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 — 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−772/15,

Quanta Storage, Inc., established in Taoyuan (Taiwan), represented by O. Geiss, lawyer, B. Hartnett, Barrister, and W. Sparks, Solicitor,

applicant,

v

European Commission, represented by C. Giolito and F. van Schaik, acting as Agents, and by C. Thomas, lawyer,

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 applicant,

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

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 applicant, Quanta Storage, Inc., operates in the computer storage devices sector and is engaged in the research and development, design, manufacture and supply of optical disk drives (‘ODDs’). It was established in February 1999. It is a public company listed at the Taipei stock exchange in Taiwan (Republic of China) (contested decision, recital 23).

2 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).

3 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).

4 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 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).

5 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).

6 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. 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).

7 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).

Administrative procedure

8 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) ('the 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).

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

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

11 On 18 July 2012, the Commission sent a statement of objections to 13 suppliers of ODDs, including the applicant ('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 Agreement) 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.

12 On 26 October 2012, in reply to the statement of objections, the applicant submitted its written comments.

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

14 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).

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

16 On 13 March 2015, the Commission sent the applicant certain documents received from Dell and HP and requested it to submit its comments, which the applicant did by letter of 27 March 2015.

17 On 9 June 2015, the applicant wrote to the Commission's hearing officer asking him to confirm that the Commission had requested Dell and HP to provide evidence that those undertakings had provided their suppliers with information concerning their competitors. In his reply of 23 June, the hearing officer stated that the Commission had not submitted such a request to those undertakings.

18 On 3 June 2015, the Commission sent the applicant a statement of facts, explaining the use which it proposed to make of those documents.

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

Contested decision

20 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).

21 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).

22 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).

23 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).

24 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).

25 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).

26 When calculating the amount of the fine imposed on the applicant, 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').

27 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).

28 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. The Commission stated that, in the applicant's case, the annual sales taken into consideration also included sales of ODDs to Sony Optiarc for HP and Dell notebooks and desktops (contested decision, recitals 528 and 529).

29 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).

30 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).

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

32 The operative part of the contested decision, in so far as it concerns the applicant, 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:

…

(h) [the applicant] from 14 February 2008 to 28 October 2008, for its coordination with regards to Dell and HP.

Article 2

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

…

(h) [the applicant]: EUR 7 146 000.’

Procedure and forms of order sought

33 By application lodged at the Court Registry on 29 December 2015, the applicant brought the present action.

34 The Commission lodged its defence on 29 April 2016.

35 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure.

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

37 The applicant claims that the Court should:

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

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

– order the Commission to pay the costs.

38 The Commission contends that the Court should:

– dismiss the action;

– set the amount of the fine imposed on the applicant at EUR 7 186 000;

– order the applicant to pay the costs.

Law

39 The applicant puts forward five pleas in support of its action. The first plea alleges breach of the rights of the defence, of the obligation to state reasons and of the right to good administration, the second, a

manifest error of law and breach of the obligation to state reasons on account of a discrepancy between the operative part of the contested decision and the Commission's reasoning as regards the duration of the infringement in relation to HP, the third, absence of proof and insufficient reasoning in relation to the applicant's participation in a single and continuous infringement, the fourth, the Commission's lack of jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement and, the fifth, errors of fact and of law in the calculation of amount of the fine and breach of the obligation to state reasons.

40 It is appropriate to examine first of all the fourth plea, alleging that the Commission lacks jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement, then the other pleas in the order in which they were presented.

…

Fifth plea, alleging manifest errors of fact and of law in the calculation of the amount of the fine and breach of the obligation to state reasons

…

The Commission's request for an increase in the amount of the fine

270 In its defence, the Commission explains that when calculating the amount of the fine to be imposed on the applicant it chose to exclude all sales of ODDs made to Dell and HP that were incorporated into servers. In order to make that deduction, the Commission relied on the estimates provided by the applicant, according to which at least 10% of its sales of ODDs had been incorporated into servers by Dell. Immediately after the adoption of the contested decision, however, Dell informed the Commission of the exact figures, according to which less than 1% of ODDs had been incorporated into servers. Ultimately, the fine imposed on the applicant in the contested decision is EUR 40 000 lower than the fine that ought to have been imposed on it on the basis of the correct value of the sales figures. In order to impose an appropriate penalty on the applicant for its infringement and to ensure equal treatment of the addressees of the contested decision, the Commission therefore asks the Court to make use of its unlimited jurisdiction and to set the fine imposed on the applicant at EUR 7 186 000.

271 The applicant disputes the Commission's arguments.

272 It must be borne in mind that the Court has power to assess, in the context of its unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation No 1/2003, the appropriateness of the amount of the fines. In the context of its unlimited jurisdiction, the powers of the EU judicature are not limited to declaring the contested decision void, as provided in Article 264 TFEU, but allow it to vary the penalty imposed by that decision (see judgment of 8 October 2008, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, T−69/04, EU:T:2008:415, paragraph 242 and the case-law cited).

273 Thus, as the Commission states, the EU judicature is therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see judgment of 8 October 2008, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, T−69/04, EU:T:2008:415, paragraph 243 and the case-law cited).

274 Accordingly, although the exercise of unlimited jurisdiction is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from also referring to the EU judicature the question of the amount of the fine and from applying to have that fine increased (judgment of 8 October 2008, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, T−69/04, EU:T:2008:415, paragraph 244).

275 Thus, it is for the General Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicant received a fine whose amount properly reflects the gravity of the infringement in question (see judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T−343/06, EU:T:2012:478, paragraph 117 and the case-law cited).

276 Lastly, as the Commission observes in its pleadings, the amount of the fine cannot be maintained when it is the result of taking into account a factually incorrect matter (see judgment of 7 June 2011, *Arkema France and Others* v *Commission*, T−217/06, EU:T:2011:251, paragraph 274 and the case-law cited).

277 In the present case, the applicant provided the Commission with its estimate in particular by an email of 28 September 2015. Dell provided its estimate by an email of 21 October 2015, namely the day on which the Commission adopted the contested decision.

278 In that regard, it should be recalled that, according to the general rules regarding evidence, the reliability and, thus, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content (judgment of 12 December 2014, *Eni* v *Commission*, T−558/08, EU:T:2014:1080, paragraph 39 and the case-law cited).

279 It should first of all be noted that both the estimate submitted by the applicant and that submitted by Dell were provided by simple emails, in reply to the Commission's emails, and did not contain either the signatures or names of the persons responsible for the estimates.

280 Next, it should be noted that although, in support of the finding that less than 1% of ODDs had been incorporated into servers by Dell, that company's email specified that that figure was 0.4% by revenue, 0.5% by cost, and 0.7% by quantity, it gave no explanation in relation to the method of calculation which enabled it to arrive at that figure.

281 As regards the applicant's email, it stated only that at least 10% of its ODDs had been incorporated into servers by Dell, but did not give any further explanations as to the method used either.

282 Consequently, although the estimate provided by Dell might appear to be more substantiated, it is not, however, sufficiently reliable for it to be established with certainty that the estimate initially submitted by the applicant constituted a factually incorrect matter within the meaning of the judgment of 7 June 2011, *Arkema France and Others* v *Commission* (T−217/06, EU:T:2011:251, paragraph 274). The applicant must therefore be given the benefit of the doubt.

283 Accordingly, the Commission's request that the amount of the fine be increased must be rejected.

…

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Dismisses the European Commission's request that the amount of the fine of Quanta Storage, Inc. be increased;

3. Orders Quanta Storage to bear its own costs and to pay four fifths of the costs incurred by the Commission.

Gratsias Labucka Ulloa Rubio

Delivered in open court in Luxembourg on 12 July 2019.

E. Coulon D. Gratsias

Registrar President

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* Language of the case: English.

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