



# Stanford – Vienna Transatlantic Technology Law Forum

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## Transatlantic Antitrust and IPR Developments

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# U.S. DEVELOPMENTS

## FTC files complaint against Intel Corp.

On 16 December 2009 the FTC issued an administrative [complaint](#) against Intel Corp. (“Intel”) claiming that Intel has violated Section 5 of the FTC Act through practices that harm competition in the relevant central processing unit (“CPU”) and graphics processing unit (“GPU”) markets (see [press release](#) and [Docket No. 9341](#), In the Matter of Intel Corporation).

First, the complaint argues that Intel has engaged in unlawful practices in order to protect its monopoly power in the CPU markets. The alleged practices include Intel’s arrangements with computer manufacturers designed to limit the use of Intel’s competitors’ products, exclusionary discounts offered by Intel to original equipment manufacturers, the design of Intel’s compiler and library software so as to reduce the performance of competing CPUs, payments and other inducements to suppliers of complementary products to limit support of non-Intel CPU products as well as deceptive and misleading practices related to the performance and compatibility of competing CPUs.

Second, the complaint claims that Intel has engaged in illegal practices in the GPU and related markets, which threaten to eliminate the potential competition posed by GPUs to Intel’s dominance in CPUs, and which, further, carry a dangerous probability of Intel acquiring monopoly power also in the relevant GPU markets. These alleged practices include Intel’s deception regarding its competitors’ efforts to enable their GPUs to interoperate with Intel’s CPUs, discontinuing interoperability for some competitive GPUs, creating barriers to and degrading interoperability between CPUs and GPUs, misleading statements concerning the readiness of Intel’s GPU products, and the bundling and tying of GPUs with CPUs resulting in below-cost pricing.

The complaint also alleges that Intel has manipulated the contents and timing of industry standards to its own advantage, in particular, by delaying competitors’ access to standards.

The complaint claims Intel’s practices constitute stand-alone violations of Section 5 and, in part, simultaneous violations under the Sherman Act’s monopolization standards. In a [statement of Chairman Leibowitz and Commissioner Rosch](#), the FTC’s rationale for the stand-alone Section 5 action is explained. Commissioner Rosch, [in a separate statement](#), concurs with the Section 5 stand-alone action but dissents on bringing, in addition, the Sherman Act based claims.

The complaint follows the settlement by Intel and AMD of their antitrust and patent disputes (see Intel's [press release](#), 12 November 2009) and other recent antitrust agency actions (see e.g. [Newsletter 5/2009](#) p. 5 for the European Commission's decision). In November 2009, New York Attorney General Cuomo filed a complaint against Intel in the U.S. District Court of Delaware claiming that Intel has violated U.S. and state antitrust laws by engaging in a campaign to maintain its monopoly power in CPUs (see [press release](#) and [complaint](#), 4 November 2009). [Juha Vesala]

## **2nd Circuit finds DDAVP purchasers stated Walker Process and related claims and had antitrust standing**

On 16 October 2009 the Court of Appeals for the Second Circuit held ([In re: DDAVP Direct Purchaser Antitrust Litigation](#)) that direct purchasers of desmopressin acetate tablets, sold under the name DDAVP, stated Walker Process and related antitrust claims and had antitrust standing to do so. The Court thus vacated a U.S. District Court (S.D.N.Y.) decision of 2006, which found to the contrary, and remanded the case.

The plaintiffs allege that the defendants abused the patent system to suppress generic competition and maintain their monopoly power over DDAVP. Underlying the suit is the allegation that Ferring B.V. and Ferring Pharmaceuticals, Inc. ("Ferring") failed to disclose the company's prior affiliation with scientists who submitted declarations supporting the grant of a patent for DDAVP. In subsequent patent litigation, this omission was found to constitute inequitable conduct, rendering the patent unenforceable. In this antitrust suit, the plaintiffs claim that Ferring (and its exclusive licensee Aventis Pharmaceuticals, Inc.), not only engaged in inequitable conduct, but also violated antitrust laws by 1) committing a Walker Process fraud, 2) improperly listing the patent in the Food and Drug Administration's ("FDA") Orange Book, 3) engaging in sham litigation against generic competitors, and 4) filing a sham citizen petition to delay FDA's approval of a generic competitor's marketing authorization.

The Court considered that the plaintiffs, direct purchasers of the pharmaceuticals, had antitrust standing to bring the Walker Process and related claims. This represented a novel legal issue since typically Walker Process claims are raised by alleged infringers in patent infringement suits, not by others in separate antitrust actions. Although the Court found that the plaintiffs had standing, it limited its holding to situations where a patent has already been found unenforceable due to inequitable conduct, leaving thus undecided possible standing of purchasers absent such prior finding.

The Court further held that plaintiffs properly stated the four antitrust claims mentioned above. Upon finding that the plaintiffs sufficiently alleged Walker Process fraud, the Court considered that also the other patent

based claims - sham litigation and improper Orange Book listing - were adequately plead. This was also true for the sham citizen petition claim, as such a petition could delay generic competition. [Juha Vesala]

### **Federal Circuit grants rehearing en banc in Princo**

On 13 October 2009 the Federal Circuit [granted](#) petitions by Philips and the U.S. International Trade Commission (“ITC”) for rehearing en banc of *Princo Corp. v. ITC and Philips*, decided by the Court on 20 April 2009 (see [Newsletter 3/2009](#) p. 2). Petition for rehearing en banc by Princo was, however, denied.

In its earlier decision, which now has been vacated, the Federal Circuit affirmed the rejection by the ITC of a patent misuse defense based on alleged tying of non-essential patents with essential but remanded back to the ITC a misuse claim based on an alleged agreement on not licensing a patent for technologies that could develop into competitors for the CD-R and CD-RW standards. [Juha Vesala]

## **EU DEVELOPMENTS**

### **Commission accepts Microsoft commitments to give users browser choice**

On 16 December 2009, the European Commission has adopted a [decision](#) making legally binding [commitments](#) offered by Microsoft to boost competition on the [web browser market](#).

Microsoft commits to offer European users of Windows choice among different web browsers and to allow computer manufacturers and users the possibility to turn Internet Explorer (“IE”) off. Microsoft also undertakes to make far-reaching interoperability disclosures. Even though this undertaking remains “informal” vis-à-vis the Commission (i.e. outside the formal legally-binding commitments), Microsoft’s public undertaking offers assurances to third parties that can be privately enforced. The Commission will carefully monitor the impact of this undertaking on the market and take its findings into account in the pending antitrust investigation regarding [interoperability](#).

On 15 January 2009, the Commission sent a Statement of Objections to Microsoft, alleging that Microsoft’s tying its IE with its dominant PC operating system Windows, which makes IE available on 90% of the world’s PCs, may have distorted competition on the merits between competing web browsers insofar as it may have provided IE with an

artificial distribution advantage which other web browsers were unable to match, in breach of EU rules on abuse of a dominant market position (Article 102 of the Treaty on the Functioning of the European Union, or “TFEU”).

In particular, as a result of its tying conduct, Microsoft may have been able to shield IE from head to head competition with other browsers, whereas the ubiquity of IE may have created artificial incentives for content providers and software developers to design websites or software primarily for IE which ultimately hindered competition and innovation in the provision of services to consumers. According to the Commission, Microsoft’s practice lead to significant consumer harm, in the light of the fact that the development of new online services makes web browsers an increasingly important tool for businesses and consumers, and a lack of real consumer choice on this market would undermine innovation.

Microsoft replied to the Statement of Objections on 28 April 2009. In June 2009, Microsoft announced that it was prepared to separate IE from Windows to address the Commission’s concerns. In particular, Microsoft stated that it would supply retail consumers with a version of Windows without a web browser at all, while computer manufacturers (“OEMs”) would have been able to choose to install IE, another browser or multiple browsers in the computers they sell.

The Commission’s first reaction to Microsoft proposal was not enthusiastic. In fact, in the Statement of Objections the Commission had clearly suggested that a potential remedy should provide consumers with a genuine choice of browsers presented to them through a choice screen in Windows.

On 24 July 2009, Microsoft offered a new set of commitments to meet the concerns expressed by the Commission, including the ballot screen solution suggested by the Commission. On 9 October 2009, the Commission published a [market test notice](#) with the summary of the proposed commitments and called for comments from interested third parties, with the aim of making those commitments binding on Microsoft.

The commitments offered by Microsoft, as now accepted by the Commission, intend to allow for an unbiased choice for both OEMs and end users between Microsoft’s browser and competing browsers. The key elements of the commitments are:

- OEMs and computer users within the EEA will have the possibility to turn IE on and off via a [control panel feature](#), and when IE is off the browser frame window and menus will not be accessible to the user or anybody else in any way.

- OEMs will be free to pre-install any web browser(s) of their choice on PCs they ship and set it as default web browser. Microsoft will not circumvent the commitments and shall not retaliate against OEMs for installing competing web browsers or by other means.
- A [Choice Screen](#) will give users within the EEA the opportunity to choose whether and which competing web browser(s) to install. The Choice Screen will display in an unbiased way icons of and basic identifying information on the most 12 widely-used web browsers (the five most widely used browsers will be prominently displayed and the other seven browsers will be shown when the user scrolls sideways).

Microsoft has until mid-March 2010 to make the Choice Screen update available to users, at which point it will be directly available to Windows 7 users. The roll-out to all users of Windows XP and Vista will be completed within five months from the date of the decision. The update will remain available for five years.

The Choice Screen update will be displayed on over 100 million PCs in Europe when it is launched in mid-March 2010 and to around 30 million new PC users per year over its five year term. In addition, from mid-March 2010 onwards, anyone can view and use the Choice Screen at [www.browserchoice.eu](http://www.browserchoice.eu).

The outgoing Commission thus puts an end to the Microsoft saga in Europe under Mrs. Kroes' tenancy. The Microsoft browser commitment is probably the last act. [Gabriele Accardo]

### **Commission closes alleged “patent ambush” case accepting commitments offered by Rambus**

On 9 December 2009, the Commission adopted a [decision](#) accepting and making legally binding the commitments offered by Rambus in relation to its royalty rates for JEDEC-compliant Dynamic Random Access Memory chips (or “DRAMs”).

The Commission's statement of objections of July 2007 stated that Rambus was likely claiming unreasonable royalties for the use of certain patents for DRAMs subsequent to a so-called “*patent ambush*” in breach of the EC Treaty rules on abuse of dominant position (Article 102 of the Treaty on the Functioning of the European Union – “TFEU”, formerly Article 82 EC).

In brief, according to the Commission, Rambus, first, intentionally concealed patents and patents applications during the standard-setting process within the U.S.-based standard setting organization JEDEC, and

once the standard was set, it then claimed excessive royalties for those patents.

According to the [commitments](#), Rambus will put a worldwide cap on its royalty rates for products compliant with the JEDEC standards for five years from the adoption date of the Commission decision.

[In particular](#), Rambus will charge zero royalties for the Single Data Rate (“SDR”) and Double Data Rate (“DDR”) chip standards, in combination with a *maximum* royalty rate of 1.5% for later generations of JEDEC DRAM standards (DDR2 and DDR3). The zero royalty rate for the SDR and DDR standards is deemed proportionate since those standards were adopted during the time in which the Commission provisionally considered Rambus may have engaged in intentional deceptive conduct. On the other hand, the maximum royalty rate is considered adequate and proportionate in the light of the fact that the industry is locked in to the JEDEC standards and therefore the effects of the alleged abusive behaviour extend to subsequent standards. The royalty cap does not exclude the possibility for prospective licensees to negotiate better rates for Rambus technologies.

The commitments offered by Rambus cover not only chips, but also memory controllers to the extent that they need to comply with the JEDEC DRAM standards. The Commission considers that this further requirement is not unreasonable.

Another important feature of the commitments is their transferability. In practice, even if Rambus should later sell its patents (before the 5 year period in which they are operative), the commitments will stay in place and will be binding on the buyer(s) of Rambus patents.

In the MEMO accompanying its decision, the Commission shed some lights on how to calculate a reasonable royalty. The Commission considers that while a reasonable royalty depends on the specifics of every case, the *ex ante* price that was being charged for a technology before a standard was set could be a good benchmark.

Rambus undertakes to post on its website two default license contracts – for DRAM chips and memory controllers respectively – compliant with the commitments.

The [non-confidential version](#) of the commitments decision will be published on the Commission website as soon as the Commission and Rambus will agree on a text which does not contain any business secrets or other confidential information. [Gabriele Accardo]

## **European Commission closes Qualcomm investigation**

On 24 November 2009 the European Commission [announced](#) it has closed its investigation into the licensing practices of Qualcomm. The investigation, [initiated in 2007](#), concerned whether Qualcomm abused a dominant position by demanding unfair royalties in violation of a FRAND commitment.

The Commission did not reach formal conclusions on the merits of the case, but considered it would not be appropriate to invest further resources into the investigation since the complainants had withdrawn their complaints or intended to do so.

However, the Commission emphasized that it remains committed to fighting abuses of market power by dominant companies in the innovative sectors when the conduct deprives consumers of the benefits of competition and choice. The Commission also noted the challenges involved in the assessment of the pricing of technologies incorporated into an industry standard and that antitrust enforcers have to remain wary of overturning commercial agreements. [Juha Vesala]

## **IPCom publicly accepts to take over Bosch's FRAND terms commitments**

On 10 December 2009, the European Commission issued a [press release](#) regarding the public declaration by IPCom, a German IP licensing company, in relation to the disputes on a portfolio of patents key to mobile standards developed by Bosch before being sold to IPCom in 2007.

Bosch portfolio included patents essential to the GSM and UMTS standards. As a member of the European Telecommunications Standards Institute ("ETSI"), Bosch took part in the GSM and UMTS (WCDMA) standard setting processes. During the development of such standards, Bosch had declared that it held essential patents in the relevant standards and committed to ETSI to grant irrevocable licenses on fair, reasonable and non-discriminatory (FRAND) terms and conditions for such patents.

Following the discussion with the Commission, IPCom is ready to take over Bosch's previous commitment to grant irrevocable licences on FRAND terms.

The Commission welcomes IPCom's declaration and considers that it is important that when patents essential to a standard are transferred from one owner to another, so should any relevant FRAND commitments. The transfer of FRAND commitments after the sale of standard-essential patents is important from a competition law perspective says the Commission. The unrestricted access to the underlying proprietary



technology on FRAND terms for all third parties safeguards the pro-competitive economic effects of standard setting. Such effects could be eliminated if, as a result of a transfer of patents essential to a standard, the FRAND commitment would no longer apply.

Arguably, ICom statement may lead to settlements with mobile phone manufacturers HTC and Nokia before the European Commission and German courts. [Gabriele Accardo]

### **European Ombudsman finds that the European Commission committed maladministration in its Intel investigation**

On 18 November 2009, the European Ombudsman [published](#) a non-confidential version of its [decision](#) on a complaint by Intel against the European Commission. The complaint relates to alleged procedural errors by the Commission during its investigation into Intel's abuse of dominance as a result of which the Commission imposed a fine of 1.06 billion Euro on Intel in May 2009.

According to Intel, the Commission failed to take minutes of the 23 August 2006 meeting with representatives of Dell, despite the fact that the meeting was directly concerned with the subject-matter of its investigation. As a result, according to the chip maker, the Commission did not make a record of potentially exculpatory evidence arising from this meeting.

In its opinions to the Ombudsman, the Commission argued that it is under no obligation to draft any minutes of meetings with any person or undertaking and that, in accordance with its own Notice on Access to the File, if the Commission chooses to make notes of meetings, such documents constitute its own interpretation of what was said at the meetings, for which reason they are classified as internal documents. The Commission submitted that its view is consistent with the rulings of the Court of First Instance in *TACA* and *Group Danone*. In particular, the Commission maintained that the meeting of 23 August 2006 was not an "interview" pursuant to Article 19 of Regulation 1/2003.

According to the Ombudsman, in examining the classification of a legal act, the analysis cannot be restricted to considering the official title of a measure, but must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure. Since the choice of form cannot alter the nature of a measure, it must be ascertained whether the content of a measure is wholly consistent with the form attributed to it by the institution concerned. The Ombudsman considers that an interview will only fall within the scope of Article 19 of Regulation 1/2003, if its purpose is to collect information relating to the subject-matter of an investigation, which was the case of the 23 August 2006 meeting

The Ombudsman found the 23 August 2006 meeting had the aim and the content of an “Article 19 interview” since the Commission sought information from a senior Dell executive which was related directly to the subject-matter of the investigation, and the issues actually discussed in the meeting of 23 August 2006 related directly to the subject-matter of the investigation and the senior Dell executive provided concrete information to the Commission which was related directly to the subject-matter of the investigation. Yet, the Ombudsman further observed that the Community Courts have not yet had the opportunity to provide an interpretation of Article 19 of Regulation 1/2003.

Accordingly, the Ombudsman found maladministration on the grounds that the Commission failed to make a proper note of the 23 August 2006 meeting, but made no finding that Intel's rights of defence had been infringed. To make a finding that rights of defence were infringed in a particular competition case would require a careful analysis of the entire file, carried out in conjunction with a careful analysis of the Statement of Objections and, eventually, the decision. The Ombudsman had not reviewed the entire file or the Statements of Objection issued. In any event, although it could not conclude on whether the rights of defence had been infringed, the Ombudsman further considered that a friendly solution was not possible in the present case.

Intel also made a second allegation, notably that the Commission actively encouraged Dell to enter into an information exchange agreement with micro-chip producer AMD (Intel's competitor in the x86 CPU market) - on this claim the Ombudsman made no finding of maladministration.

The Ombudsman did find, however, that the Commission failed to make a proper note of a telephone call between the Commission and Dell, in which the information exchange agreement was discussed. Such a note would have helped to clarify the relevant facts. On this point, the Ombudsman recommended in future that the Commission should make “proper internal notes of any meetings or telephone calls with third parties concerning important procedural issues”. [Gabriele Accardo]

### **Commission sends statement of Objections to Standard & Poor's**

On 16 November 2009 the Commission sent a [Statement of Objections](#) (“SO”) to Standard & Poor's (“S&P”), a division of McGraw-Hill Companies, Inc. The SO follows a [complaint](#) lodged by several associations representing investors (financial institutions and asset managers) with the Commission.

S&P is the sole-appointed National Numbering Agency for U.S. securities and therefore the only issuer and first-hand disseminator of U.S.

International Securities Identification Numbers (“ISINs”). ISINs are the global identifiers for securities and are governed by International Standardization Organization (“ISO”) standard 6166. Financial institution cannot carry out a number of operations without ISINs, which are indispensable. Furthermore, ISINs cannot be substituted by other identifiers for securities. Moreover, S&P is the only operator to receive first-hand information from all U.S. securities issuers. S&P includes the information gathered from securities issuers in a descriptive database (“the S&P ISIN database”), which is then licensed to information services providers such as Bloomberg, Reuters, etc.

The Commission’s preliminary view is that by requiring financial institutions and information service providers to pay licensing fees for the use of ISINs in their own databases, S&P is abusing its monopoly position. The enforcement of the payment of these license fees by S&P would amount to unfair pricing in breach of Article 102 TFEU.

This preliminary finding is based on, among the other, a comparison with the charging policy of other national numbering agencies that either do not charge any fees at all or, if they do, do so only on the basis of the distribution cost as opposed to usage, according to ISO principles. Yet, it appears that S&P does not incur any costs for the distribution of U.S. ISINs to financial service providers because the latter do not receive the ISINs from S&P but from information service providers such as Thomson Reuters or Bloomberg.

S&P has 8 weeks to reply to the SO, and will then have the right to be heard in an Oral Hearing. [Gabriele Accardo]

### **Commission investigates Thomson Reuters in the area of real-time datafeeds**

On 10 November 2009, the European Commission made public the [initiation of antitrust proceedings](#) against Thomson Reuters, the Canadian news and financial data company. The investigation relates to alleged abusive practices by Reuters in the area of real-time datafeeds.

A datafeed can be described as a virtual pipeline of electronically distributed real-time market data, which “feeds” software applications developed by banks and financial institutions. Reuters uses proprietary alphanumeric codes (Reuters Instruments Codes or “RICs”) to identify securities and their trading locations and to retrieve information from Reuters real-time datafeeds, e.g. information on stock prices at a certain exchange.

The Commission is concerned that Reuters customers or competitors are prevented from translating RICs to alternative identification codes of other

datafeed suppliers (so called “mapping”). If customers cannot perform such mapping, they are *de facto* “locked”-in to working with Reuters unless they can reconfigure or rewrite their software applications, which can be long and costly. The Commission’s press release does not clarify how competitors may also be affected by Reuters conduct.

The Commission opened the investigation on its own motion. While generally the Commission makes public the commencement of a proceeding when issuing a statement of objections or in a preliminary assessment notice (in settlement procedures), in the case at stake it has chosen to open the proceeding before any such further steps. This procedural step relieves the competition authorities of the Member States of their competence to apply Article 102 TFEU (formerly Article 82 EC) in this matter. [Gabriele Accardo]

### **Paris Court of Appeal refers case to the European Court of Justice to shed light on online distribution rules**

On 29 October 2009, the Paris Court of Appeal put on hold the [Pierre Fabre case](#) and asked the European Court of Justice to rule on whether a naked prohibition on online sales to final consumers imposed on authorized distributors within the context of a selected distribution network should be considered an “hard core” restriction by object under Article 81 of the EC Treaty (now Article 101 of the TFEU), which falls outside the scope of the Block Exemption Regulation on vertical agreements, but which may benefit from an individual exemption when under Article 81.3 of the EC Treaty.<sup>1</sup>

The question was raised in the appeal by medical-cosmetics manufacturer Pierre Fabre against the decision by the French competition authority fining the company for restricting the distribution of some of its brands over the internet.

The European Commission also intervened before the Court of Appeal in support of the French competition authority argument that the prohibition of online sales within a selective distribution is illegal unless there is an overriding reason to prohibit it, e.g. when this is required by a national or European law in order to protect public order for reasons of security or consumers health.

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<sup>1</sup> Original text in French: “... si l’interdiction générale et absolue de vendre sur Internet les produits contractuels aux utilisateurs finals imposée aux distributeurs agréés dans le cadre d’un réseau de distribution sélective constitue effectivement une restriction caractérisée de la concurrence par objet au sens de l’article 81 paragraphe 1 du Traité CE échappant à l’exemption par catégorie prévue par le Règlement n° 2790/1999 mais pouvant éventuellement bénéficier d’une exemption individuelle en application de l’article 81 paragraphe 3 du Traité CE”.

The French competition authority took the view that Pierre Fabre, by prohibiting the online sale of its products infringed competition rules, because the prohibition of online sales equates to a prohibition of active and passive sales, and cannot be considered exempt, either under a block exemption allowed by the EC Regulation of 1999 on vertical agreements (set to expire in May 2010 and currently under review by the European Commission). [Gabriele Accardo]

### **Commercial Court of Paris fines eBay Euro 1.7 million for not complying with internet sale injunction**

On 30 November 2009, the Commercial Court of Paris has ordered eBay to compensate luxury brand owner LVMH about Euro 1.7 million for not complying with an injunction to ban the sale of some of the group's perfumes online.

The case dates back to 2006 when LVMH took eBay to court for allegedly breaching its selective distribution system and allowing users to sell counterfeit goods

In June 2008, the Paris Court of Commerce ruled that eBay and eBay International AG were liable for failing to prevent the sale of counterfeit items on its websites that traded on plaintiffs' brand names and for interfering with the plaintiffs' selective distribution network. The court awarded LVMH damages worth approximately Euro 38 million in damages and issued an injunction prohibiting all sales of perfumes and cosmetics bearing the Dior, Guerlain, Givenchy and Kenzo brands over all worldwide eBay sites to the extent that they are accessible from France. Failure to adhere to the injunction could have brought daily fines of up to Euro 50,000.

It appears that the French judges found eBay liable for failing to prevent the sale of counterfeit items on its websites that traded on LVMH's brand names and for interfering with the LVMH selective distribution network. [Gabriele Accardo]

### **Commission's in-depth investigation into Sun Microsystems takeover by Oracle**

On 3 September 2009, the European Commission opened an [in-depth investigation](#) into the planned acquisition of U.S. hardware and software vendor Sun Microsystems by Oracle Corporation, a U.S. database and application software company.

The Commission raised serious doubts as to the compatibility of the transaction with the Single Market because of competition concerns on the market for databases, a key element of company IT systems.

Competition Commissioner Neelie Kroes stated: “The Commission has to examine very carefully the effects on competition in Europe when the world’s leading proprietary database company proposes to take over the world’s leading open source database company. [...] In the current economic context, all companies are looking for cost-effective IT solutions, and systems based on open-source software are increasingly emerging as viable alternatives to proprietary solutions. The Commission has to ensure that such alternatives would continue to be available.”

The proposed transaction would bring together two major competitors in the highly concentrated market for databases. Oracle is the market leader in proprietary databases, while Sun’s MySQL database product is the leading open source database. Oracle, IBM and Microsoft, with their proprietary offers, control approximately 85% of the database market in terms of revenue.

However, the Commission’s attention was also drawn by MySQL’s perceived role as a disruptive price setter. While MySQL may enjoy a relatively small market share in terms of revenue, its competitive impact is far greater than the market share figure may suggest. Even in markets where several strong competitors would remain post transaction, the removal of what could be deemed a “maverick” price-setter can set alarm bells ringing.

On 14 December 2009, the European Commission [confirmed](#) that it has engaged in constructive discussions with Oracle regarding the maintenance of MySQL as an important competitive force in the database market after Oracle’s acquisition of Sun Microsystems.

In particular, Oracle announced a series of undertakings to customers, developers and users of MySQL, such as Oracle’s binding contractual undertakings to storage engine vendors regarding copyright non-assertion and the extension over a period of up to 5 years of the terms and conditions of existing commercial licenses.

The Commission has until 27 January 2010, to take a final decision on whether the concentration would significantly impede effective competition within the European Economic Area or a substantial part of it.

In the U.S., the Department of Justice approved the transaction on 20 August 2009. On 9 November 2009, Deputy Assistant Attorney General Molly Boast of the Department of Justice’s Antitrust Division, issued a [statement](#) in which she criticized the European Commission’s review of

Oracle's purchase of Sun Microsystems, safe for later rowing back somewhat from her original statement.

The current disparity between U.S. and European reviews of Oracle's purchase of Sun Microsystems highlights the differences between EU and U.S. merger control rules rather than a major difference in the substance of their respective approaches. The Commission's merger review may be a little more structured because of the administrative systems. U.S. authorities, in turn, oppose mergers only by going to court. Yet, there may be some hesitancy to rush into court unless antitrust agencies have a case they can get satisfaction on. Rightly so. [Gabriele Accardo]

### **Treaty of Lisbon enters into force with changes to numbering**

On 1 December 2009 [the Treaty of Lisbon entered into force](#). As a consequence, the former Articles 81 and 82 EC Treaty will be known as Articles 101 and 102 of the Treaty on the Functioning of the European Union. Furthermore, the Court of First Instance is now known as the General Court. [Juha Vesala]

This and the previous issues of the *Transatlantic Antitrust and IPR Developments* can be accessed via its [webpage](#) on the Transatlantic Technology Law Forum website.