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U.S. DEVELOPMENTS

U.S. Federal Trade Commission approves modified Intel settlement

On 2 November 2010 the Federal Trade Commission (“FTC”) [approved](#) a modified settlement order that resolves the FTC’s charges against Intel Corp. The proposed settlement was announced in August 2010 and was subject to a public comment period (see [Newsletter 4/2010](#), p. 2 for details of the proposed settlement and an overview of the case).

The FTC modified the proposed settlement so as to allow Intel to manufacture and sell (until June 2013) a chip that was in development before the proposed order was negotiated, but does not have an interface required by the proposed settlement. [Juha Vesala]

U.S. District Court dismisses monopolization claims against MPEG LA

On 24 November 2010 the U.S. District Court for the Central District of California dismissed monopolization claims brought by NERO AG (“Nero”) against MPEG LA, LLC (“MPEG LA”), an administrator of various patent pools in the consumer electronics sector (NERO AG v. MPEG LA, November 24, 2010, C.D. Cal., No. 10-cv-3672-MRP-RZ).

This follows the court’s September 2010 dismissal of Nero’s initial complaint. Nero has now finally dismissed allegations included the following:

- First, Nero alleged that Nero had no practical alternative to licensing from a pool for MPEG-2 technologies (“MPEG-2 pool”) administered by MPEG LA. However, since Nero did not try to license the patents it needs individually, but based its allegation solely on the economic infeasibility of such licensing, the court found that Nero failed to plausibly allege that direct licensing from patent holders is infeasible.
- Second, Nero alleged that MPEG LA expanded the temporal scope of its monopoly by adding non-essential patents to the MPEG-2 pool. However, the court considered that the non-essential patents that Nero claimed had been added to the pool could not plausibly extend its temporal scope. This is because some patents identified by Nero were not added to the pool; they were already included in the pool at an earlier date, whereas the other patents identified by Nero will expire before some of the original patents in the pool. The court also dismissed Nero’s related allegation that the inclusion of non-essential

patents into the pool sought to raise the costs of determining which patents Nero needs to license.

- Third, Nero alleged that MPEG LA coerced licensees into an extended MPEG-2 license that prevents Nero from licensing the essential patents independently for a five-year period. The Court found, however, that Nero did not explain how it was coerced into such an extended license either by facing the threat of patent infringement litigation or by being disadvantaged due to Nero's competitors otherwise benefitting from lower royalty rates. [Juha Vesala]

U.S. In brief

- U.S. Second Circuit [upholds summary judgment against monopolization claims based on "threat" letters and "sham" litigation](#) (3 November 2010)

EU DEVELOPMENTS

European Commission adopts revised rules on horizontal cooperation agreements

On 14 December 2010 the European Commission [published](#) revised Guidelines and two block exemption regulations on horizontal cooperation agreements (see [Newsletter 3/2010](#), p. 7 for background).

The revised rules address, in particular, R&D cooperation and standard-setting cooperation. R&D cooperation agreements may benefit from a safe harbor by virtue of an R&D block exemption regulation, provided the agreements lack certain hardcore restrictions and as long as the market share of the cooperating parties does not exceed a threshold of 25% (this initially only applies to product or technology market competitors). The IPR-specific conditions for a safe harbor include requirements that all parties must have full access to the results of the R&D, though exploitation rights may be limited in accordance of the parties' so-called "specialization in exploitation" and a research institute exemption allows subsequent rights to be limited to further research. Certain no-challenge obligations and obligations not to grant licenses to third parties must, however, be assessed separately even when the block exemption covers the agreement. Guidance on the case-by-case assessment of R&D cooperation agreements is provided in the revised Guidelines.

A safe harbor is also provided for standard-setting cooperation, though only in the Guidelines. According to the Guidelines, standardization agreements do not normally restrict competition where participation in

standard-setting is unrestricted and the procedure for adopting the standard is transparent, the agreements contain no obligation to comply with the standard, and the agreements provide access to the standard on fair, reasonable, and non-discriminatory (“FRAND”) terms. The FRAND commitments should be irrevocable, applicable to all third parties, given ex ante, and be accompanied by mechanisms that ensure that also transferees of IPRs are bound by them. Good faith disclosure of essential IPRs should also normally be required, unless, for instance, standards are developed under a royalty-free licensing policy.

The Guidelines also provide guidance on the case-by-case assessment of standard-setting cooperation outside of the safe harbor. In addition, the Guidelines discuss alternative methods for assessing whether royalties demanded by essential patent holders constitute an abuse of a dominant position by being excessively high in comparison to the economic value of the technologies concerned. The alternative methods mentioned include the comparison of ex ante and ex post licensing fees, the comparison to royalty rates for the same IPR in comparable standards, the use of an independent expert to assess the objective centrality and essentiality of an IPR portfolio, and licensing terms that may have been disclosed ex ante.

The Guidelines will become effective once published in the EU Official Journal and the Block Exemption Regulations will enter into force on 1 January 2011. [Juha Vesala]

European Commission investigates Google’s alleged abusive practices in online search services

On 30 November 2010, the European Commission (see [Newsletter 2/2010](#), p. 9) opened a [formal investigation](#) into Google’s allegedly abusive conduct in its provision of online search services, in violation of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) thereby relieving National competition authorities of the Member States of their authority to apply EU competition law.

The investigation follows complaints lodged by, among others, Ciao.de (a German subsidiary of Microsoft), Foundem.co.uk, a UK price comparison site, and EJustice.fr, a French site specializing in legal search inquiries, all of which appear to have raised a similar grievance that Google’s search algorithms somehow penalize their Web sites in Google’s unpaid and sponsored search results, giving preferential treatment to its own services.

Simply put, the investigation will ultimately answer the fundamental question of whether Google has a right to program its search engine algorithms and presentation mechanisms the way it wants or whether it is abusing its market power in the search engine market.

In particular, the Commission will investigate Google's use of exclusionary automated penalties, which can remove legitimate sites from Google's natural search results, irrespective of relevance. More importantly, the investigation will focus on Google's Universal Search, a mechanism for automatically inserting its own services into prominent positions within its natural search results.

The issue is therefore whether Google leverages its search engine monopoly into new domains, such as financial search, travel search, property search, etc. The investigation will thus shed some light onto whether Google's search engine, which Web users perceive as a neutral tool, is becoming a gate keeper that Google uses as a marketing channel for its own other services.

The Commission investigation will also look into whether Google imposed exclusivity obligations on advertising partners with the aim of preventing them from posting ads from Google's competitors on their sites and whether Google made it more difficult for customers to move data from their advertising campaigns to other ad platforms.

There is no legal deadline for completing the investigation, but it will very much depend on Google's cooperation with the Commission. [Gabriele Accardo]

European Commission raids pharma companies

On 30 November 2010, the European Commission [confirmed](#) that it carried out inspections at the premises of a number of companies (Nycomed and AstraZeneca have both confirmed to have been "raided" by Commission's officials) active in the pharmaceutical sector in several Member States.

The Commission has concerns that these companies may have acted in breach of European competition laws, in particular to delay entry in Europe of generic drugs (*esomeprazole*) used to cure heart burn.

There is no legal deadline for completing inquiries into anticompetitive conduct. Their duration depends on a number of factors, including the complexity of each case, the extent to which the undertakings concerned cooperate with the Commission, and the exercise of the rights of defense. [Gabriele Accardo]

Advocate General advises ECJ that eBay should not be held liable for users' breach of trademark

On 9 December 2010, Advocate General Jääskinen issued his [opinion](#) following a request for a preliminary ruling by the UK's High Court of Justice before which a [dispute](#) is pending between luxury brand owner L'Oréal SA ("L'Oréal") and eBay Inc. ("eBay"). L'Oréal is claiming that eBay is involved in trademark infringements committed by sellers of various counterfeit L'Oréal products on its internet marketplace in the UK.

The crux of the case concerns the issue of what an operator of an internet marketplace can rightfully be expected to do in order to prevent infringements by third parties. The UK High Court of Justice essentially asked the European Court of Justice ("ECJ") whether eBay's business model includes or implies that it could be held liable for a (primary) trademark infringement in relation to goods traded in its system. According to the Advocate General, eBay should not be held liable for such third party breaches.

Advocate General Jääskinen first considered that although eBay does not itself sell L'Oréal goods on its website, by reserving L'Oréal's trademarks as keywords in a paid internet referencing service to attract customers to its internet marketplace, eBay *uses* these trademarks in relation to goods marketed by L'Oréal under these signs. However, the trademark use by eBay would appear to fall within the range of cases of legitimate use of trademark without the proprietor's consent (including mentioning the trademark in advertising), as clarified by the ECJ in the recent *Portakabin* case. Trademark use by online marketplaces is inherently different from the use by a seller of goods, and would not generally be liable to affect some of the functions of the trademark.

As regards eBay's role in alleged trademark infringements, Advocate General Jääskinen recalled that there is no provision in EU law requiring businesses to prevent trademark infringements by third parties or to refrain from acts or practices that might contribute to or facilitate such infringements, e.g. eBay's involvement in the preparation of the clients' listings. In particular, a marketplace operator is entitled to presume that market participants using its services act legally and follow the agreed contractual terms and conditions relating to the use of the marketplace until it is concretely informed of the contrary. Consequently, if the nature of an operator as a marketplace is sufficiently clearly communicated in the ad displayed with the search results of an internet search engine, the fact that some users of that marketplace may infringe a trademark is as such not liable to have an adverse effect on the functions of quality, communication and investment of that trademark.

However, Advocate General Jääskinen noted that if the use, which the trademark proprietor challenges, consists of the display of the sign on the

website of an operator of an electronic marketplace (e.g. eBay) itself rather than a sponsored link of a search engine (e.g. Google), it is the marketplace user, and not the marketplace operator, that actually uses the trademark. In this respect, the activity of eBay consisting of search and display functions applicable to the listing is in fact technically similar to that of internet search engines like Google (without the 'add-on' of the paid referencing service) though the business model is different. In *Google France and Google*, the ECJ held that (see [Newsletter 2/2010](#), p. 7) under the EU trademark rules, the activity of an internet referencing service provider which consists in storing, as a keyword, a sign identical with a trademark and organizing the display of ads on the basis of that keyword does not amount to use of that sign, whereas by purchasing Google's *AdWords* referencing service and selecting, as a keyword, a sign corresponding to an existing trademark, it is the advertiser, and not Google, that actually uses the sign.

Finally, Advocate General Jääskinen considered that eBay's exemption from liability does not apply in cases where the electronic marketplace operator has been notified of infringing use of a trademark, and the same user is allowed to continue or repeats the same infringement without being prevented from doing so. In practice, eBay may be held liable for rogue users in cases where it does not take action in light of the "notice and take down" principle, according to which the hosting provider has to act expeditiously to remove or to disable access to the illegal information upon obtaining actual knowledge of the illegal activity or illegal information or awareness of facts or circumstances from which the illegal activity or information is apparent. [Gabriele Accardo]

European Commission clears Syngenta's acquisition of Monsanto's sunflower seed business

On 17 November 2010 the European Commission [cleared](#) the acquisition of the sunflower seed business of Monsanto by Syngenta.

Among the concerns of an in-depth investigation of the transaction was whether it would harm innovation in sunflower seeds by combining firms that are both strong in the development of new sunflower varieties. The development of new varieties is undertaken by the breeding and crossing of parental lines, resulting in hybrid seeds with specific desired characteristics. Most seed companies exchange and license parental lines with other breeders in order to accelerate the breeding process. The Commission found that the transaction would give the merged firm the ability and incentive to significantly reduce such exchange and licensing of sunflower varieties, thus raising concerns about reduced innovation as well as foreclosure of competitors in the downstream markets for commercialization of hybrid seeds.

The Commission found that the commitments offered by Syngenta, to divest some of Monsanto's current and pipeline parental lines along with the right to commercialize and license the resulting hybrids, however, remedied the above concerns, thus clearing the transaction with commitments. [Juha Vesala]

Italian Competition Authority investigates Pfizer's effort to obstruct market access for a new generic drug for treating visual glaucoma

On 13 October 2010, the Italian Competition Authority ("ICA") opened an [investigation](#) to ascertain whether Pfizer's attempt to prolong the patent protection for its active ingredient *latanaprost* constitutes an abuse of its dominant position in the market for products for treating visual glaucoma in order to block or delay market access for generics.

The [investigation](#) was prompted by a complaint lodged by Ratiopharm, a generics producer. Ratiopharm highlighted a variety of Pfizer Italia's conducts aimed at obstructing or postponing the introduction of generic drugs competing with *Xalatan*, Pfizer's branded product for the treatment of visual glaucoma, into the Italian market.

In particular, Pfizer is accused of having allegedly abused the administrative procedure to obtain an extension of the patent protection until July 2011, without, however, launching any new product on the Italian market. In fact, the Complementary Patent Certificate obtained by Pfizer in Italy was based on a divisional patent (i.e. a type of patent application which contains matter from a previously filed application, i.e. the so-called parent application) that was recently declared invalid by the European Patent Office in Munich. Therefore, according to the ICA, the (unduly obtained) extended patent protection may have impaired the investments made by Pfizer's competitors to market new generic drugs as of the date of the expiration of the patent protection, scheduled for September 2009. While manufacturers of such generics drugs have recently been allowed to market their products, Pfizer has, however, undertaken legal actions based on counterfeiting claims. These actions would further increase the uncertainty for generics manufacturers if a court in Milan grants injunctions in Pfizer's favor.

It is now for the ICA to determine whether Pfizer's behavior constitutes an abuse of its dominant position in the market for products for treating visual glaucoma.

This is not the first case where the ICA investigates manufacturers of branded products that have taken steps to obstruct or delay generics market entry (see the twin cases [Glaxo/Principi Attivi](#) of 2006 and [Merck-Principi Attivi](#) of 2007).

The proceeding is scheduled to conclude on 15 October 2011. [Gabriele Accardo]

French Competition Authority makes Google's commitments in Navx case binding

On 28 October 2010, the French Autorité de la Concurrence ("FAC") formally [accepted](#) and thereby made binding on Google a set of improved [commitments](#) (available only in French) which the FAC considered to properly address its competition concerns. Last June, Google had offered to modify the rules governing its online advertising service, *AdWords*, following interim measures issued by the FCA (see [Newsletter 3/2010](#), p. 8).

Google will make the functioning of its *AdWords* service concerning devices aimed at evading road traffic speed cameras in France more transparent and predictable for advertisers by:

- Making it clearer the navigation devices for which advertising is authorized or prohibited, notably for warning devices and radar databases;
- Defining the scope of the prohibition, in particular whether it applies to the advertisements' content only or if it also applies to the advertiser's destination pages or cross-referenced pages as well as to the use of keywords;
- Introducing a procedure of information and notification targeted to the companies concerned regarding the modifications made to the *AdWords* content policy;
- Making more precise the procedure likely to lead to the suspension of an advertiser's account, in case of a breach of the *AdWords* content policy.

Google's commitments will last three years. In addition, Google announced that it would implement its new policy more broadly, for all content admitted on the *AdWords* service and in all the countries concerned, thus bringing more transparency and predictability to advertisers far beyond the scope of the Navx case.

On 14 December 2010, shortly after its Navx commitments decision, the FAC has [published](#) the result of its [sector enquiry](#) (available only in French) in the online advertisement market. The enquiry examined the competitive functioning of the online advertising market in France, where it found Google holds a dominant position. The sector enquiry results

provide, for several types of practices (in general terms and not referred to actual Google practices), an analysis that makes it possible to better grasp their compliance with competition law.

The FAC identified possible exclusionary conduct intended to discourage, delay or eliminate competitors through procedures that do not consist of merit-based competition (artificially high entry barriers, excessive exclusivity clauses in terms of their field, duration or scope, technical obstacles etc.), as well as possible operational abuses. However, the opinion is a consultative document, and the FAC makes no ruling as to the legality of such practices. [Gabriele Accardo]

European conferences and a workshop on IPRs and standardization

A number of events on IPR and standard-setting issues were held in Europe in November 2010.

On 22 November 2010 the European Commission and European Patent Office organized a [conference on IPR issues of standardization](#). The topics discussed ranged from administering patents and SDO contributions to licensing of essential patents.

The following day the [preliminary results of a study commissioned by the European Commission on IPRs and standardization were presented in a workshop](#). The final report is expected to be published in March 2011.

Moreover, on 12 November 2010, the Swedish Competition Authority held [a conference on standard-setting](#). [Juha Vesala]

EU In Brief

- Almunia (European Commission) speech "[State of Play and Future Outlook European Competition Day](#)" (21 October 2010)
- Spanish National Competition Commission [opens formal investigation into royalties demanded by copyright collecting societies AGEDI and AIE from television broadcasters](#) (24 November 2010)
- Danish Court [fines jewelry firm for preventing discounting by retailers on the internet](#) (26 November 2010, in Danish)

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.