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U.S. DEVELOPMENTS

U.S. District Court denies Apple's request for permanent injunction in the Apple v. Samsung case

On 17 December 2012, the U.S. District Court for the Northern District of California denied Apple's motion for a permanent injunction against several of Samsung's devices, albeit such devices had been found infringing by a unanimous jury verdict a few months earlier (see verdict of 24 August 2012).

The court held, based on the U.S. Supreme Court decision in *eBay v. MercExchange*, that although injunctions were once issued in patent cases as a matter of course, they now required a patentee to make a four-part showing:

1) that it had suffered an irreparable injury,

2) that remedies available at law, such as monetary damages, were inadequate to compensate for that injury,

3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity was warranted, and

4) that the public interest would not be disserved by a permanent injunction.

(1) Irreparable harm

On the first criteria, the judge held that to satisfy the irreparable harm factor in a patent infringement suit, a patentee must establish both that (i) absent an injunction, it will suffer irreparable harm and (ii) that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement.

In this case, the judge held that although Apple had showed that it had suffered substantial harm as a result of Samsung's infringement (damages exceeding a billion U.S. dollars in the above mentioned jury verdict supported this view), Apple had failed to show that its harm was *specifically* attributable to the infringing activity of Samsung. In other words, the court considered that Apple had not adequately shown that the consumers' decision in buying Samsung devices was driven by specific Apple infringing features (as opposed to other non-infringing or non-patentable features that belonged to Samsung devices.)

(2) Inadequate remedy at law

Apple argued that damages were inadequate to compensate for all the potential loss, notably for lost downstream sales, caused by Samsung's infringement. But the court concluded that since Apple had licensed some of these patents in the past, it had itself shown that money could be an acceptable form of compensation for these patents.

(3) Balancing of hardship

Interestingly, the court held that neither party would suffer any excessive hardship from the grant or denial of this injunction since Samsung would have stopped selling 23 of the 26 products that were found infringing and would have substantially modified the design of the three remaining products. Moreover, while the court acknowledged that Samsung's conduct might have been willful, it also stressed that an injunction was not to be used as a form of punishment.

(4) Public interest

Finally the court held that although the public had an interest in preserving the rights of the patent holder, it would not be equitable to deprive consumers of Samsung's infringing phone when "only limited features of the phones have been found to infringe any of Apple's intellectual property". The court therefore denied Apple's motion for a permanent injunction. Apple immediately appealed this decision. [Béatrice Martinet Farano]

U.S. Courts deny injunctions requested by Motorola in two cases against Apple and Microsoft

On 5 December 2012 the U.S. Federal Trade Commission ("FTC") filed an amicus curiae brief in the patent dispute case between Apple and Motorola Mobility in the U.S. Court of Appeals for the Federal Circuit. In this amicus curiae brief, the FTC supports a U.S. District Court order of 22 June 2012 which dismissed a request for an injunction by Motorola that could have blocked the sale of iPhones and iPads by Apple in the U.S.

This case involves patent infringement claims by Apple and Motorola against each other regarding the technologies which are used in tablets and mobile phones. By partial summary judgment some of the patent claims were dismissed on the merits. The District Court then dismissed the remaining claims, i.e. four Apple patents and one Motorola "standard-essential" patent since neither party had offered sufficient evidence to prove damages, an entitlement to injunctive relief or any other relief. Regarding Motorola's demand for an injunction against Apple regarding patents that Motorola had committed to license on fair, reasonable and non-discriminatory ("FRAND") terms, Judge Posner held that "by committing to license its patents on FRAND terms, Motorola committed to license the [patent] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent." Both parties appealed the order in the Federal Circuit.

In its amicus curiae brief the FTC states that in evaluating whether an injunction should be entered, the avoidance of patent hold-up is an important consideration. Hold-up or the threat of hold-up may deter innovation, distort investment and harm consumers. Furthermore, the threat of a hold-up may reduce the value of standard setting.

The FTC also asserts that the District Court properly applied the *eBay* factors when it denied Motorola's request for injunctive relief. Motorola could not establish that it would be irreparably harmed or that monetary relief would be inadequate. The other eBay factors, namely the balance of hardships and public interest, can be expected to militate against injunctive relief for standard-essential patents. This is so because if Motorola wants Apple to refrain from using the UMTS telecommunications invention, without that invention such a device would not be a cell phone. Regarding the public interest factor, the FTC states that consumers would be harmed by being deprived of a popular product and in the long run they would be deprived of innovations by Apple.

The amicus curiae brief by the FTC comes less than a week after a U.S. District Court in Seattle refused an injunction requested by Motorola against Microsoft products because they could infringe standard essential patents. In this case Microsoft alleges that Motorola tried to charge an unfair price to Microsoft to use its streaming technology. According to Motorola they offered similar terms to those it has charged other electronics companies.

Judge Robart ruled on the injunction after a week of hearings in November over how much a patent holder can charge for technology which is considered an industry standard. In his ruling judge Robart stated that no injunction was necessary since both parties have agreed to license the technology. According to Judge Robart this decision is intended to apply to a similar dispute between these two parties in Germany. Both parties had until 14 December 2012 to file post-trial briefs and Judge Robart is not expected to rule until January 2013. [Nicole Daniel]

U.S. Federal Circuit holds that direct buyers have standing for *Walker Process* claims

On 20 November, 2012 the U.S. Court of Appeals for the Federal Circuit ruled (*Ritz Camera & Image, LLC v SanDisk Corp*) case that direct purchasers of a product which is covered by a patent have standing to bring *Walker Process* antitrust claims.

In June 2010 Ritz Camera filed a lawsuit against SanDisk alleging that they violated Section 2 of the Sherman Act as they monopolized the market for NAND flash memory products by fraudulently obtaining patents. NAND flash memories are a type of flash memories used in many consumer electronics products, e.g. USB drives, smartphones, digital cameras and computers. SanDisk holds at least two patents for the manufacture of NAND flash memory products.

According to Ritz Camera, a retailer, SanDisk fraudulently obtained these patents as it intentionally failed to disclose invalidating prior art and made affirmative misrepresentations to the U.S. Patent and Trademark Office. Additionally, SanDisk enforced these patents through infringement suits against its competitors and by threatening customers of its competitors. This resulted in higher prices to direct purchasers, such as the plaintiff.

In bringing this lawsuit Ritz Camera relied on the ruling by the U.S. Supreme Court in *Walker Process Equipment, Inc v. Food Machinery & Chemical Corp*, where it held that "the enforcement of a patent procured by fraud on the Patent Office may violate Section 2 of the Sherman Act provided the other elements necessary to Section 2 monopolization charge are proved." SanDisk wanted the case to be dismissed, partly because direct purchasers like the plaintiff lacked standing to file for *Walker Process* claims. The District Court held that *Walker Process* did not limit the class of plaintiffs eligible for standing and denied SanDisk's motion.

The single issue on appeal to the Federal Circuit was:

"Whether direct purchasers who cannot challenge a patent's validity or enforceability through a declaratory judgment action (and have not been sued for infringement, and so cannot assert invalidity or unenforceability as a defence in the infringement action) may nevertheless bring a *Walker Process* antitrust claim that includes as one of its elements the need to show that the patent was procured through fraud."

In its ruling the Federal Circuit first outlined the conditions for a *Walker Process* claim:

(1) The defendant procured the patent by knowing and wilful fraud on the Patent and Trademark Office.

(2) All elements necessary to establish a § 2 Sherman Act monopolization claim are established.

Secondly, the court held that nothing in the Supreme Court's ruling in the *Walker Process* supported the defendant's argument that the rules on standing to bring patent validity challenges should be imported into *Walker Process* claims.

Thirdly, the court dismissed SanDisk's argument that by allowing direct purchaser suits an end-run around patent laws would be created. A *Walker Process* claim is a separate action from a patent declaratory judgment action as it is governed by antitrust principles and does not directly seek the invalidity of a patent, even if that is the likely effect.

Finally, the court also rejected SanDisk's argument that granting direct purchasers standing would lead to a flood of litigation.

This decision by the Federal Circuit expands the possibility of parties to bring *Walker Process* antitrust claims which creates potentially significant implications for consumers, accused infringers and patent owners. A direct purchaser is able to bring a *Walker Process* claim even if there is no justiciable patent infringement dispute. Furthermore, whenever there is an adverse ruling in a case challenging a patent it seems inevitable that follow-on class actions by direct purchasers will follow. However, the high bar in proving fraud before the Patent and Trademark Office may temper the long-term impact of this ruling. [Nicole Daniel]

U.S. FTC announces settlement concerning breach of FRAND licensing commitment

On 26 November 2012 the U.S. Federal Trade Commission ("FTC") announced a proposed settlement with Robert Bosch GmbH ("Bosch") to resolve concerns relating to Bosch's acquisition of SPX Service Solution U.S. LLC ("SPX").

A notable aspect of the proposed settlement is that apart from addressing concerns that the acquisition would confer Bosch monopoly power in the market for air conditioning recycling, recovery and recharge ("ACRRR") devices, the proposed settlement also resolves the FTC's allegation that (prior to being acquired by Bosch) SPX harmed competition in the ACRRR market by reneging on a commitment to license standards essential to industry standards pertaining to ACRRR devices on fair, reasonable and non-discriminatory ("FRAND") terms. According to the FTC, SPX instead pursued injunctions to block rivals who were willing to license the technologies on FRAND terms.

To address the concerns about SPX's practices relating to essential patents, the proposed settlement requires Bosch to not pursue injunctive relief and to offer the patents royalty-free to implementers of the standards in the ACRRR market. Moreover, Bosch will provide an assurance that it will also license any subsequently acquired patents that are essential to the relevant industry standards on FRAND terms to any willing implementer, without seeking injunctions.

The FTC voted 3-2 to approve the complaint and settlement. Commissioners Ohlhausen and Rosch voted no in objection to the allegations concerning essential patents. Commissioner Ohlhausen issued a dissenting statement explaining her view that seeking injunctive relief, even in breach of a licensing commitment, should not be deemed a violation of Section 5 of the FTC Act (15 U.S.C. § 45). [Juha Vesala]

U.S. Supreme Court grants certiorari to consider the legality of reverse payment settlements

On 7 December 2012 the U.S. Supreme Court granted a petition to consider whether reverse payment settlement agreements are per se lawful or presumptively anti-competitive.

In the case (U.S. Federal Trade Commission v. Watson Pharmaceuticals, Inc., et al., Docket 12-416), the U.S. Court of Appeals for the Eleventh Circuit held – like several other courts of appeals – that such settlements are generally *per se* lawful (see Newsletter 3/2012 p.4). Recently, however, an explicit conflict between the approaches of courts of appeal was created when the U.S. Court of Appeals for the Third Circuit held that such settlements are presumptively illegal (see Newsletter 4-5/2012 p. 3).

The U.S. Supreme Court will now be in a position to resolve the apparent conflict between these Courts of Appeal as well as to address the criticism that, among others, the U.S. Federal Trade Commission and Department of Justice Antitrust Division have mounted against the nearly *per se* legality approach followed by certain Courts of Appeal. [Juha Vesala]

EU DEVELOPMENTS

ECJ rejects appeal relating to abuse of the patent system and the procedures for marketing of drugs

On 6 December 2012, the European Court of Justice ("ECJ") handed down its ruling rejecting AstraZeneca's ("AZ") appeal in relation to the Losec case. In the first instance, the General Court largely upheld the Commission decision which found that AZ abused the patents system and the procedures for marketing pharmaceutical products in order to prevent or delay the arrival of competing generic medicinal products on the market for proton pump inhibitors, such as AZ's product Losec (See Newsletter 4/2010, p. 6, Newsletter 5/2010, p. 7 and Newsletter 3/2012 p. 9 for additional background information).

In its appeal, AZ claimed that lack of transparency was insufficient for a finding of regulatory abuse, notably to obtain supplementary protection certificates ("SPCs"), but there should be a requirement for deliberate fraud or deceit. AZ further claimed that the withdrawal of marketing authorizations constituted the exercise of an unfettered right under EU law. It should not be regarded as failure to compete on the merits and therefore did not constitute conduct that tended to restrict competition.

With regards to the first abuse of a dominant position concerning SPCs, the ECJ recalled that EU law prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the merits. In this respect, the ECJ recalled that pursuant to settled case-law the concept of "abuse" is an objective concept referring to the conduct of a dominant undertaking which is such as to influence the structure of a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Accordingly, the ECJ held that the General Court was fully entitled to hold that AZ's "consistent and linear conduct", characterized by (a) the misleading representations it made to the patent offices to obtain the issue of SPCs which it was either not entitled to or for which it was entitled for a shorter period, and (b) its manifest lack of transparency (e.g. as regards the existence of the French technical authorization) by which AZ deliberately lead the patent offices and judicial authorities into error to preserve its monopoly on the medicinal products market, was a breach of competition on the merits and therefore an abuse of a dominant position. In fact, as regards AZ's misleading representations (made in relation to the aforesaid French technical authorization) to secure the grant of SPCs, AZ knowingly accepted that the granted SPCs were unlawful in the event that the alternative interpretation proposed by AZ was not followed by the national courts or the Court of Justice.

However, the ECJ held that it cannot be inferred from the General Court's judgment that any patent application made by a dominant undertaking which is rejected on the ground that it does not satisfy the patentability criteria automatically gives rise to liability under Article 102 of the Treaty on the Functioning of the European Union. In fact, the General Court did not hold that undertakings in a dominant position had to be infallible in their dealings with regulatory authorities and that each objectively wrong representation made by such an undertaking constituted an abuse of that position, even where the error was made unintentionally and immediately rectified. And the assessment of whether representations made to public authorities for the purposes of improperly obtaining exclusive rights are misleading must be made *in concreto* and may vary according to the specific circumstances of each case.

As regards the issue of whether an abuse of dominance can only be found if the conduct also has anticompetitive effects, the ECJ held that under the established case law there is no requirement that current and certain anticompetitive effects be shown. In any event, AZ's misleading representations to patent offices were not only liable to lead the public authorities to grant it a right to which it was not entitled, but they also actually had such result in several Member States.

With regards to the second abuse of a dominant position, the ECJ held that the deregistration of the marketing authorizations, without objective justification and after the expiry of the exclusive right granted by EU law, with the aim of hindering the introduction of generic products and parallel imports, also does not come within the scope of competition on the merits.

Yet, the ECJ confirmed that the preparation by an undertaking, even in a dominant position, of a strategy whose object is to minimize the erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from practices coming within the scope of competition on the merits, which is such as to benefit consumers. In fact, an undertaking which holds a dominant position has a special responsibility to ensure that competition in the common market is effective and undistorted, and therefore it cannot therefore use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defense of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification, like the onerous pharmaco-vigilance obligations.

The ECJ further confirmed that the fact that, in the light of its special responsibility, an undertaking in a dominant position cannot deregister a market authorization in such a way as to prevent or render more difficult the entry of competitors on the market, unless, as an undertaking engaged in competition on the merits, it can rely on grounds relating to the defense of its legitimate interests or on objective justifications. Where the latter grounds do not exist, the fact that the undertaking in question is prevented from deregistering a market authorization does not constitute either an "effective expropriation" of such a right or an obligation to grant a license, but a straightforward restriction of the options available under European Union law.

Therefore the fact that the regulatory framework offers alternative means, which are longer and more costly, to obtain a market authorization does not prevent the conduct of an undertaking in a dominant position from being abusive where that conduct, considered objectively, has the sole purpose of rendering the abridged procedure provided for by the EU legislator unavailable, thus excluding the producers of generic products from the market for as long as possible, by increasing the costs incurred by them in overcoming barriers to entry to the market, and ultimately delaying the significant competitive pressure exerted by those products. [Gabriele Accardo]

European Commission sends Samsung Statements of Objections regarding its alleged abuse of mobile phone standard-essential patents

On 21 December 2012, the European Commission sent a Statement of Objections to Samsung, based on concerns that Samsung's conduct in seeking injunctions against Apple in various Member States on the basis of its mobile phone standard-essential patents ("SEPs") amounts to an abuse of a dominant position in breach of Article 102 of the Treaty on the Functioning of the European Union. The Samsung SEPs in question relate to the European Telecommunications Standardisation Institute's ("ETSI") 3G UMTS standard, in relation to which Samsung started to seek (in 2011) injunctive relief before courts in various Member States against Apple based on claimed infringements of certain of its 3G UMTS SEPs.

In a separate communication, the Commission stated that it takes note of Samsung's announcement of 18 December 2012 that it is withdrawing its claims for injunctions in Europe, although such a decision would not alter the Commission's preliminary conclusions about the anti-competitive nature of Samsung's conduct thus far.

The present investigation derives from the specific standardization context and the associated commitment by Samsung to license SEPs on Fair Reasonable and Non-Discriminatory ("FRAND") terms. Standard-setting organizations generally require that members commit *ex ante* to license their SEPs on FRAND terms. Access to those patents which are standard-essential is a precondition for any company to sell interoperable products in the market. At the same time, the FRAND commitment allows SEP holders to be fairly remunerated for their intellectual property.

Competition Commissioner Joaquin Almunia commented that "When companies have contributed their patents to an industry standard and have made a commitment to license the patents in return for fair remuneration, then the use of injunctions against willing licensees can be anti-competitive". In particular, according to the Commission, while recourse to injunctions is a possible remedy for patent infringements, such conduct may be abusive where SEPs are concerned and the potential licensee is willing to negotiate a license on FRAND terms. Since injunctions generally involve a prohibition on the sale of the product infringing the patent, such recourse risks excluding products from the market without justification and may unduly distort licensing negotiations in the SEP-holder's favour. Besides, the Commission further recalls that "the right of access to a tribunal does not constitute an unfettered prerogative. According to the EU Charter of Fundamental Rights, it may be restricted, provided that the restriction (i) corresponds to objectives of general interest, (ii) is proportionate, and (iii) does not infringe upon the very substance of the right." The Commission's preliminary view is that these conditions are fulfilled in the case at hand.

The current investigation protects the public interest that commitments given during a standard-setting process are respected so that consumers and businesses can enjoy the benefits of standardization, while the validity or infringement of the patents in question shall be determined by national courts (which may assess whether it is necessary to stay its proceedings). As such, no position will be taken on what a reasonable royalty rate might be, and Samsung's right to seek damages and other corrective or alternative measures for an infringement of its SEPs remains untouched.

It is recalled that Apple also launched injunctions against Samsung on the basis of non-SEPs, i.e. patents for which no commitment to license on FRAND terms had been given in a standardization context. [Gabriele Accardo]

European Commission accepts commitments for sale of e-books by international publishers and Apple

On 13 December 2012, the Commission issued a press release stating that it has made legally binding the commitments offered by Apple and four international publishers for the sale of e-books in the European Economic Area ("EEA") (see Newsletter 1/2012 p. 5 and Newsletter 4-5/2012 p. 10 for more background).

In a statement, Commissioner Joaquin Almunia recalled that the Commission was concerned that the joint switch from a typical wholesale model to an 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 breach of Article 101 of the Treaty on the Functioning of the European Union.

In essence, incentives of Apple and publishers were aligned such that the latter could deal with Amazon and other retailers as a group. In fact, under the agency model, if any retailer sold an e-book at prices lower than that on Apple's iBookstore, the publishers would have to match that lower price on Apple's store, thus making very costly (in terms of lower revenues for the publishers) to allow other retailers to sell at lower prices than Apple. As Commissioner Almunia pointed out, Amazon and other retailers were faced with a concerted and coordinated demand by the four publishers to agree to the agency model of distribution, since doing otherwise might have resulted in not being supplied with e-books, with obvious disruption of their businesses.

Almunia further clarified that the Commission preferred to accept the commitments and not to embark into a lengthy investigation insofar as such an outcome was not the best solution in the case of a nascent and very fast-moving market. Under the commitments the publishers and Apple will terminate the agency agreements that include price restrictions and "most-favored customer" clauses, and will not enter into such agreements for the next five years. Retailers will be entitled to offer discounts during a two-year "cooling-off" 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 over a one year period.

This is a further case where the Commission has worked closely with the U.S. Department of Justice ("DOJ") to seek a global solution as the practice was implemented first in the U.S. and a short time later in Europe. In the U.S., three publishers settled with the DOJ in September and litigation with other companies is still on-going. [Gabriele Accardo]

European Commission renders legally binding commitments on Rio Tinto Alcan

On 20 December 2012, the Commission issued a press release stating that it has made legally binding the commitments offered by Rio Tinto Alcan ("Alcan") to address the Commission's concerns that Alcan might have infringed Article 101 and 102 of the Treaty on the Functioning of the European Union, by contractually tying its leading Aluminum Pechiney ("AP") aluminum smelting technology to the purchase of aluminum smelter equipment namely, pot tending assemblies or "PTAs", i.e. specialty cranes used in aluminum reduction plants or smelters where aluminum is primarily produced) (see Newsletter 4-5/2012 p. 11 for more background). By accepting the commitments the Commission closed a case which stemmed from a complaint by crane manufacturer Réel, and which prompted the Commission to issue a Statement of Objections to Alcan back in 2008.

Alcan, which according to the Commission is a company with substantial market power in the market for the licensing of aluminum smelting technology, committed to modify its AP technology transfer agreements so as to enable the licensees of the AP aluminum smelting technology to purchase PTAs from any recommended supplier. The commitments introduce an objective and non-discriminatory process for selecting qualified suppliers of PTAs, whereas Alcan will provide competing PTA suppliers with the necessary technical specifications to ensure that their PTAs are capable of operating in smelters using AP technologies. [Gabriele Accardo]

European Commission accepts commitments from Thomson Reuters

On 20 December 2012, the Commission issued a press release stating that it has made legally binding the commitments offered by Thomson Reuters to address the Commission's concerns that Thomson Reuters might have abused its dominant position in the market for consolidated real-time datafeeds through its licensing practices (see Newsletter 6/2009

p. 11, Newsletter 1/2012 p. 7 and Newsletter 4-5/2012 p. 11 for more background) in breach of Article 102 of the Treaty on the Functioning of the European Union. Competition Commissioner Joaquín Almunia commented that information plays a key role in ensuring that financial markets operate in a healthy and efficient way.

In particular, under the commitments, Thomson Reuters will create a new licence ("ERL") allowing customers, for a monthly fee, to use Reuters Instrument Codes ("RICs") for data sourced from Thomson Reuters' competitors. The ERL could be used worldwide by customers with genuine business operations in the European Economic Area (EEA). In addition, Thomson Reuters would provide customers with the necessary information to map RICs to alternative symbology (i.e. codes by other suppliers). Furthermore, a separate license would be available for third party developers to enable them to facilitate customer switching, in particular allowing RICs and rival services to interoperate. Third-party developers and competing datafeed vendors can share information (with the exclusion of RICs themselves) and cooperate closely in the building, maintenance, sale and advertising of such switching tools. [Gabriele Accardo]

European Commission approves joint-venture in the market of Trusted Execution Environments

On 7 November 2012, the European Commission has approved, subject to conditions, the creation of the joint-venture ("the JV") between ARM, Giesecke & Devrient and Gemalto, under the European Commission Merger Control Regulation.

The JV will develop and market trusted execution environments ("TEE") designed to run on ARM's specific hardware extension ("ARM TrustZone"). A TEE solution creates a separate secure operating system for consumer electronic devices, such as smartphones, tablets, and smart TVs, and allows applications running on the main operating systems (Android, iOS or Windows Phone) to offer enhanced security services (examples of such trusted applications include banking applications, mobile payments, delivery of premium content and enterprise data solutions).

Notwithstanding the fact that a number of actual or potential competitors will remain active in the TEE market, the Commission was concerned that, owing to ARM's very strong upstream position as a supplier of architecture for application processors on consumer electronics devices, including ARM TrustZone, on which the JV's and its competitors' TEE solutions would be based, ARM could degrade the interoperability of its architecture with alternative TEE solutions offered by JV's competitors .

Accordingly ARM committed to provide, for a period of eight years, to the JV's competitors the information on current and future versions of TrustZone (or other equivalent architectures that ARM may release in future) that is necessary to develop alternative TEE solutions. [Gabriele Accardo]

European Commission clears acquisition of Austrian mobile phone operator Orange by Hutchison 3G subject to conditions

On 12 December 2012 the European Commission approved under the EC Merger Regulation the proposed acquisition of Orange's mobile telephony business in Austria by Hutchison 3G ("H3G") subject to conditions. The commitment package is aimed at facilitating the entry of new players in the relevant Austrian mobile telecommunications market.

In May 2012 H3G notified the proposed acquisition to the Commission. In June 2012 the Commission opened an in-depth investigation and a statement of objections was adopted on 20 September 2012. The Commission's investigation is focussed on the Austrian market for mobile telecommunications services to end consumers.

The market for mobile telecoms in Austria is highly concentrated and the proposed merger would bring together two of the four mobile network providers in Austria. Furthermore, this market is characterized by high barriers to entry and little bargaining power for consumers when negotiating contracts with the operators. The Commission came to the conclusion that the market power of H3G and Orange under the proposed acquisition was higher than what their market shares suggested. Accordingly, the Commission was concerned that the proposed acquisition of Orange by H3G would result in higher prices and the reduction of competition.

H3G submitted a commitment package to remove the concerns of the Commission.

As a structural remedy H3G committed to divest its radio spectrum and additional rights to a new entrant in the relevant Austrian mobile telephony market. Additionally, the new mobile network operator will have the right to acquire spectrum from H3G and additional spectrum at an auction planned by the Austrian telecom regulator in 2013. The Austrian telecom regulator will reserve spectrum for this new entrant to make sure it can build up a physical network for mobile telecommunication services. Furthermore, the new entrant will receive better conditions when purchasing sites to build up its network.

Regarding access, H3G committed to provide – for the next 10 years – wholesale access to its network for up to 30% of its capacity to up to 16 mobile virtual network operators. This serves to enable such operators to offer their services to end consumers at competitive terms and conditions.

As an up-front commitment H3G agreed not to complete the merger before it has entered into a wholesale access agreement with a mobile virtual network operator.

These commitments are supposed to lower barriers to entry for mobile virtual network operators to ensure that competition in the Austrian mobile telecoms market will be safeguarded.

According to Competition Commissioner Almunia he always supports innovation and new technologies require significant investments. Accordingly, consolidation at the EU level can be good if it "brings new services, more choice and lower prices to customers."

Since the Commission cleared the merger the Austrian Competition Authority will not appeal against the decision of the Austrian Competition Court which allowed the merger. [Nicole Daniel]

European Commission urges industry to find solution for greater access of online content

In the wave of its blueprint for intellectual property rights released last may, the EU Commission has just held an "orientation debate on content in the digital economy" with the aim of adapting copyright to the new digital era. As part of this strategy, the EC announced on December 2012 a "stakeholder dialogue" to be led jointly by EU Commissioners Michel Barnier (Internal market and services) Neelie Kroes (digital agenda) and Androulla Vassiliou (education, culture, multilingualism) before the end of 2013. The "stakeholder dialogue" should focus, more specifically, on the following areas identified by the European Commission as in need of rapid progress:

(1) *Cross-border access and portability of services*: The Commission's objective is to foster cross-border online access and the "portability" of content lawfully acquired in a member state all across Europe.

(2) *User-generated content and licensing for small-scale users of protected material*. The Commission's objective is to foster transparency/ clarity in conditions regarding the use of protected material online and encourage a streamlined licensing process for online material.

(3) *Audiovisual sector and cultural heritage institutions.* The Commission's objective is to facilitate the deposit and online accessibility of films in the EU for both commercial and non-commercial uses.

(4) *Text and data mining (TDM):* The Commission's objective is to promote efficient TDM for scientific research purposes, notably through standard licensing models and technology platforms

In parallel to the stakeholder dialogue, the Commission announced that it will continue its review of the EU Framework, notably through market studies, impact assessment and legal drafting work, with a view to a decision in 2014 on whether to table legislative reform proposals. [Béatrice Martinet Farano]

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.