EUROPEAN COMMISSION

Hearing Officer

Final Report of the Hearing Officer[1]

Western Digital Ireland / Viviti Technologies

(COMP/M.6203)

I. OVERVIEW

1. On 20 April 2011, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation[2] by which Western Digital Corporation ("WD", the "Notifying Party") intends to acquire, by way of purchase of shares, sole control within the meaning of Article 3(1)(b) of the Merger Regulation of Viviti Technologies Ltd, formerly known as Hitachi Global Storage Technologies Holdings Ltd ("HGST").[3] On 30 May 2011, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

2. On 18 August 2011, the Commission issued a Statement of Objections ("**SO**") pursuant to Article 18 of the Merger Regulation, in which the Commission provisionally concluded that the proposed transaction would create a significant impediment to effective competition on a number of hard disk drive (HDD) markets.

3. After having been granted access to the file on 19 August 2011,[4] the Notifying Party submitted its written comments on the SO on 1 September 2011. In its comments, the Notifying Party did not request to develop its arguments at a formal oral hearing pursuant to Article 14(1) of Regulation (EC) No 802/2004.[5] Instead, it developed orally its arguments at a State of Play meeting with DG Competition on 6 September 2011.

---

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 Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation").

3 The proceedings are referred below as Case M.6203.

4 A data room was also organized on 22-26 August 2011 so that the Notifying Party's economic advisers were able to access confidential quantitative information.

5 Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p.1.

4. In light of certain arguments raised by the Notifying Party in its comments on the SO and at the State of Play meeting of 6 September, the Commission carried out a further market investigation. At a State of Play meeting on 20 September 2011, the Commission shared with the Notifying Party the results of this further market investigation, and presented its views on certain of the arguments raised by the Notifying Party. The latter requested the opportunity to submit, by 26 September, supplementary comments to respond to the Commission's findings. The Commission agreed to such request. On 22 September, the Notifying Party was given access to non-confidential versions of the documents received by the Commission in the context of the further market investigation. Further information was also provided to the parties on 23, 24 and 26 September. The supplementary comments were submitted by the Notifying Party on 23 September and 26 September.

5. On 3 October 2011, the Notifying Party submitted a first commitments proposal. The Commission indicated that the commitments offered were not adequate to solve the competition concerns. On 10 October 2011, the Notifying Party put forward a revised set of commitments, which the Commission submitted to a market test on the same date. A further revised remedies package was presented to the Commission on 24 October 2011, and subsequently amended pursuant to further discussions with the Commission. The Notifying Party offered a final set of commitments on 27 October 2011, which the Commission concluded addressed all of the remaining concerns regarding the compatibility of the proposed transaction with the internal market.

II. REQUESTS TO THE HEARING OFFICER

6. During the procedure, the Notifying Party submitted three requests to me concerning access to the file.

First request

7. On 26 August 2011, the Notifying Party asked me to review a decision of DG Competition refusing access to documents contained in the file of other proceedings under the Merger Regulation, namely Case No COMP/M.6214 – Seagate Technology PLC/The HDD Business of Samsung Electronics Co Ltd ("**Case M.6214**"). The parties in these proceedings, which are competitors of WD and HGST on certain HDD markets, notified their proposed concentration to the Commission one day before the proposed concentration between WD and HGST was notified. I responded to the Notifying Party's request on 30 August along the following lines.

8. First, the Notifying Party requested to be given access to the file in Case M.6214 on the basis that it had "sufficient interest" because it was an important competitor of the parties involved in that case. I rejected this request since pursuant to Article 17 of Regulation 802/2004,[6] the Commission should provide access to the file to the parties to whom it has addressed a statement of objections and, upon request, to the other involved parties (as defined under Article 11(b) of that regulation). Since WD did not fall in either category in Case M.6214, it had no right of access to the file in that case.

9. Second, the Notifying Party claimed that, in Case M.6203, the Commission had relied extensively in the SO upon documentation and information from the file of Case M.6214 that had not been made available to it. I carefully reviewed the SO and found that it relied only on a few documents which had originally been submitted in Case M.6214 and later re-submitted in Case M. 6203 upon request from DG Competition. Non-confidential versions of these documents were accessible to the Notifying Party in the file of Case M.6203. The claim that the Commission had relied, in the SO, on documents not accessible from Case M.6214 to the Notifying Party was therefore unfounded.

10. Third, in its request, the Notifying Party seemed to suggest that DG Competition had gone through the file in Case M.6214 generally and picked documents for its analysis in Case M.6203. Therefore, in application of the principle of equality of arms, the Notifying Party considered that it should similarly be able to review documents from Case M.6214 to search for exculpatory information. I investigated the matter with DG Competition and found no evidence that DG Competition had carried out a general review of the case file in Case M.6214 for the purpose of finding specific adverse evidence to be used in its assessment in Case M.6203. The only documents which had been re-submitted in Case M.6203 appeared to be broad recent strategic documents of the parties in Case M.6214 and market studies of independent consultants, both of the kind which the Commission normally requests from competitors in a merger investigation. In addition, such documents did not appear to be, by their nature, inherently more adverse or more favourable to the Notifying Party. In light of the above, I saw no reason to accept the Notifying Party's request to be given the opportunity to review documents in the file of case M.6214, and accordingly rejected such request.

Second request

11. On 31 August, the Notifying Party requested me to review a decision by DG Competition to redact the result of the bidding data analysis contained in the report prepared by the Notifying Party's economic advisers in the context of the data room.[7] Since the request was not sufficiently reasoned, I informed the Notifying Party on 31 August that I was not able to address the request until sufficient clarification was provided.

---

6 Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1–39

7 See footnote 4 above.

12. In the mean time, I investigated the matter with DG Competition, which subsequently decided to disclose further information from the economic advisers' report to the Notifying Party.

13. The Notifying Party did not provide me with any clarification on their initial request, nor made any follow-up request.

Third request

14. On 27 September 2011, the Notifying Party sent me a request to review a decision of DG Competition, following the State of Play meeting of 20 September 2011, refusing full or more granular access to certain redacted data and information gathered by the Commission in the course of its market investigation. The Notifying Party had received access to non-confidential versions of these data and information on 22, 23, 24 and 26 September.[8] I responded to the request on 3 October 2011, as set out below.

15. First, the Notifying Party requested access to confidential information submitted by a competitor in response to questions on entry into the 3.5" Desktop market in order to verify the Commission's findings in this respect. In parallel to my review of this issue, DG Competition organized a data room procedure granting the Notifying Party's external advisers, under strict confidentiality rules, access to further parts of the information submitted by the competitor.[9] DG Competition also provided the Notifying Party with further information, in the form of ranges, on the data originally redacted. In my response to the Notifying Party's request, I also provided general descriptions of the nature and content of the remaining confidential information that was not disclosed in the data room. I concluded that the information that had been provided was sufficient for the Notifying Party effectively to express its views on the conclusions reached by the Commission on the point in issue and presented to the Notifying Party at the 20 September State of Play meeting.

16. On the same issue, the Notifying Party had also requested that the Commission obtain data (i.e. data that was not on file) underlying certain costs calculations submitted by the competitor referred to in the previous paragraph. The Commission indeed requested, and obtained, further information from the competitor. Parts of such information were made accessible in the above-referred data room. I considered therefore that the request of the Notifying Party relating to this first issue had been addressed.

8 See paragraph 4 above.

9 The data room was organized on 30 September 2011.

17. Second, the Notifying Party complained to me that it had only received partial access to information submitted to the Commission by a certain group of customers in response to a question on their purchases of HDD. DG Competition had given the Notifying Party access to "anonymised" versions of parts of the customers' responses, as well as aggregated information showing the distribution of purchases per product group. The Notifying Party claimed that, absent access to individual customer purchase volumes, it was unable to assess the relative importance of each customer's response and therefore its ability to defend itself was significantly impaired.

18. In my response, I considered that disclosing the individual purchase volumes, as requested, would potentially allow the identification of customers who responded to the questionnaires and had requested their responses to remain anonymous (which had been accepted[10]). In addition, I found that the information requested by the Notifying Party fell within the category of business secrets and other confidential information. Furthermore, the Notifying Party had not provided any reason why it would be necessary for it to assess the relative importance of each customer's response. Finally, after review of the information that DG Competition had provided to the Notifying Party on 23, 24 and 26 September 2011, I concluded that such information allowed the Notifying Party to usefully comment on the Commission's findings presented to it at the 20 September State of Play meeting. I nevertheless provided some additional information to reassure the Notifying Party of the representativeness of the customers' responses gathered by the Commission.

19. Third, the Notifying Party requested access to another set of data provided by customers in response to a Commission's questionnaire, on which, according to the Notifying Party, the Commission seemed to *"essentially"* rely to support some of its findings. First, I clarified to the Notifying Party that, contrary to its claim, the information contained in the customers' responses, was not crucial for the Commission's findings, but served only to confirm the results of a previous market investigation, which had been made accessible to the Notifying Party during the access to file of 19 August 2011. Second, after investigating the matter with DG Competition, I asked the latter to grant the Notifying Party access to information requested in the form of tables including the relevant parts of the customers' replies in a way that would secure the anonymity of the customers. Access was granted partly by DG Competition on 28 September 2011 and partly by me on 3 October 2011. In view of this additional access, I considered that the Notifying Party's request had been satisfied.

20. The Notifying Party did not submit any follow-up comment or new request after my response of 3 October.

[10] I saw no reason in this case to refuse the request for anonymity of the customers.

III. THE DECISION

21. The decision concludes that the proposed transaction is compatible with the internal market and the EEA Agreement, subject to the condition that the Notifying Party complies with the commitments entered into vis-à-vis the Commission. In particular, these include an "upfront buyer" clause, pursuant to which the Notifying Party will not be able to close the proposed transaction before it has entered into a binding sale and purchase agreement for the sale of the divestment business with a suitable purchaser, which is approved by the Commission. The decision does not contain any objections on which the parties have not had the opportunity to make known their views.

IV. CONCLUSION

22. Other than the three requests on access to file mentioned in Section II above, I did not receive any request or complaint from any party to the proceedings. In view thereof, and in light of the conclusion in Section III that the decision does not contain any objections on which the Notifying Party has not been heard, I consider that the effective exercise of the procedural rights of all participants in this case has been respected.

Brussels, 21 November 2011

(signed)

Wouter WILS