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

Overview

Agreements

Unilateral conduct

Mergers

General

U.S. DEVELOPMENTS

U.S. Second Circuit denies en banc rehearing of reverse payment decision

On 7 September 2010 the U.S. Court of Appeals for the Second Circuit denied petitions for en banc rehearing of a reverse payment settlement decision (In re: Ciprofloxacin Hydrochloride Antitrust Litig., April 29, 2010) in which a panel of the court upheld a District Court finding of no antitrust violation (See Newsletter 3/2010, p. 2). The panel, basing its decision in Second Circuit precedent and precedent from some other Circuits, reasoned that if a settlement between a patent holder and a generic manufacturer does not extend beyond the scope of the patent in question, it generally does not violate antitrust law.

The denial of en banc rehearing follows despite broad support for it. A number of amici supported a rehearing, including the Federal Trade Commission and the Department of Justice. In its original decision, the panel of the court specifically invited petitions for en banc rehearing and provided reasons why such a rehearing would be appropriate (See Newsletter 3/2010, p. 2). Nonetheless, only one judge (Pooler) dissented the decision to deny a rehearing.

The period for petitioning for U.S. Supreme Court certiorari is still pending. The most recent petition for certiorari in a reverse payment settlement case was not granted by the Supreme Court (Newsletter 4/2009, p. 2). [Juha Vesala]

U.S. hearing on competition in the digital marketplace

On 16 September 2010 the Subcommittee on the Courts and Competition Policy of the U.S. House Judiciary Committee held a hearing on Competition in the Evolving Digital Marketplace.

A prepared statement of the U.S. Federal Trade Commission, delivered by Bureau of Competition Director Richard Feinstein, focused on the principles applied by the agency to antitrust analysis in markets where technology advances and the competitive situation changes rapidly. According to the prepared statement, U.S. antitrust laws are flexible enough to accommodate the requirements of markets where such changes are characteristic.

The statement emphasized the role of Section 5 of the FTC Act in rapidly developing markets, where new products and business models may complicate antitrust analysis. It allows FTC intervention in “unfair methods

of competition" that do not necessarily constitute traditional antitrust violations under Sections 1 or 2 of the Sherman Act. Moreover, the remedies at the FTC's disposal are particularly suited for new or dynamic markets where novel issues may arise, as they carry less risk of chilling a leading firm's incentives to compete given their lack of punitive elements and the low risk of treble damages in follow-up private litigation. As an example of successful application of Section 5 of the FTC Act, the statement noted the FTC's recent settlement with Intel (See Newsletter 4/2010, p. 2).

The statement also considered the challenges of merger review in markets where technological change is rapid and predicting the future is difficult given that past competitive facts, such as past and current market shares, may have limited indication value for predicting the future competitive situation. The FTC must therefore, in addition to current competitive factors, assess the impact and significance of firms and products that will shape future competition. As an example of such considerations, the statement cites the FTC's decision not to oppose Google's acquisition of AdMob. In that decision, the Commission allowed Apple's foreseen entry into mobile advertising, through its iAd network, to allay concerns over loss of competition between Google and AdMob to the extent that no action was taken (See Newsletter 3/2010, p. 3). [Juha Vesala]

U.S. In brief

- The Attorney General of Texas is reportedly investigating Google's search rankings and algorithms (3 September 2010)
- Leibowitz (FTC) speech "Making the Grade? A Year at the FTC" (21 September 2010)

EU DEVELOPMENTS

European Commission closes preliminary investigations into Apple's iPhone policies

On 25 September 2010, the European Commission declared that it would not open formal proceedings against Apple, following Apple's iPhone change of policies on restrictions on the development of applications (or "apps") for its popular smart phone operating system and cross-border warranties.

Apple will give app developers more flexibility as they will not be required to use only Apple's programming tools and approved languages when writing iPhone apps; independent developers may also use third-party

layers. The Commission was concerned that Apple's previous policy could have ultimately resulted in shutting out competition from devices running platforms other than Apple's.

Also, Apple introduced cross-border iPhone warranty repair services within the European Union and the European Economic Area ("EEA") allowing EU consumers to use warranty services in a Member State other than the country where an iPhone is bought (normally their home country of residence). Independent Authorized Service Providers have been also appointed to offer cross-border iPhone warranty services in those Member States where Apple does not directly perform repairs. The Commission was concerned that Apple's previous policy, based on the "country of purchase" rule, could amount to a territorial restriction leading to a partitioning of the internal market. [Gabriele Accardo]

OFT fines Reckitt Benckiser £ 10.2 million for abuse of dominance

On 15 October 2010 the Office of Fair Trading ("OFT") stated that Reckitt Benckiser admitted infringing UK and European competition law by withdrawing and delisting Gaviscon Original Liquid from the National Health System ("NHS") prescription channel in 2005. Reckitt Benckiser's admission led to the early resolution of the investigation and a reduced fine on the company.

The OFT had issued a Statement of Objection on 23 February 2010 (See Newsletter 2/2010, p. 12) alleging that Reckitt Benckiser withdrew NHS packs of Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired but before the publication of its generic equivalent name. As a result of its abusive practice, Reckitt Benckiser expected that more prescriptions would have been issued for its alternative product, Gaviscon Advance Liquid, which is patent protected until 2016, and is not subject to competition from equivalent generic medicines.

The OFT will publish the infringement decision providing full details of its findings. [Gabriele Accardo]

English Court of Appeal allows M-Tech's appeal against Oracle

On 28 August 2010, the English Court of Appeal issued a judgment setting aside an order for summary judgment by the High Court of Justice, thus granting M-Tech permission to appeal and proceed to a full trial to defend itself against trademark infringement allegations by Oracle.

M-Tech imported 64 disk drives that used the trademark belonging to Sun Microsystems Inc. ("Sun"), now owned by Oracle America, Inc. ("Oracle")

into the United Kingdom from the United States of America. As a result, Oracle (formerly Sun Microsystems) sued M-Tech for infringement of its trademark for computer equipment on the basis of M-Tech's importation into the UK of disk drives that it had obtained from a U.S. broker. Oracle applied for summary judgment before the English High Court of Justice. M-Tech put forward two defenses:

First, M-Tech claimed that Oracle deliberately failed to make publicly available serial mark trackers that would enable independent resellers to identify whether a particular item of Oracle hardware had first been placed on the market within the European Economic Area ("EEA", which includes the European Union's 27 Member States, Norway, Liechtenstein and Iceland) by Oracle or with Oracle's consent. Moreover, Oracle aggressively pursued independent resellers for trademark infringement if they attempted to sell any Oracle hardware that was first marketed outside the EEA. As a result, Oracle's practices would deter the importation of Oracle hardware by independent dealers whether or not those products were first put on the market in the EEA.

According to M-Tech, it would follow that the enforcement of Oracle's exclusive rights in the trademarks would be contrary to Articles 28 and 30 of the EC Treaty (now Articles 34 and 36 of the Treaty on the Functioning of the European Union, "TFEU") as the effect of Oracle's behavior is to prevent the attainment of a single market in hardware which has been first marketed by Oracle, or with its consent, in the EEA. (While Article 34 TFEU provides that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States, Article 36 TFEU provides that Article 34 shall not preclude restrictions on imports justified on grounds of the protection of intellectual property, provided that such restrictions do not constitute a means of arbitrary discrimination or disguised restriction on trade between Member States.)

M-Tech's second line of defense pointed to Oracle's agreements with its authorized distributors, which required them to buy new and secondhand equipment from within Oracle's authorized network unless a particular item could not be supplied from within the network. According to M-Tech, the purpose of these agreements with authorized distributors and resellers is to eliminate the unauthorized secondary trade of Oracle's hardware. This would result in the artificial partitioning of the secondhand Oracle equipment market, and permits Oracle to control the market, contrary to Article 101 of the TFEU. In such instances, M-Tech argues that Article 101 of the TFEU can therefore be relied on as a defense to trademark infringement proceedings.

Justice Kitchen of the High Court of Justice rejected those defenses and granted Oracle's summary judgment application, noting that M-Tech had no real prospect of success. In particular, Justice Kitchen held that the proprietor of a trademark has the right to control whether or not goods

using his mark are first marketed in the EEA, and, secondly, that there was no sufficient connection between the enforcement of Oracle's trademarks and the infringement (despite the fact that Oracle was prepared to accept that its agreements were contrary to competition rules).

Justice Arden of the Court of Appeal took the opposite view, although she stressed that the matters pleaded by M-Tech need to be established at trial. Arguably, Justice Arden's view (at least in part) stems from the broader (policy) implications that this case may have for parallel imports and the grey market. She stated that this case has important financial and economic implications, not just for the parties directly involved but also for others involved in the grey market in Oracle, and possibly other, computer hardware and goods.

First, Justice Arden found M-Tech's first defense - that Articles 34 and 36 of the TFEU may apply to practices such as those alleged by M-Tech - potentially valid, although she noted that there is no case law which clarifies whether, as in this case, not supplying a serial mark tracker or litigating aggressively against parallel importers can constitute measures "having equivalent effect", which qualify the right to bring infringement proceedings. (M-Tech further put forward a third line of defense, based on the abuse of rights conferred by a registered trademark. According to Justice Arden, this line of defense is similar to the defense based on the freedom of movement rules.)

Secondly, Justice Arden found that M-Tech's allegation that Oracle's distribution agreements formed part of an overall scheme for excluding secondary traders from the market in breach of Article 101 of the TFEU was sufficiently closely connected with the infringement claims to provide M-Tech with a potential defense.

Once the case resumes before the High Court of Justice, and provided M-Tech can establish its allegations at the trial, the trial judge will have to consider whether to make a reference to the Court of Justice in order to address questions of economic policy likely to affect the European Union as a whole, as Justice Arden suggested. [Gabriele Accardo]

European Commission sets out to create an Innovation Union

On 6 October 2010 the European Commission announced strategic plans to promote innovation in the European Union by, among other things, addressing obstacles that prevent ideas from reaching the market. Proposed measures for turning the European Union into an Innovation Union are outlined in a communication from the European Commission.

Some of the measures relate to competition policy. In particular, the Commission notes that collaborative intellectual property right (IPR)

arrangements, such as cross-licensing agreements and patent pools, while often pro-competitive, need to be examined in order to ensure that they are not used anti-competitively. Further, according to the Commission, standard-setting processes require clear IPR rules so as to avoid the possibility that companies will receive unfair market power when their IPRs are incorporated into standards.

The measures also include promoting Europe-wide marketplaces for trading IPRs and a subsequent legislative proposal to speed up and modernize standard-setting. [Juha Vesala]

Competition Director General's speech on Digital Convergence and Competition rules

On 15 September 2010, Alexander Italianer, DG Comp's Director General, gave a speech at the 6th International Competition Forum in Korea, addressing the topic on safeguarding and promoting competition in the age of digital convergence.

Mr. Italianer noted that digital convergence in high-technology industries means that value is shifting away from single-product performance towards products capable to support a variety of digital content such as software applications, music, movies, games, and in the ability of such products to share content with as many other devices as possible.

According to Mr. Italianer, digital convergence offers considerable opportunities for consumers and businesses. Yet, it also brings new challenges for competition agencies, notably in understanding the complexities of the digital landscape, safeguarding the level playing field and the access to markets (notably "Cloud Computing"), platforms and data that are useful in developing new and innovative digital products and services. [Gabriele Accardo]

AstraZeneca appeals judgment of General Court

On 16 September 2010, AstraZeneca brought an appeal against the Commission's decision that fined the drug maker EUR 52.5 million for breaching Article 102 of the TFEU (See Newsletter 4/2010, p. 6).

In particular, AstraZeneca claims that, as regards the abuse concerning supplementary protection certificates, lack of transparency is insufficient for a finding of regulatory abuse. They argue that there should be a requirement for deliberate fraud or deceit, and that the General Court was wrong to find that the mere act of applying for an intellectual property right that may come into force some 5-6 years later was conduct that could be

said to tend to restrict competition, because such conduct would be too disconnected or remote from the allegedly affected market.

AstraZeneca further claims that, as regards the abuse concerning the withdrawal of marketing authorizations, the General Court was wrong to decide that the exercise of an unfettered right under Community law is a failure to compete on the merits and constitutes conduct tending to restrict competition. [Gabriele Accardo]

Oracle/Sun merger appealed

On 1 July 2010, Monty Program Ab (a company founded by a founder of MySQL, the open source database provider acquired by Sun Microsystems in 2008) appealed the European Commission's decision clearing the merger between Oracle and Sun Microsystems (See Newsletter 1/2010, p. 7).

Monty Program claims that the Commission wrongly considered Oracle's pledges (i.e. public undertakings, yet not legally binding commitments) of future behavior vis-à-vis customers, users, and developers of MySQL concerning issues such as the continued release of future versions of MySQL, as new "factual elements" allowing the removal of all competition concerns and an unconditional clearance decision. Also, Monty Program criticizes the Commission for having failed to market test Oracle's pledges and having incorrectly assessed the effects of those pledges on Oracle post-merger.

Finally, Monty Program claims that the Commission erred in its assessment that even if Oracle were to remove MySQL (Sun Microsystems' main database software product) from the market following the merger, other open source database vendors would replace the competitive constraint exerted by MySQL. [Gabriele Accardo]

Swiss Competition Commission investigates online sales restrictions by Electrolux and V-Zug

On 16 September 2010, the Swiss Competition Commission ("COMCO") announced (French, German, not available in English) that it is investigating Electrolux's and V-Zug's restrictions of online home appliance sales.

In particular, COMCO will look into Electrolux's and V-Zug's refusal to allow distributors to sell their products via the Internet. The press release states that, pursuant to COMCO's new guidelines (see also press release in German) on vertical agreements, in principle distributors should be able to use the Internet and to respond to online orders.

Although COMCO does not apply European Union competition law (because Switzerland is not an EU/EEA Member State), last June the Swiss authority issued new guidelines on distribution agreements in order to align its rules with the recently amended EU rules on vertical agreements, which the European Commission published last April and then entered into force on 1 June (See Newsletter 3/2010, p. 4).

The investigation may last up to 12 months, and the authority does not exclude the possibility that other producers of white goods may eventually be drawn into the investigation. [Gabriele Accardo]

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