts to be identified. Each time a contact is mentioned, the conduct alleged, the period of the infringing conduct, the participants, the customers or the procurement events in question are mentioned, thus making it easy to identify the contact in question. Consequently, the applicants cannot claim that there has been a breach of their rights of defence.

...

B. Second plea: the Commission lacked jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement

...

198 However, it should be noted that the applicants confuse, on the one hand, the Commission's jurisdiction under Article 101 TFEU and Article 53 of the EEA Agreement in the light of public international law over an agreement, decision or concerted practice which was challenged under the second plea and, on the other, the geographic scope of the agreement, decision or concerted practice in question. It should be pointed out, as the Commission observes, that, while the implementation of the conduct in the EEA is relevant for the purposes of establishing the Commission's jurisdiction, the geographic area covered by that conduct is determined by the conduct covered by the cartel and by the functioning of the cartel. Consequently, as is apparent from the documents before the Court, the Commission was correct to find that the scope of the cartel was EEA-wide.

...

D. Fourth plea: errors of fact and of law in the finding of a single and continuous infringement

...

1. First part: the need to establish a link of complementarity in order to establish the existence of a single and continuous infringement

...

205 It is sufficient to observe that, as was already pointed out in paragraph 123 above, the decisive criterion for the existence of a single and continuous infringement is that the various instances of conduct forming part of the infringement are part of an 'overall plan' having a single objective. In addition, it is not necessary to establish whether those instances of conduct present a link of complementarity in order to characterise them as a single and continuous infringement, in the sense that each of the alleged instances of conduct is intended to deal with one or more consequences of the normal pattern of competition and, through interaction, contributes to the attainment of the set of anticompetitive

effects desired by those responsible (see, to that effect, judgment of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 247 and 248).

...

2. Second part: errors of fact and of law as regards the contacts alleged by the Commission to substantiate the existence of a single and continuous infringement

...

²³⁰ It should be noted that the fact that certain characteristics of the cartel evolved over time, such as the inclusion of new participants, a reduction in their number or the expansion of the cartel to also cover HP, cannot preclude the Commission from classifying that cartel as a single and continuous infringement, given that the objective of the cartel remained the same (see, to that effect, judgment of 24 March 2011, *Aalberts Industries and Others v Commission*, T-385/06, EU:T:2011:114, paragraph 10). Moreover, the Court concurs with the Commission's observation that the fact that Quanta Storage, Inc. ('Quanta') participated in collusive contacts with respect to both Dell and HP very soon after it acceded to the cartel highlights the existence of an overall plan to distort competition which continued even though certain undertakings ceased to be involved in the single infringement (see, to that effect, judgment of 16 September 2013, *Masco and Others v Commission*, T-378/10, EU:T:2013:469, paragraphs 119 and 120).

...

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Toshiba Samsung Storage Technology Corp. and Toshiba Samsung Storage Technology Korea Corp. 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