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U.S. DEVELOPMENTS

U.S. Court of Appeals holds reverse payment settlements to be presumptively illegal

On 16 July 2012 the U.S. Court of Appeals for the Third Circuit [held](#) that payments from a patent holder to a generic manufacturer of pharmaceutical products who agrees to delay entry into the market are presumptively illegal, unless the payment is shown to be made for a purpose other than delayed entry or to offer a pro-competitive benefit.

The ruling is noteworthy because it rejects the scope of the patent test approach employed by the Courts of Appeal for the Second, Eleventh and Federal Circuits (See e.g. [Newsletter 3/2012](#) p. 4, [3/2010](#) p. 2 and [1/2008](#) p. 2). Under the scope of the patent test, reverse payment settlements are considered lawful when the settlement does not extend beyond the scope of the patent in question, unless the patent was procured by fraud or the enforcement action was objectively baseless.

The Third Circuit refused to follow the scope of the patent test since, according to the court, the test improperly restricts the application of antitrust law and is contrary to the policies underlying the Hatch-Waxman Act (Pub. L. No. 98-417, 98 Stat. 1585 (1984); see [21 U.S.C. § 355](#) for the relevant passage) and U.S. Supreme Court case-law, as outlined below.

The court criticized the scope of the patent test on the grounds that the test presumes that the patent is valid almost without chance of rebuttal. As a practical matter, that approach does not subject reverse payment settlements to any antitrust scrutiny. The test also effectively presumes that the patent holder would have prevailed, even though the very issue of validity would be litigated in the underlying patent suit. According to the court, there is no significant policy basis for such a presumption of validity. In particular, the presumption of validity of patents is not a substantive right of patent holders, but merely a procedural presumption. The presumption that the patent holders would have been able to exclude generic competitors is also especially inappropriate when the underlying suit concerns infringement because in infringement cases it is the patent holder who bears the burden of showing infringement.

The court noted that studies indicate that many granted patents are later found to be invalid or not infringed, which reinforces the conclusion that reverse payments could allow patent holders to protect themselves from competition and invalidation of weak patents. The court also questioned the suggestion that other generic manufacturers would invalidate weak patents when a reverse payment settlement prevents an initial challenger from doing so. The court noted that the first challenger would be the most motivated one to challenge a patent because it would benefit, if successful, from a 180-day period of exclusivity under the Hatch-Waxman

Act. Upholding the scope of the patent test would also enable the monopolist patent holder with its high profits to make reverse payments to several subsequent challengers.

The court explained that holding reverse payment settlements presumptively illegal is supported by U.S. Supreme Court case-law that supports elimination of weak patents, which other courts following the scope of the patent test have overlooked. According to the court, reverse payment settlements are contrary to that public interest as well as the Hatch-Waxman Act that specifically seeks to promote the entry of generic producers of pharmaceuticals by encouraging challenges of weak or narrow patents. The court further explained that the judicial preference for settlement, which could be served by the scope of the patent test, should not outweigh the objective to protect consumers from unjustified monopolies. Moreover, settlements not involving reverse payments – which comprise the vast majority of pharmaceutical settlements – would not be deterred by the approach of the court since only settlements in which reverse payments are made would be subject to presumptive illegality.

The Third Circuit remanded the case back to the U.S. District Court of New Jersey to be reconsidered under this “quick look” type of rule of reason analysis. However, petitions for certiorari have been filed with the U.S. Supreme Court (Dockets [12-245](#) and [12-265](#)) which may bring the issue of appropriate antitrust standard for reverse payment settlements before the Supreme Court. A [petition](#) for certiorari was also [filed](#) in another reverse payment settlement case by the U.S. Solicitor General on behalf of the FTC (see [Newsletter 3/2012](#) p. 4 for the 11th Circuit ruling in that case). The Supreme Court has denied petitions for certiorari in previous cases (see Newsletter [2/2011](#) p. 3 and [4/2009](#) p. 2), but at least this time there is an apparent conflict between the Third Circuit and the Second, Eleventh and Federal Circuit. [Juha Vesala]

U.S. Court of Appeals holds that a bookmarking website did not infringe copyright

On 2 August 2012, the U.S. Court of Appeal for the Seventh Circuit issued a landmark decision in [Flava Works v. Marques Rondale Gunter](#) regarding the liability of social networking and other User Generated Content (UGC) platforms providing linking and bookmarking services.

In this case, Flava, a producer of (essentially pornographic) videos accessible behind a “pay wall”, filed a motion for a preliminary injunction against the owner of Myvidster.com, a bookmarking website, after noticing that many Flava’s videos were accessible on myVidster’s website as a result of having been “bookmarked” (i.e. recommended and linked) by some myVidster’s users.

The U.S. District Court for the Northern District of Illinois granted the preliminary injunction, finding that there was a reasonable chance that myVidster would be considered a contributory infringer and that Flava could consequently succeed in its claim for copyright infringement in a full trial.

The Seventh Circuit vacated this decision, holding that by merely providing a bookmarking/linking service, without actually copying any infringing content, myVidster had infringed neither the reproduction nor the performance rights of Flava.

The Seventh Circuit held that myVidster did not host, nor copy any of the infringing videos claimed by Flava but rather provided a link to a server on which such infringing videos had been uploaded by third parties and from which they were directly streamed when clicked by myVidster's users. The court concluded that only the individuals uploading the video on the Internet, rather than myVidster or even myVidster's users, were therefore infringing Flava's exclusive right to "reproduce" and "distribute" the work in copies. Because myVidster had not encouraged such illegal uploading, myVidster was not held contributorily liable for such behavior.

As to the performance rights claims, the court held that by linking users to infringing content, myVidster was merely giving web surfers addresses where they could find entertainment. The court reasoned that this activity was not different from the one, performed by most newspapers, of listing names and addresses of theaters where a work will be performed, an activity that certainly did not amount to performance of a work in the court's view. The court thus concluded that myVidster was neither directly nor contributorily liable for merely providing link or bookmarking to infringing content hosted on third party websites. [Béatrice Martinet Farano]

EU DEVELOPMENTS

European Court of Justice rules that Austria does not act as an undertaking in collecting and making available data from the companies register

On 12 July 2012 the European Court of Justice ("ECJ") – after a preliminary reference from the Austrian Supreme Court ("Oberster Gerichtshof") – [ruled](#) in Case C-138/11 that storing data in a database, which undertakings were obliged to report on due to statutory obligations and permitting interested persons to search for data and/or providing them with hand-outs did not constitute an economic activity and therefore the Republic of Austria did not act as an undertaking within the meaning of

Article 102 TFEU. This decision is in line with the [opinion](#) of Attorney General Jääskinen delivered on 26 April 2012.

The main proceedings in Austria involve Compass-Datenbank, a limited liability company which operates a database to provide information services. Compass-Datenbank brought an action against the Republic of Austria to make available to it, in return for remuneration, certain documents from the companies register ("Firmenbuch"). Compass-Datenbank argued that under the essential facilities doctrine the Republic of Austria, as an undertaking having a dominant position on the market, was obliged to provide it with data from the Firmenbuch.

The three [questions](#) referred to the ECJ were: firstly, whether the public authority acts as an undertaking in storing data and allowing inspection and/or print-outs in return for payment, but prohibiting any more extensive use. If it does not, does the public authority act as an undertaking when it prohibits the uses going beyond allowing inspection and the creation of print-outs by relying on its *sui generis* right to protection as the maker of the database? If the answer of the ECJ to these questions is that the public authority acts as undertaking, is the essential facilities doctrine to be applied when there is no upstream market?

The ECJ held "that a data collection activity in relation to undertakings, on the basis of a statutory obligation on those undertakings to disclose the data and powers of enforcement related thereto, falls within the exercise of public powers". Accordingly, that activity did not constitute economic activity. It also held that the maintenance and making available of the collected data to the public did not constitute an economic activity since these activities could not be separated from the activity of collecting the data. The legal classification was not altered by the fact that searches and/or the provision of printouts were carried out for remuneration, as charging for providing the data was inseparable from the making available of the data.

The ECJ further held that a public entity relying on the *sui generis* protection granted to it as the maker of the database in accordance with Article 7 of Directive 96/9/EC on the legal protection of databases did not by that fact alone act as an undertaking. The ECJ also held that the ISP Directive was irrelevant for that case since the Firmenbuch data was not covered by the law which transposed that Directive into Austrian law.

As it held that Austria did not act as an undertaking, the ECJ did not address the question on the essential facilities doctrine. [Nicole Daniel]

European Court of Justice holds that the doctrine of exhaustion applies to downloaded software (UsedSoft v. Oracle)

On 3 July 2012, the European Court of Justice issued a groundbreaking [judgment](#) regarding the resale of used software licenses in the European Union.

Oracle develops and markets computer software, including software available through a downloading process, offered in connection with a package of up to 25 licenses. UsedSoft is a German company, marketing used software licenses, including Oracle “used” licenses, which it acquires from original Oracle licensees. Concerned about the emergence of a second-hand market for its software, Oracle sought a preliminary injunction against UsedSoft seeking to enjoin its practice of selling Oracle’s “used” licenses, based on its exclusive right of reproduction within the meaning of Article 4(1)(a) of Directive 2009/24 (the Software Directive) and on its standard non-transferable license agreement terms.

After holding that this practice indeed infringed Oracle’s exclusive right of reproduction within the meaning of the Software Directive, the German Federal Court of Justice (Bundesgerichtshof), referred the case to the ECJ on the question of whether UsedSoft could, relying on the doctrine of exhaustion, argue that by granting an unlimited license over a specific copy of its software, Oracle had exhausted its rights to control the further distribution of such a copy of its software (first sale doctrine).

To hold that the doctrine of exhaustion applied in such case, the court had to determine whether the granting of an unlimited license over a downloadable software program was tantamount to the sale of a physical copy (e.g. DVD, CD-ROM) of such software.

The ECJ held that the rule of exhaustion did indeed apply in this case and that under certain conditions, the resale of software licenses should be allowed, despite contractual provisions to the contrary.

The court observed that by granting an unlimited license for a one-time fee (representing the economic value of the software), Oracle had transferred its right of ownership to the copy in question and could not rely on its own contractual provision to circumvent the exhaustion doctrine.

On the other hand, the ECJ made clear that for the exhaustion rule to apply, the original licensee/reseller had to stop using the software itself (e.g. by disabling or destroying its own copies) and pointed out that the right holder may therefore seek to enforce this rule by using technical tools such as product keys, registration codes and audits.

The implication of this decision for software developers is significant. In particular, it may well lead to a transformation of their distribution and business models, with an increase use of cloud computing (over which

right holders retain greater control) and of integrated packages where software programs will be offered as part of a service (e.g. maintenance), since services are not affected by the exhaustion rule. [Béatrice Martinet Farano]

European Commission and U.S. Federal Trade Commission clear Universal's acquisition of EMI's recorded music business

On 21 September 2012 both the [European Commission](#) ("Commission") and the [U.S. Federal Trade Commission](#) ("FTC") cleared the acquisition of EMI's recorded music business by Universal. That merger brings together two of the four major global record companies.

On 17 February 2012 Universal notified the Commission of its proposed acquisition of EMI's recorded music business. On 23 March 2012 the Commission opened an in-depth investigation and on 19 June 2012 issued a statement of objections. Even though the sales of physical music, for example CDs, accounted for the majority of sales in the European Economic Area ("EEA"), the Commission focused its investigation on the wholesale markets for digital music, since they are expected to surpass the sales of physical music in the near future. In these markets, record companies negotiate licensing deals for their music with companies such as Apple or Spotify and Mobile Network Operators (collectively "digital music providers") that offer their telephony subscriptions together with music. In its decision the Commission found that the merger would have increased the market power of Universal to such an extent that it would be able to impose higher prices and more burdensome licensing terms on digital music providers. This could adversely affect the providers' ability to expand or launch new music offerings and consequently result in reduced consumers' choice not only for digital music, but also for cultural diversity in the EEA. Furthermore, the Commission was concerned that following the proposed transaction, Universal would enjoy excessive market power in relation to its direct customers at retail level.

According to a press release by the Commission, Universal committed to divest its significant assets as a response to the Commissions' concerns. These divestments include EMI Recording Limited, home to the Parlophone label featuring artists such as Coldplay, David Guetta and Tina Turner (but not the Beatles), and EMI's classical music labels: Chrysalis (featuring artists such as The Ramones), Mute Records (featuring artists such as Depeche Mode) and others. A number of local EMI entities, e.g., EMI France (David Guetta catalogue) are also part of the divestment package. In addition, Universal committed to not include Most Favored Nation ("MFN") clauses in any new or renegotiated contracts with digital customers in the EEA for ten years. (These clauses provide that a digital customer has to offer Universal attractive licensing deals on the same terms as it did to Universal's competitors.)

According to the Statement of the Bureau of Competition by Director Richard A. Feinstein, the U.S. FTC closed its investigation into the proposed acquisition by Universal of EMI Recorded Music since its staff did not find sufficient evidence that the merger would substantially lessen competition in the commercial distribution of recorded music market. The FTC staff did not find sufficient evidence for head-to-head competition in the distribution of music and interactive music streaming services. Furthermore, no sufficient evidence to support the concern that the merger would significantly increase the potential for coordination between recorded music companies was found. The argument that EMI had functioned as a maverick was supported by the fact that no evidence of disruptive competitive behavior on EMI's side was found. Feinstein explained that even though the FTC and the Commission worked closely together throughout the investigation, they came to "different conclusions because of different evidence unique to each jurisdiction". Still the FTC noted that the remedy obtained by the Commission would reduce concentration in the U.S. market too. [Nicole Daniel]

European Commission issues Statements of Objections against several pharmaceutical companies

On 25 and 30 July 2012, in relation to the [Citalopram case](#) and the [Perindopril case](#) respectively, the European Commission sent statements of objections ("SOs") to more than a dozen companies in connection with these two antitrust investigations in the pharmaceutical sector. The Commission also issued a [note](#) highlighting its current enforcement action in pharmaceutical sector following its inquiry.

In the *Perindopril* case, the SO was sent to the French pharmaceutical company Servier and several of its generic competitors – a list of which is available in the Commission press release – in connection with practices potentially delaying the generic entry of perindopril, a cardio-vascular medicine, possibly in breach of the EU Antitrust rules that prohibit restrictive business practices and the abuse of a dominant market position, respectively Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). The Commission had opened [proceedings](#) against Servier and other companies on 8 July 2009 (see [Newsletter 4/2009](#) for additional background).

The Commission's objections relate to two specific sets of practices by Servier, aimed at delaying or preventing the market entry of cheap generic versions of perindopril and ultimately to preserve Servier's dominant position with regard to perindopril, which was about to reach the end of its patent protection. Firstly, as part of a comprehensive strategy, Servier acquired scarce competing technologies to produce perindopril, rendering the generic market entry more difficult or delayed. Secondly, in exchange for payments by Servier, generic competitors were induced to conclude

patent settlements and/or not to challenge the validity of the patents that protected Servier's branded drug.

In the *Citalopram* case, the Commission took the preliminary view that Lundbeck concluded agreements with generic companies to prevent the market entry of competing generic versions of its best-selling medicine citalopram, a blockbuster antidepressant, in breach of Article 101 TFEU. In fact, the agreements foresaw direct payments from Lundbeck to the generic competitors as well as the purchase of generic citalopram stock for destruction or guaranteed profits in a distribution agreement. In essence, generic manufacturers subsequently abstained from entering the market with generic citalopram for up to two years, although in principle they could do so when certain of Lundbeck's citalopram patents had expired.

Together with the Servier investigation this is the first case that deals with the so-called "pay for delay" agreements. According to the Commission, such practices, if established, would be likely to cause significant consumer harm as national health services or insurance schemes are then forced to continue paying for the more expensive patent protected versions of a medicine when, absent the practices, cheaper generic medicines would have been available earlier. [Gabriele Accardo]

European Commission market tests commitments in the e-books market

On 19 September 2012, the European Commission [invited](#) interested parties to comment on the [commitments](#) offered by four international publishers - Simon & Schuster (CBS Corp., USA), Harper Collins (News Corp., USA), Hachette Livre (Lagardère Publishing, France), Verlagsgruppe Georg von Holtzbrinck (owner of inter alia Macmillan, Germany) – and Apple, following the Commission's investigation into the e-book market in the European Economic Area ("EEA"), under Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The Commission carried out inspections at the premises of the companies concerned in early 2011 and opened formal proceedings in December 2011 (see [Newsletter 1/2012](#) p. 5 for more background).

The Commission investigation's focused on agency agreements concluded by the four publishers and Apple for the sale of e-books in the EEA. The publishers adopted agency agreements containing the same key terms, in particular an unusual so-called Most Favored Nation ("MFN") clause, which allows more control by publishers over retail prices. The Commission was concerned that the switch from a typical wholesale model to such agency model may have been the result of collusion between competing publishers helped by Apple, and may have been aimed at raising retail prices of e-books in the EEA or preventing the emergence of lower prices.

In essence, in the proposed commitments, the five companies would offer to terminate the existing agency agreements and refrain from adopting price MFN clauses for five years. In case any of the four publishers would enter into new agency agreements, retailers would be free to set the retail price of e-books during a two-year period, provided the aggregate value of price discounts granted by retailers did not exceed the total annual amount of the commissions that the retailer received from the publisher. If the market test confirms that the commitments address the Commission's competition concerns, the Commission may make them legally binding on the companies. [Gabriele Accardo]

European Commission market tests proposed commitments by Rio Tinto Alcan in aluminum smelting markets

On 10 August 2012, the European Commission [invited](#) interested parties to comment on the [proposed commitments](#) by Rio Tinto Alcan ("Alcan") in the aluminum smelting market. According to the [notice](#) published by the Commission, last 11 July 2012, the Commission adopted a preliminary assessment concerning Alcan's allegedly anticompetitive practice of contractually tying its leading Aluminum Pechiney ("AP") aluminum smelting technology to aluminum smelter equipment it supplies, namely pot tending assemblies ("PTAs"), which the Commission considers to be in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

According to the Commission's preliminary assessment, Alcan may have a dominant position on the relevant market for the licensing of aluminum smelting technology and its contractual practice may lead to higher prices, hamper innovation and shut out competitors from the market for PTAs.

To address these concerns, Alcan has offered to modify its AP technology transfer agreements so as to enable the licensees of the AP aluminum smelting technology to choose any supplier whose PTAs meet certain technical specifications. If the market test confirms that the proposed commitments remedy the competition concerns, the Commission may make the commitments legally binding on Rio Tinto Alcan. [Gabriele Accardo]

European Commission market tests improved commitments by Thomson Reuters in relation to proprietary codes

Last 12 July 2012, the European Commission [invited](#) interested parties to make comments on the [improved commitments](#) offered by Thomson Reuters relating to the sector for financial information services, more particularly the market for consolidated real-time datafeeds. Proceedings against Thomson Reuters had been opened on 30 October 2009 and a first commitment proposal was market tested between 14 December 2011

and 25 January 2012 (see [Newsletter 6/2009](#) p. 11 and [Newsletter 1/2012](#) p. 7 for background information).

As it may be recalled, the Commission was concerned that Thomson Reuters may be abusing its dominant market position in the market for consolidated real-time datafeeds by prohibiting customers from using Reuters Instrument Codes (“RICs”) for retrieving data from alternative providers and cross-referencing them against alternative codes by other suppliers (so-called “mapping”), in breach of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).

In essence, such restrictive licensing practices create substantial barriers for customers who use RICs in their internal applications and wish to switch to alternative providers, insofar as they would have to remove RICs from their internal applications and replace them with alternative codes, which may prove technically challenging and costly and often prevents customers from switching.

The improved commitment would allow customers to license additional RIC usage rights for the purpose of switching and to use RICs for retrieving data from other providers against a monthly license fee. In addition, Thomson Reuters would provide customers with the necessary information to map RICs to alternative symbology (i.e. codes by other suppliers). The existing license fee would be reduced and the fee structure simplified. Furthermore, the license could be used worldwide by customers with genuine business operations in the European Economic Area (EEA). The scope of the license would be widened to cover all RICs which relates to instruments traded over-the-counter (OTC), unless Thomson Reuters was the sole provider of the OTC-data at the time of the switch. Furthermore, a separate license would be available for third party developers to enable them to facilitate customer switching. [Gabriele Accardo]

European Commission publishes its annual report on EU customs enforcement of intellectual property rights

The European Commission has recently published its annual [report](#) on EU customs enforcement of intellectual property rights. This report reveals important information on the nature and evolution of intellectual property rights in Europe.

Overall, the number of customs seizures has increased 15% compared to 2010, partially due to the growth of e-commerce market, to reach a total of 115 million individual articles, whose equivalent genuine product value is estimated to be over 1.2 billion euros.

Medicines are among the most counterfeited articles (24%), followed by packaging materials and cigarettes. Products for daily use (i.e. body care articles, toys, electrical household, etc.) accounted for 28% of the total

number of detained articles. China continues to be the main source country, accounting for 73% of detained articles.

In 90% of the cases, the articles detained by customs were either destroyed as a result of an agreement between the holder of the goods and the right-holder or the right holder initiated court proceedings to establish the infringement of their rights. In only 7.5% of the cases, the goods were released because they were either original goods (3%) or the right holder did not react to the notification by customs (4.5%). [Béatrice Martinet Farano]

French Supreme Court holds Google keyword advertising practices lawful

On 25 September 2012, the French Supreme Court issued a new landmark [decision](#) (non-official, available in French only) in the Google keyword advertising saga.

It may be recalled that the important ECJ decision Google France (ECJ Joined cases C-236/08 and C-238/08, see Newsletter [6/2011](#) p.7) had started with a preliminary reference from the French Supreme Court to the ECJ on the potential liability of Google for its practice of selling sponsored links consisting in third party's trademarks, notably after several French Courts had found Google liable for such practice.

In its decision, the ECJ broadly ruled for Google, concluding that Google was neither directly liable – since it did not make any “use in the course of trade” of such trademark when merely offering them as a sponsored link to its customers – nor indirectly liable for trademark infringement, since it was protected by the hosting safe harbor as soon as it was not playing an active role in the drafting of the commercial message accompanying the sponsored link or in the establishment or selection of the relevant keyword. Yet, some lower courts in France continued to hold Google liable on different grounds (see e.g. Google v. Cobrason, CA Paris, 11 May 2011). A decision from the Supreme Court was therefore highly awaited.

In this case, the French Supreme Court held that neither Google, nor the advertiser buying keywords consisting in (third party) trademark were liable as long as (1) the keyword provided a link to content clearly marked as advertising content (e.g. sponsored links, separated from natural result) and (2) there was no confusion as to the source of the product. This decision, essentially in line with the ECJ most recent case law in this area (see Case C-323-09 [Interflora v. Marks & Spencer](#), [Newsletter 6/2011](#) p.9) will therefore be welcomed by Google, and more generally by platforms using keyword advertising as a revenue model. [Béatrice Martinet Farano]

Italian competition authority's decision against Pfizer quashed by court

Last 3 September 2012, the Italian administrative court (“TAR”) [quashed](#) (the TAR ruling is available only in Italian) a [decision](#) of the Italian Competition Authority (“ICA”) which fined pharmaceutical company Pfizer EURO 10,6 million for an abuse of its dominant position to artificially extend the patent protection of its anti-glaucoma drug *Xalatan* and keep generic rivals out of the market in breach of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”). The TAR held that Pfizer’s conduct was legitimate.

As it may be recalled (see [Newsletter 1/2012](#) p. 9, [Newsletter 3/2011](#) p. 7 and [Newsletter 6/2010](#) p. 8 for background information), according to the ICA, Pfizer’s conduct to prolong patent protection for its active ingredient *latanaprost* in order to obstruct or delay the introduction of generic drugs competing with *Xalatan*, Pfizer’s branded product for the treatment of visual glaucoma, constituted an abuse of its dominant position by blocking or delaying market access to generics. The ICA concluded that Pfizer abused the administrative procedure by obtaining an extension to patent protection in Italy until July 2011, and again until January 2012, in order to align the duration of the patent protection for its product *Xalatan* with the rest of Europe. The ICA rejected Pfizer’s proposed commitments, because they were considered manifestly incapable of removing the anticompetitive effects of Pfizer’s conduct.

Contrary to the ICA’s findings, the TAR held that Pfizer’s proposed commitments were sound particularly in addressing ICA’s main concern of allowing market entry by generics to whom Pfizer would have granted a non-exclusive, royalty free license in Italy. The set of Pfizer’s commitments, according to the TAR, was likely to diminish the legal uncertainty created by Pfizer’s strategy, following the termination of certain litigation matters.

The TAR did not side with the ICA in respect to the theory of harm either. In essence, the TAR held that Pfizer had done nothing more than exercising its rights, stressing that in order to be regarded as anticompetitive, the practices under scrutiny had to be accompanied by a clear exclusionary intent and an additional anti-competitive element is necessary that goes beyond the existence of a simple set of legitimate actions carried out and brought before the competent administrative and jurisdictional authorities. In other words, the TAR required a clear exclusionary intent and other additional elements for an abuse of dominance to be established. [Gabriele Accardo]

French Court confirms Dailymotion is entitled to hosting safe harbor, but holds it liable for falling short of its obligation as a host

On 13 September 2012, the French Court of Paris (Tribunal de Grande Instance) issued an important [decision](#) (unofficial, available in French only)

in a case involving TF1, one of the main French TV channels, against Dailymotion, the French equivalent of YouTube.

In this case, TF1 brought an action against Dailymotion for copyright infringement after noticing that several movies, series, news and TV programs in which it owned copyright were available on Dailymotion without its consent. TF1 asserted that Dailymotion was liable (1) first as “publisher” of such content - because of the *active role* it had played in the management and selection of this content - and (2) second as a hosting provider, by falling short of its obligation to promptly take down the infringing content when notified by TF1.

Not surprisingly, the court rejected TF1’s first claim that Dailymotion ought to be considered as the publisher of the infringing content, confirming several decisions from French courts that Dailymotion was the mere host of such content and therefore, eligible under the hosting safe harbor.

Yet, the court also held that although it was eligible under the hosting safe harbor, Dailymotion was still liable for (1) not taking any steps (warning letter(s), disabling measures, blacklisting, etc.) towards repeated infringers and (2) not “promptly” taking down infringing content upon being notified by the right holders. In this case, a period of four days, including a week-end, between the reception of the notification (Friday morning) and the taking down of the disputed content (Tuesday afternoon) was considered too long to constitute a “prompt reaction”.

On the other hand, the court confirmed that Dailymotion had no general monitoring obligations and denied the claimant's request for keyword preliminary monitoring, holding that the filtering system/fingerprinting technology (in this case: Audible Magic) implemented by Dailymotion was more reliable and more in line with the legal requirements set up by the e-commerce Directive than any of the keyword filtering methods requested by TF1. [Béatrice Martinet Farano]

UK’s Office of Fair Trading investigates the online hotel booking market

Last 31 July 2012, the United Kingdom’s Office of Fair Trading (“OFT”) formally issued a [Statement of Objection](#) (“SO”) to online travel agents Booking.com and Expedia as well as hotel group InterContinental Hotel Group and Hotel Inter-Continental London alleging that they have infringed U.K. competition law in relation to the online supply of room-only hotel accommodation by online travel agents. However, the OFT stated that the investigation is likely to have wider implications as the alleged practices are potentially widespread in the industry. The OFT has assessed the alleged practices from January 2007 onwards.

Booking.com and Expedia each entered into separate arrangements with IHG which restricted the online travel agent’s ability to discount the price of

room-only hotel accommodation. In essence, such anticompetitive agreements between hotels and online travel agents could limit price competition between online travel agents and increase barriers to entry and expansion for online travel agents that may seek to gain market share by offering discounts to consumers.

The formal investigation was initiated in September 2010, following a complaint submitted by a small online travel agent, alleging that it was being prevented by various hotel chains from offering discounted sale prices for room-only hotel accommodation. [Gabriele Accardo]

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](#).