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Editor-in-chief: Juha Vesala, TTLF Fellow
Contributors: Gabriele Accardo, Juha Vesala

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U.S. DEVELOPMENTS

Department of Justice files statement of interest regarding the proposed Google settlement

On 18 September 2009 the U.S. Department of Justice filed a statement of interest with the U.S. District Court of S.D.N.Y. regarding the proposed class action settlement in *The Authors Guild Inc. et al. v. Google Inc*. The Department raised concerns about the settlement, including that it may violate antitrust law, but emphasized the significant societal benefits offered by it.

The antitrust issues identified in the proposed settlement by the Department include, first, the risk that book publishers and authors could jointly restrict price competition and, second, the risk that the settlement could foreclose distributors of digital library products other than Google.

As to *concerns regarding reduced price competition* among publishers and authors, the Department considered that the settlement could restrict price competition among authors and publishers

1) by establishing an industry wide revenue sharing formula at the wholesale level;
2) by setting default prices for books and, effectively, precluding discounting in retail sales by Google; and
3) by allowing the publishers and authors of known books to control the prices of orphan books that may compete with their books.

According to the Department, the collectively agreed pricing terms resemble quintessential per se antitrust violations, despite arguments of the parties that their conduct is unilateral or should be regarded as a joint venture escaping a per se condemnation. In this respect the proposed settlement would thus risk being considered to violate antitrust laws.

As to the *foreclosure concerns*, the Department considered that the settlement would grant Google a de facto exclusive right for the digital distribution of, in particular, orphan works. The joint agreement by competing authors and publishers to deny Google's competitors access to such works has according to the Department significant anticompetitive potential. As only Google would have the ability to market a comprehensive digital book library, including the orphan works, competing sellers of libraries lacking the orphan works would not be able to compete effectively with Google. The Department noted that giving Google's competitors comparable access to orphan works would substantially lessen the foreclosure concerns. [Juha Vesala]

Department of Justice and the Federal Trade Commission file amicus brief with the Supreme Court in American Needle v. NFL

On 25 September 2009 the U.S. Department of Justice and the Federal Trade Commission filed with the U.S. Supreme Court an amicus brief supporting the petitioner in *American Needle Inc. v. National Football League et al.* a case concerning whether the National Football League ("NFL") teams and the league acted jointly or as a single entity in licensing their trademarks and logos exclusively to a headwear manufacturer (see Newsletter 4/2009, p. 4 for background).

The Brief argues that whether a joint venture engages in concerted action or acts as a single entity depends on the function of the venture concerned. Accordingly, applied to the present case, only if

1) the teams and the league are effectively merged in the relevant aspect of their operation, thereby eliminating actual and potential competition among them in that respect, and,
2) when the restraint does not significantly affect rivalry among the teams and the league outside such merged operations,

would treatment as a single entity be appropriate.

According to the Brief, the Court of Appeals' analysis, though appropriately focusing on the aspect of licensing, was flawed in several respects. Among other things, the Brief argues that the Court

- failed to distinguish between the different stages of the licensing decisions,
- gave the purpose of promoting NFL football an excessive role in assessing the licensing activities,
- erroneously considered that the teams would need to cooperate in licensing in order to produce games, and
- incorrectly considered that the absence of competition among the teams was an indication of its infeasibility.

Moreover, the Brief warns that the broad concept of single entity advocated by the respondents, if accepted, could harm antitrust enforcement beyond this dispute and the realm of sports. The Brief consequently argues that the Court of Appeals decision should be vacated and the case be remanded for further proceedings. [Juha Vesala]

Senate Judiciary Committee passes bill on reverse payment settlements

On 15 October 2009 the U.S. Senate Judiciary Committee passed the Preserve Access to Affordable Generics Act (S. 369, 111th Congress) which would outlaw certain reverse payment settlements. This was immediately commended by the FTC Chairman Leibowitz. The status of the bill can be monitored at the Library of Congress website.

Department of Justice and Federal Trade Commission to hold workshops on Horizontal Merger Guidelines

On 22 September 2009 the U.S. Department of Justice and Federal Trade Commission announced that they will hold workshops on the Horizontal Merger Guidelines and solicit public comments on them in view of possibly updating the guidelines to better reflect the agency practices and legal and economic developments, which have followed the previous revisions of the Guidelines.

Of interest is in particular that, apart from several fundamental aspects of merger review, the agencies have invited public comments on whether effects on innovation of mergers would warrant more attention in the Guidelines. [Juha Vesala]

U.S. District Court dismisses T3's antitrust claims against IBM

On 30 September 2009 the U.S. District Court of S.D.N.Y. granted in *International Business Machines Corp. v. Platform Solutions, Inc. and T3 Technologies, Inc.* (No. 06 Civ. 13565(LAK)) IBM's motion for summary judgment on antitrust claims raised by T3 Technologies, Inc. ("T3"), a firm involved in the selling of IBM compatible mainframe computers.

In particular, T3 claimed that IBM has attempted to monopolize the market for IBM compatible mainframe computers by refusing to license its mainframe operating system to Platform Solutions, Inc. ("PSI") and Fundamental Software, Inc. ("FSI"). In absence of such licenses from IBM, PSI and FSI were unable to offer components to T3 which were required for T3 to sell IBM compatible computers. Moreover, according to T3, IBM terminated an earlier agreement that enabled T3 to sell IBM's 31 bit mainframe servers.

The Court granted summary judgment to IBM, as it found T3 lacked antitrust standing. The Court stated further that even if T3 had antitrust standing, its claims would in any case fail because IBM's refusal to deal with FSI and PSI does not constitute anticompetitive conduct. The Court, however, noted that that the right to refuse dealings is not unqualified but is subject to a limited exception in case voluntary dealings are terminated so as to forsake short-term profits for an anticompetitive objective.

Nevertheless, on T3's argument that IBM decided to cease its licensing and support of the 31 bit operating system in the sole purpose of suppressing competition, with no legitimate business reason, the Court considered that T3 did not demonstrate that IBM sacrificed short term profits in order to achieve an anticompetitive end. With this respect, the Court noted the benefits of developing the more functional and competitive 64 bit technology and switching to it from the 31 bit technology. Accordingly, IBM's refusal to deal in the 31 bit operating system with FSI and PSI did not constitute anticompetitive conduct even under the limited exception. [Juha Vesala]

EU DEVELOPMENTS

European Commission publishes web browser commitments proposed by Microsoft

On 7 October 2009 the European Commission announced that it will invite comments on commitments proposed by Microsoft to remedy the Commission's concerns about Microsoft tying the Internet Explorer web browser to the Windows operating system (see Newsletter 1/2009, p. 5 for the Commission's preliminary concerns and background). A notice summarizing the Commission's concerns and the commitments offered by Microsoft, and inviting comments from interested parties, was subsequently published in the Official Journal.

The commitments are an updated version of ones offered in July (see Newsletter 4/2009, p. 11). The Commission's preliminary view is that these improved commitments, by ensuring genuine, informed consumer choice as to which web browser(s) to use, would address the Commission's preliminary concerns. Following the consideration of the comments received, the Commission may decide to make the commitments legally binding. [Juha Vesala]

Commission publishes non-confidential version of its decision on Intel's abuse of dominance in the x86 CPU market

On 21 September 2009, the Commission published a non-confidential version of its Intel decision, adopted on 13 May 2009, together with a summary of the key elements of the decision. In May 2009, the Commission imposed a fine of 1.06 billion Euro on Intel for abuse of dominant position under Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

The investigation stemmed from a complaint by Advanced Micro Devices (AMD) in October 2000 further integrated in 2006, and included several on-the-spot inspections at Intel sites in Europe, as well as on-the-spot inspections at several Intel customers and European PC retailers locations. The Commission issued a first Statement of Objections in July 2007 concerning Intel's conduct vis-à-vis five Original Equipment Manufacturers (Dell, HP, Acer, NEC and IBM), and a supplementary Statement of Objections in July 2008 concerning Intel's conduct vis-à-vis the retailer Media-Saturn-Holding (MSH).

According to the Commission, Intel engaged in a single, continuous strategy aimed at foreclosing AMD from the x86 CPU market. Intel committed two separate types of exclusionary abuses, the effects of which reinforced each other, by:

- Giving wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their x86 central processing units (CPUs) from Intel. Intel also made direct payments to a major retailer on condition it stock only computers with Intel x86 CPUs (conditional rebates).
- Making direct payments to computer manufacturers to halt or delay the launch of specific products containing a competitor's x86 CPUs and to limit the sales channels available to these products (so-called naked restrictions).

Intel contested such conclusions arguing that the case law requires the Commission to demonstrate not only the exclusivity or quasi-exclusivity condition of the discounts but also whether the scheme in question did in fact affect the situation of competitors (i.e. whether they did actually or likely foreclose competitors). According to Intel the Commission adopted the expedient of eliminating the requirement to show actual foreclosure in order to establish an infringement of Article 82, as a result of which such a per se approach would be at odds with both the case law and the Commission's own guidance on Article 82.

Contrary to Intel's claim, the Commission held that the EC case law only requires a finding that rebates/payments are granted on condition of exclusivity/quasi-exclusivity (which the Commission claimed to have duly demonstrated), but does not require evidence of actual market foreclosure. In any event, the Commission noted that a breach of Article 82 of the Treaty can also result from the anticompetitive object pursued by a dominant undertaking (such as the naked restrictions imposed by Intel). As to Intel's claim of EC's "change of approach", the Commission pointed out that, leaving aside the fact that the Article 82 guidance paper does not apply to this decision because it was published only after Intel had been given the opportunity to make its views known on the Commission's objections, in any event there would be no support for Intel' contentions in that document either.

In particular, the Commission found that, in the absence of any objective justification, the findings below are in themselves sufficient to demonstrate Intel's abuse of dominance:

- The level of rebates granted to Dell, HP, NEC and Lenovo was de facto conditional upon those OEMs purchasing all or nearly all of their x86 CPUs from Intel;
- Payments granted to MSH were conditional upon selling only PCs based on Intel x86 CPUs;
- Payments to HP, Acer and Lenovo, were linked to or conditioned on these OEM halting or postponing the launch of AMD-based products.

The Commission also found that Intel generally sought to conceal the conditions in its arrangements with PC manufacturers and MSH. Moreover, the decision provides evidence of the growing threat that AMD's products represented to Intel, and that Intel's customers were actively considering switching part of their x86 CPU supplies to AMD.

Yet, even though the Commission held that under EC case law demonstrating actual impact on the market of the conduct concerned is not required, the Commission devoted significant resources to carry out the so-called "as efficient competitor analysis" to also demonstrate that the conditional rebates that Intel granted to Dell, HP, NEC and Lenovo and the conditional payments granted to MSH were capable of causing or likely to cause anticompetitive foreclosure (which is likely to result in consumer harm).

As, the Commission put it, the as efficient competitor analysis is not indispensible for finding an infringement under Article 82, but it is one possible way of showing whether Intel's rebates and payments were capable of causing or likely to cause anticompetitive foreclosure.

In particular, the as efficient competitor analysis establishes what price a competitor which is "as efficient" as Intel (in terms of producing x86 CPUs and in terms of delivering x86 CPUs that provide the same value to customers as Intel), but which would not have as broad a sales base as Intel, would have to offer x86 CPUs in order to compensate an OEM for the loss of any Intel rebate. The same kind of analysis has been conducted for the Intel payments to MSH. But the analysis of the capability of these payments to foreclose an as efficient competitor also took account of the fact that these payments were made at another level of the supply chain, and that their effect was additional to that of conditional rebates to OEMs.

The Commission considered that the rebate scheme is abusive if, in order to compensate an Intel trading partner for the loss of the Intel rebate, an

as efficient competitor had to offer its products below Intel's cost. In general the lower the calculated effective price is compared to the average price of the dominant supplier, the stronger the foreclosure effect.

The Commission ultimately found that Intel's rebates were capable of having or likely to have anticompetitive foreclosure effects, since even an as efficient competitor would have been prevented from supplying Dell's x86 CPU requirements.

As to Intel's naked restrictions (i.e. payments awarded to major OEMs payments conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products), the Commission concluded that the Intel conducts directly harmed competition. Consumers therefore ended up with a lesser choice than they otherwise would have had. [Gabriele Accardo]

European Court of Justice confirms that Commission did not sufficiently consider claimed innovation benefits of restricting parallel trade

On 6 October 2009 the European Court of Justice held (*GlaxoSmithKline Services v Commission*, Joined Cases C‑501/06 P, C-513/06 P, C-515/06 P and C‑519/06 P) that the Court of First Instance ("CFI") did not err in finding that the Commission did not sufficiently examine the evidence GlaxoSmithKline's ("GSK") presented on that its agreements restricting parallel trade would be justified under Article 81(3) EC Treaty as they increase GSK's investment in research and development.

However, the Court of Justice found that the CFI committed an error of law by requiring proof on harm to final consumers as a prerequisite for finding that a restriction of parallel trade constitutes a restriction of competition "by object", a concept that entails that no proof of anti-competitive effects is required. However, since the CFI had found the agreement restrictive of competition on the basis of its effects ("by effect"), the CFI's judgment nonetheless remained well founded with respect to finding a restriction of competition despite that error. [Juha Vesala]

European Commission holds public hearing on the "Google Books" US settlement

On 7 September 2009, the European Commission held an "information hearing" to establish the effect on the EU market of Google's settlement with a US class of authors and publishers, which disputed steps taken by the internet company to digitize books. "Provisional conclusions" are expected sometime in October 2009.

The hearing followed concerns, raised by stakeholders and some EU governments, that Google has apparently been digitizing content without the consent of authors, contrary to EU law, and that European rights-holders may be being marginalized in the class action settlement in the US.

The aim of the hearing was to gather views on Google's ongoing US settlement and give Google a chance to respond to critics and comments concerning the settlement and the Google Books service more broadly. The hearing focused particularly on the scope of the settlement deal, how many European works are covered and the role of the central registry which oversees licensing. The European Commission was also interested in clarifying the notion of "commercially available", which is a key factor to determine how, or whether, Google can display the copied text.

Google's rivals have suggested that the European Commission could use antitrust law to address suggestions that Google could be abusing its dominant position online to engage in price-fixing, limit access to the online book market and drive booksellers out of business. Yet, Google asserted that it is a fairly straightforward process for rivals to use the registry that is set up as part of the US settlement to launch rival services.

The other route the Commission may pursue would be to make changes to copyright law. Vivien Reding, Commissioner for Information Society and Media, and Charlie McCreevy, Commissioner for the Internal Market and Services, highlighted the need to adapt Europe's fragmented copyright legislation to the digital age, in particular with regard to orphan and out-of-print works.

However, the process of adapting copyright law will be fraught with the usual trappings of legislative reform, and it will take political determination and extensive negotiation to find a solution for the management for copyright of books that will be acceptable to the majority of stakeholders. If the Commission should decide to go this direction it may also be likely that any proposal might be bundled with an overhaul of the rules governing other types of creative works such as music, adding to the complexity. [Gabriele Accardo]

European Commission raids Pharma companies

On 6 October 2009, the European Commission carried out surprise inspections at the premises of several pharmaceutical companies based on suspect infringements of EC Treaty provisions prohibiting restrictive business practices and/or the abuse of a dominant position.

The Commission did not release details of the investigations linked to these inspections, while the undertakings involved (Sanofi Aventis, Teva

Pharmaceutical, Novartis, Ratiopharm and Ranbaxy Laboratories) have confirmed their cooperation with the Commission officials.

These unannounced inspections came just a week after Neelie Kroes, the EU Competition Commissioner, warned of antitrust cases in the coming months, during a speech given to members of the European Parliament. Earlier this year the Commission published its final report on the pharmaceutical sector inquiry. The report's conclusion was that the market is not functioning as well as it could, mainly due to delays in entry of generic medicines to the market. [Gabriele Accardo]

Commissioer Kroes speaks on standards and competition policy

On 15 October 2009 Commissioner Kroes gave a speech that addressed the European Commission's thoughts on standards, reflecting the experiences gained from Commission's recent and pending standards-related cases. In particular, the speech touches upon deceptive practices in standard-setting (patent ambush and ex post hold-up) and IPR policies of standard-setting organizations aimed at preventing the former practices, such ex ante declarations regarding maximum royalties.

The Commission will in appropriate cases address the former set of issues and will provide revised guidance on the latter types of agreements. A draft of the Guidelines on horizontal agreements, updating current guidance on standard-setting cooperation, will according to Commissioner Kroes be ready for public consultation in early 2010. [Juha Vesala]

Italian Competition Authority investigates Google's alleged abuse in the market for online advertising

On 26 August 2009, the Italian Competition Authority opened an investigation (see also press release of 4 September 2009) to determine whether Google is abusing its dominant position in online search services. The procedures was prompted by a complaint from FIEG, the Federazione Italiana Editori Giornali (Italian Newspaper Publishing Federation), according to which Google is putting publishers at a disadvantage in the advertising market if they opted out of Google's news aggregator service, Google News Italia, which brings together, indexes and partially displays news published by many online Italian publishers.

In fact, Google makes it possible for a publisher not to appear on its Google News service, but FIEG claims that websites not wishing to appear on Google News are "automatically" excluded from Google's search engine. However, being on Google's search engine is a determinant factor in allowing a website to attract visitors and thus earn advertising revenues, given the popularity of Google's search engine. This, according to the

Italian Competition Authority, may distort the market for online advertising with the further effect of consolidating Google's market position as an intermediary in the sale of online advertising.

Websites may exclude themselves from both Google News and Google search by including a certain text file in the website directory, or a special HTML tag in the website source code. However, websites owners wishing to just exclude Google News while maintaining Google search have to contact Google News, but with no guarantees or indication of how efficiently such a request will be dealt with.[Gabriele Accardo]

UK Competition Commission provisionally rules against the merger of Ticketmaster and Live Nation

On 8 October 2009 the UK Competition Commission announced that is has provisionally ruled against the proposed merger of Ticketmaster Entertainment, Inc. and Live Nation, Inc. as their merger would limit the development of competition in the market for live music ticket retailing in the UK.

The Competition Commission is specifically concerned that the merger could inhibit the entry of a new competitor, CTS Eventim, into the UK ticketing market. Live Nation has signed an agreement with CTS on ticketing services for live music events and venues in the UK, which absent the merger would have introduced growing competition in the market currently dominated by Ticketmaster and another large ticketing agent. The merger would, according to Competition Commission, give Live Nation the incentive to impede CTS's entry by, in particular, reducing the supply of its tickets to CTS. If CTS thus would not become an additional effective competitor to Ticketmaster, the merger could lead to higher net prices, lower service quality and less innovation in the market.

The Competition Commission has invited comments on the provisional findings and has issued a notice on possible actions that could remedy the competition concerns identified. [Juha Vesala]