



Neutral citation [2023] CAT 78

Case No: 1537/5/7/22 (T)

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

29 December 2023

Before:

ANDREW LENON K.C.  
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

~~(1) GRANVILLE TECHNOLOGY GROUP LIMITED (IN LIQUIDATION)~~  
~~(2) VMT LIMITED (IN LIQUIDATION)~~  
~~(3) OT COMPUTERS LIMITED (IN LIQUIDATION)~~

Claimant

- v -

~~(1) INFINEON TECHNOLOGIES AG~~  
~~(2) MICRON EUROPE LIMITED~~  
~~(3) MITSUBISHI ELECTRIC EUROPE BV~~  
~~(4) SK HYNIX UK LIMITED~~  
~~(5) TOSHIBA ELECTRONICS EUROPE GMBH~~

Defendant/Part 20 Claimant

- and -

**SAMSUNG SEMICONDUCTOR EUROPE LIMITED**

Part 20 Defendant

Heard at Salisbury Square House on 28 November 2023

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**RULING (DISCLOSURE)**

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## APPEARANCES

Andrew Bartlett (instructed by Osborne Clarke LLP) appeared on behalf of OT Computers Limited (in liquidation)

Daniel Jowell KC and Joshua Pemberton (instructed by Allen & Overy LLP) appeared on behalf of Micron Europe Limited)

Kristina Lukacova instructed by (Covington & Burling LLP) appeared on behalf of Samsung Semiconductor Europe Limited)

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## A. INTRODUCTION

1. By way of brief background, these proceedings relate to a claim for damages for breaches of Article 101 of the Treaty of the Functioning of the European Union (“TFEU”) and or section 2 of the Competition Act 1998 brought by OT Computers Limited (“OTC”) against Micron Europe Limited (“Micron”) damages arising out of a cartel in the supply of dynamic random-access memory computer memory chips (“DRAM”) to certain PC manufacturers (referred to as the “OEMs”). The cartel operated from 1 July 1998 until 15 June 2002. The claim relies on a decision adopted by the European Commission dated 19 May 2010 in Case COMP/38511 — DRAMs (“Commission Decision”) establishing the existence of the cartel in which Micron and Samsung and the former defendants were participants. OTC was a UK personal computer (PC) manufacturer in the 1990s and early 2000s, trading under the name “Tiny” until it became insolvent and entered into administration and ceased trading in January 2002. OTC was not itself an OEM but claims that the prices it paid for DRAM were affected by the cartel.
2. The claim was issued in 2016 by OTC and two other claimants against a total of five defendants. Following a series of confidential settlements and the trial of a preliminary issue of limitation, Micron has been left as the sole remaining defendant. Samsung was joined as a Part 20 defendant by the original first defendant to the main claim. Following settlement and discontinuance of the claim against the first defendant, Micron brought a fresh Part 20 claim against Samsung. The trial of the Part 20 claim is to take place after the trial of the main claim.
3. At the first case management conference (“CMC”) in June 2023, the Tribunal ordered that disclosure should be provided in stages and gave directions for the first stage. Those directions have been complied with. OTC and Micron are now seeking further disclosure.
4. This ruling follows the second CMC on 28 November 2023 in these proceedings at which the OTC applied for further disclosure from the Micron and Samsung and Micron applied for further disclosure from OTC.

## B. LEGAL FRAMEWORK

5. The principles governing applications for disclosure in the Tribunal are helpfully set out in the ruling on disclosure in *Ryder Ltd and another v Man SE and others* [2020] CAT 3. A central principle is that the scope of disclosure is not to be determined solely by the criterion of relevance but should also have regard to the principles of effectiveness and proportionality. In the context of a claim for follow-on damages arising from breaches of competition law, raising issues of quantum and causation the Tribunal held follows:

“(1) The initial burden of proof is on the Claimants to satisfy the Tribunal on the balance of probabilities that the Infringement had an effect on prices.

(2) If that hurdle is passed, the Tribunal will seek to arrive at a reasonable estimate of what the effect might have been and what any pass-on (within the relevant legal principles) might have been, again on the balance of probabilities.

(3) A reasonable estimate in this context means an estimate that is arrived at in a proportionate manner/ However, any estimate will still be reached through averages, extrapolations and aggregates. It does not mean that every logical avenue that might be relevant can be explored, or that all data which is arguably relevant must be provided. As observed by Birss J in *Vodafone v Infineon Technologies AG* [2017] EWHC 1383 (Ch), at [31]:

“while of course more [disclosure] can be better ... it is relevant to ask how much more would it be and how much better would it make the result.”

The decision as to what disclosure to order is appropriate is informed by the views of the economic experts as to the data they would like to have and the method they would like to use. It is for the Tribunal to decide.

(4) In reaching that decision, the Tribunal has regard to the principles of effectiveness, that cases should not be unreasonably difficult to bring, and of proportionality as set out in rule 60(2) read with the governing principles in rule 4 and also the Disclosure PD.

(5) It is not therefore simply a question of relevance, as some of the skeleton arguments we received seemed to suggest. Disclosure will only be ordered in relation to a specific category of documents if the Tribunal is satisfied the documents sought are relevant and that disclosure would be necessary and proportionate. The Tribunal will not make an order merely because it determines that the documents are relevant to the issues.”

6. Rule 4 of the Competition Appeal Tribunal Rules 2015, mirroring CPR Rule 1.1.(2)(c), species the factors to be taken into account when assessing proportionality, namely the amount of money involved, the importance of the

case, the complexity of the issues and the financial position of each party. With regard to the amount of money involved, OTC's pleaded loss before interest and after deduction of settlements with other parties, is approximately £6.7 million. OTC is claiming interest on its loss at the rate of 8% per annum for the post insolvency period although it accepts that the rate may be limited to 2.5% per annum over the Bank of England base rate, depending on the outcome of the proceedings in *Granville Technology Group Limited (in liquidation) and others v Innolux Corporation and others* (CL-2016-000758) ("the LCD Proceedings"), in which case total quantum of the claim would be c. £16 million. The combined total estimated costs of all three parties to trial is c. £12.5 million. OTC is an insolvent company which has set aside £2 million to meet any adverse costs order. Whilst the issues in this case are undoubtedly complex, the principle of proportionality requires the Tribunal to keep in mind the cost consequences of any disclosure orders which it makes and to ensure that the scope of disclosure does not extend beyond what is really necessary for the just disposal of the case.

### **C. OTC APPLICATION FOR DISCLOSURE FROM MICRON**

7. OTC now seeks further disclosure which it contends is necessary to enable the principal issues in dispute to be determined fairly, namely:
  - (1) Did the Infringement cause an overcharge in DRAM prices charged to the Major OEM customers and what was the amount of that overcharge?
  - (2) Did the Infringement, which, as found by the Decision concerned only sales to Major OEMs, cause an Overcharge in prices charged by cartel participants to non-Major OEMs and, in particular, the Claimant?
  - (3) Did the Infringement cause an increase in prices charged for DRAMs not manufactured by cartel participants and, in particular, any Overcharge in the prices charged to the Claimant in respect of such DRAMs?
8. OTC submitted that document disclosure is of particular importance in a case such as this where the relevant events took place over twenty years ago so that

human memories are likely to be unreliable and relevant individuals may not be available to give evidence as witnesses.

9. In response, Micron submitted that, given the relatively modest size of the claim in these proceedings, the costs of providing disclosure could easily become disproportionate, that Micron has already given substantial disclosure and that the issues in the case turn on analysis of data rather than documents.

**(1) Worldwide sales data**

10. The first issue between the parties is as to whether disclosure of sales data should be restricted, on the grounds of relevance, to UK sales data or whether Micron should give disclosure of documents in respect of worldwide sales data.
11. In a witness statement in support of OTC's application, Ms Schellion Horn, an economist at Grant Thornton, contended that disclosure on worldwide basis was necessary on the following grounds (i) the Commission Decision was concerned with DRAM prices charged by the cartelists to Major OEMs worldwide; (ii) the DRAM price paid by OTC would have been influenced by global factors, for example capacity in the market as a whole; (iii) analysis of the umbrella effects of the cartel (i.e. the knock-on effect of the cartel on the prices charged by non-participants in the cartel) requires information about the market as a whole.
12. The fact that Micron's prices were negotiated on a global basis is supported by the first witness statement of Michael Bokan, Senior Vice President of Worldwide Sales at Micron, which was served in connection with the trial of the preliminary issue earlier in the proceedings.
13. OTC submitted that if disclosure were limited to UK sales, significant data would be excluded, for example, the prices of DRAM purchases made by major OEMs through headquarters in the US, which created a risk of bias in the data. Finally, OTC submitted that there has been no suggestion that Micron could not provide the worldwide data.

14. In response, Richard Murgatroyd, a partner at RBB Economics, contended on behalf of Micron that worldwide data is not needed for three main reasons. First, worldwide data is already available in the form of the Combined Legacy Sales Dataset (“the CLS Dataset”), which is a transaction-level Excel file covering sales of DRAM products made by Micron billed or shipped to an entity in the UK. The CLS Dataset includes sales to major OEMs based in either the US or Asia, provided that the sale has been billed to its UK subsidiary or, absent this information, has been shipped to the UK. In practice, therefore, the CLS Dataset would therefore include sales made to all major OEMs including IBM, Hewlett-Packard, Dell, Apple and others so that OTC’s concern that major OEMs would be excluded is unwarranted.
15. Second, whilst global changes in supply and demand will affect prices, it is not necessary to have evidence of global sales data from Micron in order to determine any overcharge to OTC. Micron’s UK sales already constitute a more than ample sample size. It is highly unlikely that sales made by Micron in other countries are more relevant to the assessment than sales made by Micron in the UK. Expanding the sale data to all of Micron’s customers worldwide would be disproportionate and unnecessary. Third, the worldwide sales data of Micron, as a single market participant, is unlikely to serve as an appropriate source of information as to global supply and demand. Micron’s data may be endogenous to Micron’s prices. Finally, Micron’s solicitors Allen & Overy, having made enquiries as to the availability of worldwide data, concluded that such data are not readily available and would be difficult to obtain, even if possible to do so.
16. Taking into account these competing contentions, I am not satisfied that an order for disclosure by Micron of documents relating to its worldwide sales data is necessary or that it would be proportionate, for the following reasons. It does not follow from the worldwide scope of the Commission Decision that disclosure relating to Micron’s worldwide prices is needed in these proceedings. What matters is the extent of any overcharge in the spot prices charged by Micron to OTC in the UK. Second, OTC has failed to establish that disclosure of Micron’s worldwide sales data is necessary for the determination of that issue or that, without disclosure of the worldwide data, there would be any material risk of bias in the data. The primary source of pricing information relevant to



any overcharge is the data relating to Micron's UK sales. This has been provided. Third, the data in the CLS Dataset also includes some data relating to international sales to OEMs so this data has not been excluded. Fourth, Micron's worldwide sales data is not essential, and may not be reliable, as a source of information as to market capacity which can be determined from other sources. Fifth, a requirement for disclosure of worldwide data, which is not readily available, would almost certainly lead to the incurring of significant additional costs over and above Micron's incurred costs of disclosure of £742,107 and its estimated total costs of disclosure of £1.3 million. In my view, this would be disproportionate to the marginal benefit, if any, to be gained from the additional disclosure sought.

**(2) The Micron File**

17. There are two main issues between the parties concerning the scope of the searches to be carried out by Micron. The first concerns the Micron File. This is a pool of 244,353 electronic documents which Micron has extracted from 64 CDs of unknown provenance provided to its solicitors by its former legal counsel in the US. It is common ground that the documents in the Micron File relate to DRAM.
  
18. As set out in the fifth witness statement of Jonathan Hitchen, a partner in Allen & Overy, following the June CMC, Micron carried some initial investigations into the contents of the Micron File and reported on its findings to OTC. OTC is seeking an order requiring Micron to search the entirety of the Micron File. Micron objects to this order on the grounds, amongst others, first, that the poor quality of the documents means that predictive coding would not be effective and, second, that most of the documents in the Micron File probably relate to US proceedings in which Micron was involved rather than the Commission investigation and are therefore likely to be irrelevant to these proceedings. OTC challenges these objections on the basis that predictive coding, whilst not perfect, would be partially effective, and that the documents emanating from the US may well be relevant to the present proceedings because the DRAM market was a worldwide market.

19. A further objection raised by Micron to a requirement that it search the entire Micron File is that it would be extremely labour-intensive and disproportionately expensive to do so. Using keyword searches, Micron has created a sub-set of some 26,000 potentially relevant documents from the Micron File. Micron also objects to searching this sub-set also on the ground that it would be disproportionate to do so. Micron estimates that the cost of searching the 26,000 documents would be approximately £412,000 of which some £50,000 would be attributable to senior lawyers. OTC's estimate for this task is considerably lower (£43,433 for a first level paralegal review and £85,000 for a managed review by specialist e-disclosure provider).
20. In my judgment, it would not be appropriate to require Micron to carry out a search of the entire Micron File. I accept Micron's submission that a search of such a large number of documents would be very time-consuming and expensive to carry out and with no firm prospect that it would lead to the disclosure of documents assisting in the determination of the issues in the case. Micron's objections based on cost and proportionality plainly have less force in relation to the sub-set of 26,000 documents. I consider that the review of the 26,000 documents could be carried out by paralegals rather than by senior lawyers and that Micron's estimate of the costs involved is excessive. I consider that it is appropriate to require Micron to search the 26,000 documents by reference to the categories that have been agreed in Micron's comments dated 17 November 2023 on OTC's updated disclosure requests.

**(3) The 15 boxes**

21. The second main issue concerning the scope of disclosure arises from OTC's request that Micron should carry out a manual review of 15 boxes of hard copy documents described in Micron's disclosure report as relating to the Commission's investigation. Micron resists this request on the grounds that (i) it is unlikely that any relevant documents in those boxes have not already been disclosed as part of the Commission File and (ii) Micron has agreed to carry out a search of fifteen lever arch files which were included in the fifteen boxes.

22. It seems to me that, given that the documents were provided to the Commission for the purposes of its investigation, there must be a realistic possibility that they contain relevant documents which were not disclosed in the Commission File and which would assist materially in the determination of the issues in the case. A manual search of the fifteen boxes would be a relatively limited exercise which should not lead to the incurring of substantial additional costs. I consider that it is appropriate to require Micron to carry out a search the documents in the fifteen boxes by reference to the agreed categories in OTC's updated disclosure requests.

**D. OTC APPLCIATION FOR DISCLOSURE FROM SAMSUNG**

23. Samsung has been a dormant company since February 2015. It was a sales entity with no involvement in the manufacturing of DRAM, most of which took place in Korea in plants owned and operated by Samsung Electronics. At the first CMC, Samsung was ordered to search for any data in its control recording any DRAM sales it made to OTC, to related companies headquartered in the UK and to OTC's suppliers between 1 July 1998 and 29 January 2002 but the searches produced nil returns.
24. OTC is now seeking disclosure of the same categories of documents from Samsung as it sought from Micron. OTC submits that there is no dispute that Samsung holds relevant sales data. To date it has only looked for data relating to OTC or its suppliers but other sales may be relevant. OTC relies on the fact that Samsung has in its possession copies of the documents which it provided to the Commission. These documents are held on CDs or portable data carriers by Samsung's solicitors. This is a wider pool of documents than the Samsung Case File which has been disclosed. OTC submits that these additional documents could be, but have not been, searched. It contends that, although Samsung is a Part 20 Defendant, rather than a defendant to the main claim, it was nevertheless an addressee of the Commission Decision, that it played a significant role in the underlying wrongdoing and may have had a significant share of the DRAM market.

25. Samsung's position is that it should not be required to provide any further disclosure for a number of reasons. First Samsung refers to the fact that it applied for and received leniency from the Commission in its investigation of the DRAM Cartel. As an applicant for leniency, it had to provide the largest possible volume of potentially relevant information to help the EC's investigation. The Samsung Case File, comprising more than 1,700 files, which has been disclosed to OTC by Micron, is the best source of any documents relevant to the DRAM Cartel and DRAM business more broadly. It probably contains the majority of the documents submitted by Samsung to the Commission. Second, Samsung contends that, to the extent information previously in its possession was not relevant to the Commission's investigation, such information is very unlikely now to be in Samsung's possession or control as a result of Samsung's data retention policies. Samsung also relies on the Tribunal's direction that there should be a split trial with the claim against Samsung being tried after the main claim. Counsel for Samsung referred me to the decision of Birss J in *Vodafone Group Services Ltd and another v Infineon Technologies AG and others* [2017] 5 C.M.L.R., a claim for follow-on damages and stand-alone damages arising out of a cartel relating to smart card chips, in which the judge made a relatively narrow order for disclosure against Samsung as a Part 20 Defendant. This was on the basis that the relatively small number of sales made by Samsung to Vodafone meant that Samsung was only going to be liable for a very small fraction of the claim and it was therefore not proportionate to require Samsung to give disclosure on a wider basis, given the costs that this would involve. In the present case, there were no direct sales to OTC and no indirect sales to pleaded intermediaries. Fourth, Samsung objects to the request that it provide disclosure of documents held by other Samsung entities on the basis that they are not in Samsung's possession or control.
26. In my judgment, it would not be appropriate to order Samsung to provide any further disclosure. This is for the following reasons. First, OTC is not a defendant to OTC's claim but a defendant to Micron's Part 20 claim. OTC, having decided not to sue Samsung, successfully applied for a direction that the trial of the Part 20 claim between Micron and Samsung be held separately for

the reason, amongst others, that the Part 20 claim raised wholly distinct issues from the main claim. The fact that that Samsung is a Part 20 defendant rather than a defendant to OTC's claim does not of course preclude the possibility that it holds relevant, disclosable documents but the onus is on OTC to establish that disclosure should be ordered against Samsung, despite its status as a third party at one remove from the main claim. Second, OTC has not established that disclosure from Samsung is needed in order to dispose fairly of OTC's claim against Micron. There is no evidence of direct sales by Samsung to OTC. I accept OTC's submission that the wide pool of documents submitted to the Commission, which Samsung's solicitors now hold in electronic form, probably includes documents which are not included in the Samsung Case File. It has not, however been established that any of these documents are any more than tangentially relevant to the issue of the alleged overcharge by Micron to OTC or to any other issue in the main proceedings. It would not be appropriate or proportionate to require Samsung to incur the costs of searching those documents. I therefore refuse OTC's application for disclosure against Samsung.

**E. MICRON APPLICATION FOR DISCLOSURE BY OTC**

27. By the time of the second CMC, Micron's application for disclosure had been narrowed down to certain documents emanating from the LCD proceedings namely (i) all skeleton arguments (redacting references to confidential information) (ii) trial transcripts (iii) expert reports and (iv) witness statements to the extent these relate to the issue of pass-on.
  
28. The LCD Proceedings comprise a claim for follow-on damages arising from a price-fixing cartel relating to sales of liquid crystal display ("LCD") panels. Micron contends that the issue of the extent to which the inflated prices charged by the cartelists were passed on by the claimants in the LCD Proceedings, who include OTC, to their own customers is an overlapping issue with these proceedings, albeit that the inflated cost in question was the cost of a different component, the LCD panels rather than the DRAM. Micron submits that evidence as to OTC's price-setting processes is common to both sets of proceedings and refers to the fact that OTC's disclosure statement in these

proceedings noted that there was likely to be a significant overlap between documents relevant to both claims. Micron submits that disclosure of the documents sought would not lead to substantial additional costs.

29. OTC's response was that, whilst in broad terms there are similar issues between the two sets of proceedings, OTC went into administration in January 2022 soon after the start of the LCD Cartel which started in October 2001 so the vast majority of the claim was concerned with the position of the other claimant, Granville, not OTC. There was no witness evidence from OTC and the expert evidence was primarily focused on Granville, not OTC. Moreover, there was a confidentiality ring in the LCD proceedings which would complicate the disclosure process. OTC is concerned about the possibility that a disclosure order in relation to the LCD proceedings would be a distraction inevitably leading to chains of enquiry and yet more costs, particularly given that Micron expressly reserved the right to request yet further disclosure from the LCD proceedings over and above the documents now sought.
  
30. I am not persuaded that it would be appropriate to make an order for disclosure of materials from the LCD Proceedings. The fact that there is an overlapping issue of pass-on in both sets of proceedings is not a sufficient basis for such an order, given that LCD proceedings were concerned with a different component and given OTC's limited exposure to the LCD cartel and its limited involvement in the LCD proceedings. Documents relating to OTC's price-setting process, to the extent they affected the prices charged for DRAM, are already disclosable in these proceedings. The possibility that disclosure of the materials from the LCD proceedings would throw up the existence of hitherto undisclosed documents relevant to price-setting in this case is pure conjecture. Moreover, I accept OTC's submission that disclosure of materials from the LCD proceedings would potentially be a distraction leading to further enquiries and further costs with no commensurate benefit in terms of the overriding objective of dealing with the case justly and at proportionate cost. I therefore refuse Micron's application.

**F. DISPOSITION**

31. For the reasons given above, my ruling is as follows:

- (1) OTC's application for disclosure in relation to Micron's worldwide sales data is refused and OTC's application for disclosure in relation to the Micron File and 15 boxes is granted to the extent set out at [20] and [22] above.
- (2) OTC's application for further disclosure against Samsung is refused.
- (3) Micron's application for disclosure of certain documents relating to the LCD Proceedings is refused.

Andrew Lenon K.C.  
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)  
Registrar

Date: 29 December 2023