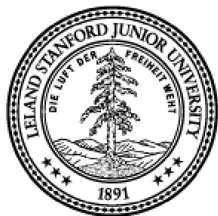

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Editor-in-chief: Juha Vesala, TTLF Fellow
Contributors: Gabriele Accardo and Juha Vesala, TTLF Fellows

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U.S. DEVELOPMENTS

U.S. Supreme Court holds licensing activities of NFL teams were joint conduct subject to § 1 Sherman Act

On 24 May 2010 the U.S. Supreme Court held that teams of the National Football League ("NFL") engaged in concerted action subject to Section 1 Sherman Act when licensing their intellectual property rights such as brands and logos through an entity called the National Football League Properties ("NFLP"). Lower courts had considered that the teams were acting as a single entity incapable of conspiring under Section 1 (see Newsletter 5/2009 p. 3 and Newsletter 4/2009 p. 4 for background).

In its opinion, the Court emphasized that the inquiry into whether firms act jointly (instead of independently) should focus on the substance of the activities concerned rather than their form such as whether a single legal entity is or legally distinct entities are concerned. Decisive in determining whether concerted action is present is whether the arrangement, by joining together separate economic actors pursuing separate economic interests, deprives the marketplace from independent decision-making and thus of actual or potential competition. The Court explained that only concerted action is subject to Section 1 of the Sherman Act because, in comparison to independent conduct exclusively subject to Section 2, it inherently carries a higher anti-competitive risk and subjecting only discrete agreements to Section 1 lowers the risk of deterring firms' necessary conduct.

Applying these principles to the present case, the Court considered that while the NFL teams have shared interests in producing football and promoting the NFL brand, the teams nonetheless remain separate and have potentially competing interests as to many of their functions. In particular, the teams compete as suppliers in the market for intellectual property. The activities of the teams, also to the extent undertaken through the separate licensing entity NFLP, therefore constitute concerted action subject to Section 1 of the Sherman Act. The Court, however, explained that Rule of Reason should generally apply to the NFL activities in which cooperation is necessary. [Juha Vesala]

U.S. Court of Appeals for the Second Circuit invites petitions for en banc rehearing in reverse payment settlement case

On 29 April 2010 the U.S. Court of Appeals for the Second Circuit affirmed a lower court decision finding that reverse payment settlements did not

violate antitrust laws, as they did not extend beyond the scope of the patent in question. However, the Court invited petitions for rehearing en banc and indentified several issues with the approach adopted in its earlier decision (*In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187 (2d Cir. 2005)), by which the panel in this case is bound (See Newsletter 4/2009 p. 2 for background of the present case and an amicus brief filed by the U.S. Department of Justice advocating a change to the Tamoxifen approach).

In support of why this case would be suitable for rehearing en banc, the Court noted that, first, the United States has in its amicus brief called into question the antitrust standards adopted in the Court's earlier Tamoxifen case (and also applied by some other Circuit courts). Second, the Court noted that, as an empirical matter, reverse payment settlements appear to have increased after the Court's 2005 ruling – a phenomenon the Court at the time thought would be rare. Third, the Court noted that even a principal drafter of the Hatch-Waxman Act (Senator Hatch) has criticized the settlements in question. Fourth, the Court recognized that its 2005 ruling was based an interpretation of the Hatch-Waxman Act that subsequently has turned out to be erroneous in that, unlike the Court then believed, only the first filer of an Abbreviated New Drug Application ("ANDA") – and not for instance others following a settlement with the first generic manufacturer to file an ANDA – is eligible for a 180-day exclusivity period.

The Federal Trade Commission has filed an amicus brief supporting rehearing en banc of the case. [Juha Vesala]

U.S. Federal Trade Commission closes its investigation of Google's acquisition of AdMob

On 21 May 2010 the U.S. Federal Trade Commission ("FTC") announced the closure of its investigation of Google's acquisition of the mobile advertising network company AdMob.

According to the FTC, though the acquisition raised competition concerns as Google and AdMob have competed in the past few years with notable intensity and can currently be considered as the two leading mobile advertising networks, these concerns were outweighed by the recent evidence that Apple, which recently acquired Quattro Wireless, is likely to become a strong competitor in the mobile advertising market. Apple's entry through the introduction of its iAd network is particularly significant as AdMob's revenue and market share are largely derived from the iPhone platform.

AdMob also competes with Google in advertising sales on Google's Android platform. However, according to the FTC, competitive harm appears unlikely as Google's exercise of market power would risk making the Android platform less competitive against the iPhone and other

platforms. In order to remain competitive, Google has a strong incentive to encourage the development for its Android platform of free and low cost applications, which are often made available on the basis of advertising revenue shared with the application developers.

Moreover, according to the FTC, developers of smartphone platforms other than iPhone or Android have strong incentives to facilitate competition among mobile advertising networks. [Juha Vesala]

U.S. In brief

- FTC, DOJ, and USPTO hold joint "The Intersection of Patent Policy and Competition Policy Workshop" (26 May 2010)
- Rosch (FTC) speech "Forces Driving and Impending Innovation" (13 May 2010)
- Leibowitz (FTC) prepared Statement of the FTC "How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy" (9 June 2010)

EU DEVELOPMENTS

Internet distribution – The European Commission publishes new rules on vertical agreements

On 20 April 2010, the European Commission published the revised Block Exemption Regulation and the Guidelines on Vertical Restraints.

The long awaited Block Exemption Regulation (the "BER") and the Guidelines follow a significant consultation process which has attracted significant attention, notably in respect to the rules that apply to distribution agreements in the online space. In particular, the Guidelines clarify under which circumstances vertical restrictions on online selling are allowed, in particular in the context of exclusive distribution and selective distribution systems.

Online selling and exclusive distribution. Under the revised BER suppliers *can* restrict active, but not passive sales to territories (or customer groups) where they operate an exclusive distribution system. In this respect, the new Guidelines provide useful guidance on how to distinguish between active and passive sales in the online context.

- **Passive sales.** In general, the simple fact of *having a website* is considered a form of passive selling, since it is a reasonable way to

allow customers to reach the distributor. *Language options* used on a website or in communication are also considered passive sales.

- **Hardcore restrictions of passive selling.** According to the Guidelines, restrictions aimed at preventing customers from viewing the website of a distributor located in another exclusive territory, automatic re-routing, or terminating a transaction when credit card data reveals an address that is not within the distributor's (exclusive) territory should all be prohibited, as they would be considered as hardcore restrictions of passive selling.

- **Active selling.** The Guidelines consider *online advertisement specifically addressed to certain customers* a form of active selling to these customers. For instance, territory based banners on third party websites are a form of active sales into the territory where these banners are shown. More generally, efforts to reach out to customers in a certain territory or a certain customer group are considered active selling in that territory or to that customer group. Also, when customers pay a search engine or online advertisement provider to have advertisement displayed *specifically* to users in a particular territory, the Commission will likely view such an "effort" as active selling into that territory.

- **Restriction of online active sales.** The Guidelines confirm the current rules whereby promotion on the internet or the use of the internet that would lead to active selling into, for instance, other distributors' exclusive territories or customer groups may be restricted, just as a supplier may prevent active sales in relation to traditional distribution systems.

- **Restriction of online passive sales.** As an exception to the general rule which prohibits restriction of passive sales, suppliers may restrict passive sales by other distributors when an exclusive distributor is the first to sell a new brand or the first to sell an existing brand in a new market. This restriction is allowed for the first two years that the distributor is selling the contract goods.

Online selling and selective distribution. The Guidelines broadly maintain the current policy whereby the supplier cannot, in principle, restrict the online sales of its (authorised) distributors since a restriction of the use of the internet is a hardcore restriction. However, the supplier may require (and thus exclude from online sales companies which do not meet the) quality standards for the use of a website, just as the supplier may require quality standards for a shop or promotion in general. The Guidelines provide further clarification on quality standards as well as other restrictions that a supplier may, or may not, impose on its authorised dealers under the BER in the context of online sales.

- **Quality standards for online sales.** As to quality standards, a supplier may require its distributors to have one or more brick-and-mortar shops or showrooms as a condition for becoming a member of its distribution system.

  In general, however, obligations which dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which, without having to be identical, are not overall equivalent (i.e. do not pursue the same objectives and achieve comparable results) to the criteria imposed for the sales from the brick-and-mortar shop would be considered as hardcore restrictions.

  Similarly, a supplier may restrict the use of third party platforms to distribute the contract products by its distributors, making it subject to the standards and the conditions agreed between the supplier and its distributors for the distributors' use of the internet.

The Guidelines further clarify that, under the BER, some restrictions of online sales in the context of a selective distribution are permitted while others are prohibited:

- **Permitted restrictions of online sales.** In order to ensure an efficient operation of the physical outlets, the supplier may require its dealers to sell off-line at least an absolute amount (in value or volume). However, this requirement may not limit the online sales of the distributor and must be determined on the basis of objective criteria, such as the buyer's size in the network or its geographic location. The Guidelines also clarify that suppliers may offer their distributors a fixed fee in order to ensure an efficient operation of their physical outlets.

- **Prohibited hardcore restrictions.** The Guidelines clarify that obligations which dissuade appointed dealers from using the internet by imposing unreasonable criteria for online sales are considered as hardcore restrictions of passive selling. The Guidelines identify two of such cases, notably requiring a distributor to limit the proportion of overall sales made over the internet, as well as requiring a distributor to pay a higher price for products to be resold online than for products intended to be resold off-line, unless such a dual pricing is objectively justified by substantially higher costs for the manufacturer.

In cases where foreclosure of alternative distribution formats, such as online-only distributors, is due to the cumulative application of selective distribution in a market (the main suppliers all having selective distribution systems) or from the actions of a single supplier with a market share exceeding 30%, the Commission may find that there are unjustified restrictions of competition, and may act or withdraw the benefit of the BER. [Gabriele Accardo]

European Commission publishes draft guidelines on horizontal agreements and R&D block exemption regulation

On 4 May 2010 the European Commission published, for public consultation, draft guidelines on horizontal agreements and two related draft block exemption regulations, including one on research and development ("R&D") agreements.

The guidelines touch upon various different aspects of horizontal cooperation, of which for technology and intellectual property rights, agreements on research and development and standard setting cooperation are most of relevance. While the draft guidelines and block exemptions do not fundamentally alter the ones currently in force, they introduce some new elements and clarify certain existing ones.

- **Research and development.** For research and development agreements the most significant changes include that in order to benefit from an antitrust safeharbor established for R&D agreements under the R&D block exemption regulation, the parties must prior to starting the research agree that they will disclose their background intellectual property rights (that is, those necessary for exploiting the results of the R&D cooperation). The draft regulation also now specifically mentions that a market share threshold also applies on the affected technology markets and it also clarifies and reformulates various other details such as the conditions for an exemption (e.g. access to the results of the R&D) and the applicable hardcore restrictions.

- **Standard setting cooperation.** As to standard setting cooperation, the draft guidelines introduce a safeharbor preconditioned on the cooperation being governed, among other things, by certain minimum intellectual property rights policies. In particular, sufficiently effective disclosure obligations and FRAND (fair, reasonable and non-discriminatory) licensing arrangements are required for the safeharbor to apply. For instance, FRAND commitments must also made binding on subsequent holders of essential patents in case they are transferred. The draft guidelines also make explicitly clear that a requirement or possibility of unilateral ex ante declarations of the most restrictive licensing terms do not raise competition concerns (see also below p. 8 for related European Commission initiatives in this area).

The draft guidelines also identify methods for assessing whether royalties demanded for essential patents breach a FRAND commitment in view of assessing whether essential patent holder conduct constitutes excessive

pricing prohibited as an abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union.

The revised block exemption regulations are expected to be finalized during 2010 as the current regulations are about to expire at the end of 2010. [Juha Vesala]

Standard Setting in the EU's Digital Agenda

On 19 May 2010, the European Commission made public its long awaited policy document on the Digital Agenda for Europe. The overall aim of the Digital Agenda is to deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications.

In particular, one of the goals of the Digital Agenda is improving ICT standard-setting and interoperability, as effective interoperability between IT products and services is key to building a truly digital society. To this end, the Digital Agenda will for example, propose legal measures to reform the rules on implementation of ICT standards to allow the use of certain ICT fora and consortia standards.

More importantly, guidance on transparent *ex-ante* disclosure rules for essential intellectual property rights and licensing terms and conditions in the context of standard setting is also deemed to contribute to lower royalty demands for the use of standards and thus to lower market entry costs.

In this respect, in a recent speech Neelie Kroes, Commissioner for Information Society and Media, made it clear that a legislative solution on standard setting may be a possibility, although she stressed that the aim is to make standard setting more efficient, and not more burdensome for companies.

Mrs. Kroes appears to flag that, if need be, she would be ready to go beyond the recently published Commission's draft antitrust rules on horizontal agreements relating to standard-setting. The draft rules, currently available for consultation (see above p. 7) rely on the well-established concepts of non-discrimination, transparency, and availability and specify minimum requirements that distinguish standard-setting from a cartel. On the important issue of licensing, Mrs. Kroes is of the view that because establishing FRAND (Fair, Reasonable and Non-Discriminatory) prices is a hard task, transparency of costs (and therefore of licensing terms) is in everyone's interest, as it would facilitate implementation of the standard and reduce the risks of litigation.

Ultimately, according to Mrs. Kroes, the European Commission should not need to run lengthy investigations in every case where there is a lack of interoperability. Yet, she made it also clear that companies should not be able to withhold essential interoperability information from the market when such behaviour would result in lock-in situations. [Gabriele Accardo]

Ticketmaster/Live Nation merger gets final clearance in the UK

On 7 May 2010, the UK Competition Commission ("CC") reaffirmed its initial decision of December 2009 (see Newsletter 1/2010 p. 9 for details) concluding that the merger of Live Nation and Ticketmaster would not result in a substantial lessening of competition in the market for live music ticket retailing or in any other market in the UK, including live music promotion and live music venues.

In particular, in its final decision the CC has found that the merger will make little difference to the prospects of rival ticketing agent CTS Eventim's success in the UK. The entry in the UK by CTS Eventim was prompted by an agreement signed with Live Nation prior to the merger being proposed. Under their agreement, CTS Eventim provides Live Nation with ticketing software and services, enabling Live Nation to sell its own tickets. Eventim is also allocated a proportion of Live Nation's tickets to sell to consumers.

The CC's decision concludes that on the basis of its agreement with Live Nation alone, CTS Eventim will still be a small-scale retailer of live music tickets in the UK and its prospects of becoming a large-scale retailer and competing effectively with the large incumbent ticket retailers will not be affected significantly by the merger. [Gabriele Accardo]

French Competition Authority probes Sanofi-Aventis alleged abuse against generic manufacturers

On 17 May 2010, the French Autorité de la concurrence (French Competition Authority, "FCA") determined to open a fully fledged investigation (under Article 102 TFEU) into Sanofi-Aventis allegedly abusive practices aimed at preventing generic competition to its blockbuster Plavix following a complaint by Teva Santé, the leading Israeli generics manufacturer. The FCA rejected the request for interim measures claimed by Teva Santé.

In November 2009, Teva Santé complained, *inter alia*, about Sanofi-Aventis marketing practices, using the differences between Plavix and competing generics in order to denigrate competing generic medications amongst physicians and pharmacists.

In particular, in its commercial presentations to physicians and pharmacists, Sanofi-Aventis would appear to have emphasized the differences that exist between its reference and competing generics (other than its own), without indicating that their total bioequivalence has been recognized by health authorities (i.e. the generic formulation has been fully tested and approved for use by medical authorities across Europe) and that these differences are of no therapeutic relevance.

In its decision, the FCA considers that denigratory practices are susceptible to amount to an abuse of dominance. The FCA recalled that in a previous case, it had already held that it is not for a dominant undertaking to carry out the task of health authorities, further noting that according to the European Commission's Guidance on enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) "*It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product*."

The FCA continues that while it is perfectly permissible for a laboratory to demonstrate the objective qualities of a product, by letting it be understood, in an implicit but necessary manner, that these differences have an impact on the product's safety and efficiency, and therefore on the patient's health, the Sanofi-Aventis laboratory is encouraging health care professionals not to prescribe or replace the original with anything other than the laboratory's own generic.

According to the FCA, Sanofi-Aventis's behaviour may be regarded, at this stage of the investigation, as not a legitimate business conduct aimed at defending its interests against the entry of generics competing with Plavix, and must be investigated further. [Gabriele Accardo]

Google offers commitments to close investigation in Italy

On 14 May 2010, the Italian Competition Authority ("AGCM") published the commitments (available on the AGCM website) offered by Google to put an end to an antitrust investigation of its Google News service under Article 102 TFEU (see Newsletter 5/2009 p. 10 and Newsletter 2/2010 p. 11 for more background information). Italian publishers complained that Google's use of newspaper content in its news service limited their ability to draw traffic to their own websites, depriving them of advertising revenue. In particular, they claimed that Google excluded from its search engine any publications that declined to appear on Google News Italia.

Google's proposed measures appear to enhance existing features of its Google News service by ensuring that newspaper publishers do not have

their content excluded from Google's search engine. Google will also disclose more information about its revenue-sharing mechanisms.

First, Google has offered to run a separate mechanism – a crawler, i.e. a computer program used by search engines to process and index web pages – from Google News for three years. Publishers will be able to exclude their content from the news aggregator without prejudice to the inclusion of the content on Google's search engine.

Secondly, Google will also enhance transparency by communicating the percentage (so far Google communicated absolute figures) of revenue-sharing for publishers affiliated to its advertising intermediary AdSense. According to the AGCM clear, detailed, and verifiable information is fundamental for allowing Google services to be compared to competing offerings.

The commitments are open to consultation for a month and the AGCM will conclude its assessment by the end of September. [Gabriele Accardo]

EU In Brief

- Judgment of the General Court of the EU in *EMC Development AB v. European Commission*, T-432/02 on the assessment of an agreement on a standard (12 May 2010)
- Almunia (European Commission) speech "New Transatlantic Trends in Competition Policy" (10 June 2010)
- Judgment of Danish Maritime and Commercial Court in *Pandora Production Co. Ltd. and WIPEC Holding Aps v. Lisa Aagaard Copenhagen A/S* (D 0003-08, in Danish) finding void under Article 101 an obligation to pay royalties on third party products sold by the licensee (29 April 2010)

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