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U.S. DEVELOPMENTS

U.S. Supreme Court reverses Eleventh Circuit opinion in *FTC v. Actavis, Inc*

On 17 June 2013, the U.S. Supreme Court ("the Court") reversed a decision by the Court of Appeals (Eleventh Circuit). The Court of Appeals had upheld a dismissal of a complaint made by the Federal Trade Commission ("FTC"), which claimed that a reverse payment settlement agreement between certain pharmaceutical companies (Actavis, Inc., Solvay Pharmaceuticals, Paddock Laboratories, and Par) violated U.S. antitrust law.

In brief, a reverse payment settlement agreement is one in which, in order to settle a dispute between the alleged patent infringer and the patentee, the patent holder pays the alleged infringer a considerable amount of money to keep the alleged infringer's product off the market.

Under the Hatch-Waxman Act, a drug manufacturer is able to patent a new prescription drug and place it into the market upon submitting a New Drug Application to the Food and Drug Administration (hereinafter the "FDA"), pursuant to 21 U.S.C. § 355 (b)(1). Similarly, a generic drug may be marketed by another drug manufacturer, upon submitting an Abbreviated New Drug Application to the FDA, pursuant to 21 U.S.C. §§ 355 (j)(2)(A)(ii), (iv), as long as it states in its application that it contains the same "active ingredients" and has the same effects as the previously branded drug. The first generic to file an Abbreviated New Drug Application has a 180-day exclusivity period as long as it does not infringe the rights of the already branded drug.

In the case at hand, Solvay Pharmaceuticals introduced its branded drug, AndroGel, into the market in 1999, which was then approved by the FDA in 2000. In the same year Actavis, Inc. (also known as Watson Pharmaceuticals) filed an Abbreviated New Drug Application to the FDA for its generic version of AndroGel, which was approved by the FDA thirty months later. However, in 2006, Solvay and Actavis reached a settlement in their patent-litigation dispute. The terms of the settlement agreement provided that Actavis would not introduce its generic product into the market until 31 August 2015 (65 months before Solvay's patent expires), and Solvay would pay Actavis $19-$30 million annually for nine years in exchange for its settlement.

The FTC claimed that this settlement agreement violated section 5 of the Federal Trade Commission Act, as Actavis had unlawfully agreed to share Solvay's monopoly profits by abandoning its generic drug patent application, and as a result, eliminating the chance for American consumers to choose a cheaper alternative to the brand-name AndroGel for nine years.

The Court of Appeals held that a patent holder has a "lawful right to exclude others from the market," and that a patent holder has "the right to cripple competition." *Id.* Hence, as a matter of public policy, a reverse payment settlement agreement is consistent with the parties' right to avoid litigation costs. It dismissed the FTC complaint on the basis that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." FTC v. Watson Pharmaceuticals, Inc., 677 F.3d 1298, 1312 (2012).

On appeal, the Court fundamentally disagreed, holding that even if the agreement's anticompetitive effects fell within the scope of the exclusionary potential of the patent, such fact or characterization cannot immunize the agreement from antitrust attack, since patent and antitrust policies are both relevant in determining the "scope of the patent monopoly"—and consequently antitrust law immunity—that is conferred by a patent.

The Court's 5-3 decision essentially entails that reverse payment settlement agreements may be a violation of antitrust laws, but the Court took a more pragmatic and fact-based approach to the matter, claiming that the Court of Appeals' decision would create bad precedent and would incentivize settlements in the pharmaceutical sector in order to claim immunity from antitrust litigation.

The Court acknowledged that reverse payment settlement agreements are not a *per se* violation of antitrust laws, thus recognizing the impact that such a settlement agreement would have on American consumers in the pharmaceutical market, but their validity should be tested under the rule-of-reason. Yet, the Court did not provide any guidance as to the relevant factors to assess reverse payment settlement agreements, thus leaving to lower courts to ascertain the scope of the existing rule-of-reason precedent to reverse payment settlement agreements.

The Court's ruling thus conceded that there is a general public interest in settling disputes between parties in order to avoid the heavy costs of litigation, but such large-scale corporate settlements may result in adverse and anticompetitive effects, and that requires analyzing antitrust law and patent law by way of a case-by-case approach.

Justice Breyer, writing for the majority, specifically states that "Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors." *F.T.C. v. Actavis, Inc.*, 133 S.Ct. 2223, 2230 (2013). Thus, the Court characterizes this agreement as the creation of a monopoly in that particular brand of drug, AndroGel: if Solvay is able to remove Actavis from the market by preventing Actavis from producing its own generic drug at a lower cost than Solvay, then Solvay would be free to charge whatever price it wishes due to a lack of competition in the

market. This, the Court holds, is a monopoly and a violation of antitrust laws (and broadly prohibited by the Sherman Act).

Justice Breyer referred to early precedent set by the Court in the area of antitrust law in order to emphasize that there must be a balancing of interests approach, otherwise known as a pragmatic approach, in order to best serve the interests of both the patent holder, its licensees, as well as the consumers within the general pharmaceutical market. In particular, *United States v. United States Gypsum Co.*, 333 U.S. 364, 390-391 (1948) held that courts must "balance the privileges of [the patent holder] and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize." Similarly, in *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 168, the Court held that certain cross-licensing agreements that settled litigation could sometimes "curtail the manufacture and supply of an unpatented product."

Therefore, Justice Breyer rejects the claim that the dissenting opinion of Chief Justice Roberts that the Court in this decision is creating case law that is unlikely to withstand the test of time. Contrarily, the Court in its majority opinion attempts to show that indeed previous case law deterred the acts of certain large corporations in order to prevent the anticompetitive effects that could result from such settlement agreements. [Gabriele Accardo and Anthony Reda]

U.S. Supreme Court rules on patentability of DNA

On 13 June 2013 the Supreme Court ruled in the *Association for Molecular Pathology v. Myriad Genetics* case that DNA is a product of nature and not patent eligible merely because it has been isolated. However, cDNA is patent eligible because it is a product that is not naturally occurring. Thereby the Supreme Court affirmed in part and reversed in part the decision of the Federal Circuit.

Myriad Genetics ("Myriad") discovered the precise location and sequence of the BRCA1 and BRCA2 genes; mutations of these genes can increase the risk of breast and ovarian cancer. This discovery enabled Myriad to develop medical tests to detect mutations in these genes in patients to assess their cancer risk. Myriad obtained several patents which would give it the exclusive right to isolate a patient's BRCA1 and BRCA2 genes and would give the respondent the exclusive right to create BRCA cDNA.

A group of plaintiffs, which included doctors, breast cancer patients and researchers, joined a lawsuit by the Association for Molecular Pathology ("AMP") seeking a declaration that Myriad's patents are invalid under 35 U.S.C. §101.

The District Court granted summary judgment to the plaintiffs since Myriad's patents covered products of nature and were therefore invalid.

The Federal Circuit however, found that both isolated DNA and cDNA were patent eligible.

The Supreme Court held that the principal contribution of Myriad was its uncovering of the precise location and genetic sequence of the BRCA1 and BRCA2 genes. According to *Diamond v. Chakrabarty* it is central to the inquiry for patent eligibility whether the action was new "with markedly different characteristics from any found in nature". In this case Myriad did not create or alter the genetic information or the genetic structure. Even though it found these important genes, a §101 patent eligibility inquiry is not by itself satisfied with a groundbreaking, innovative or brilliant discovery.

The Supreme Court further describes how Myriad's patent descriptions highlight the problems with its claims:

Firstly, they describe in detail the process of discovery, but §101 demands are not satisfied by extensive effort alone.

Secondly, even though the isolation of DNA from the human genome severs those chemical bonds that bind the gene molecules together, Myriad's claims are not saved by the fact.

Finally, Myriad cites *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,* a case where Congress has endorsed a PTO practice in subsequent legislation, arguing that the past practice of the PTOin awarding gene patents is entitled to deference. In this case however, there has not been such an enforcement and the United States argued in both the Federal Circuit and the Supreme Court that isolated DNA was not patent eligible under §101.

cDNA is patent eligible since it is not a product of nature. DNA takes the shape of a double helix and consists of two chemically joined nucleotides. The sequences of DNA nucleotides contain information to create the strings of amino acids which are used to build proteins in the body. Nucleotides coding for amino acids are exons and nucleotides not coding for amino acids are introns. Composite DNA (cDNA) are synthetically created exons-only strands of nucleotides, i.e. cDNA omits the introns.

The Supreme further notes that this case neither involves method claims, patents on new applications of knowledge nor the patentability of DNA where the order of naturally occurring nucleotides has been altered. [Nicole Daniel]

U.S. District Court rules Apple colluded on E-Book Prices

On 10 July 2013 the District Court in Manhattan ruled in *United States v. Apple Inc., et al* that Apple conspired with five major publishers to raise

prices on e-books. The publishers settled and denied any wrongdoing. However, the case against Apple went to trial.

The alleged collusion is connected to Apple's launch of the iPad tablet and of e-books in the iTunes online store. It went on from late 2009 until early 2010. Apple tried to compete with Amazon, which sold e-books under the wholesale model and at that time accounted for between 80% and 90% of e-book sales. Amazon sold the e-books below cost to promote its Kindle reading device. Apple got five major publishers – Hachette, Penguin, HarperCollins, Macmillan and Simon and Schuster – to agree to the agency model, i.e. publishers set their own prices and Apple receives a 30% commission on the sale. These publishers also agreed to a "most favored nation" clause, which determined that Apple could match prices in other e-book stores. The publishers then got Amazon to accept an agency model on the same terms as with Apple. This resulted in price control by the publishers and a price increase of 18 percent.

The Justice Department argued that Apple made use of the publishers' dissatisfaction with Amazon's e-book discounting strategy when it entered the e-book market. It is not seeking monetary damages; instead it asked the court to adopt measures which ensure that Apple won't engage in such conduct in the future. These measures include not entering "most favored nations" clauses or charging 30% commission.

Judge Denise Cote held that Apple was at the center of the conspiracy as it created a mechanism and environment which enabled collusion to eliminate retail price competition for e-books. E-Mails by Steve Jobs were compelling evidence for the judge that Apple participated in the conspiracy.

Apple plans to appeal as it says it did not conspire to fix e-book pricing and instead injected innovation and competition into the e-book market.

This decision could expose Apple to substantial damages in a separate lawsuit as 33 state attorneys-general seek to recover money on behalf of consumers. Furthermore the decision could impact on the leverage Apple may have in negotiating future deals.

On August 9, 2013 Judge Cote held a hearing on the remedy requests of the Justice Department. She said that she was considering a plan according to which Apple would be required to negotiate future contracts in a specific way, i.e. separately with major publishers and in defined intervals of possibly six to eight months apart. However, Judge Cote said that she did not want to over-regulate the business of Apple. Lawyers for Apple and the government said that they would meet and discuss the judge's plan.

On September 5, 2013 the final judgment was issued by Judge Cote. The judgment includes restrictions in how Apple has to deal with publishers for

the next five years. An example of such a restriction is that Apple has been barred from concluding most favored clauses with publishers or enforce existing most favored nation clauses. Additionally, Apple's Audit Committee or another committee comprised of only outside directors has to designate an Antitrust Compliance Officer to supervise Apple's antitrust compliance efforts. Furthermore the Court will appoint an External Compliance Monitor. Apple will appeal the injunction.

Judge Cote has scheduled a trial to determine monetary damages in May 2014. Such damages could total hundreds of millions of dollars. [Nicole Daniel]

U.S. ITC rulings in complaints by Apple and Samsung against each other

On 4 June 2013 the United States International Trade Commission ("ITC") ordered an import ban against older iPhones and iPads into the U.S.

The ITC held that Apple had violated section 337 of the Tariff Act of 1930 with importing and selling wireless communication devices, portable music and data processing devices and tablet computers which infringe specific claims under the '348 patent, a deemed standards-essential patent on UMTS wireless technology which was one of the patents on which Samsung brought a complaint.

In its decision the ITC rejected Apple's FRAND defense. According to the ITC Apple was not able to prove that the patent was standards-essential and therefore could invoke the FRAND defense. Furthermore, even if Apple would have proved that there was a FRAND patent it still could not prove that the ITC could not issue an exclusion order for such a patent.

However, the exclusion order, i.e. the import ban, was vetoed on August 3, 2013 by the White House during the Presidential Review period of 60 days. The veto was based on reasons of public interest in competitive conditions that an exclusion order based on a standards-essential patent could give rise to.

Concerning Apple's complaint against Samsung a final ruling was handed down on August 9, 2013. The ITC concluded that Samsung infringed two Apple patents. These patents regarded "touch screen device, method, and graphical user interface for determining commands by applying heuristics" and an "audio I/O headset plug and plug detection circuitry". The ITC ordered an import ban which will take effect if it is not vetoed by the White House within 60 days. [Nicole Daniel]

EU DEVELOPMENTS

European Commission fines Lundbeck and other pharmaceutical companies for delaying market entry of generic medicines

On 19 June 2013 the European Commission issued a press release stating that it had imposed fines in the amount of € 93,8 million on Lundbeck (a Danish pharmaceutical company) and € 52,2 million on manufacturers of other generic medicines that were producing a cheaper and generic version of Lundbeck's brand-drug citalopram. The generics manufacturers were notably Alpharma (now part of Zoetis), Merck KGaA/Generics UK (Generics UK is now part of Mylan), Arrow (now part of Actavis), and Ranbaxy. According to the Commission, Lundbeck entered into agreements with these producers in order to delay their entry into the market in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

In 2002, citalopram, Lundbeck's best-selling medicine, was nearing the end of its life-cycle, while its remaining patent protection was limited to certain manufacturing processes. However, as Competition Commissioner Joaquín Almunia noted, when these generic competitors were close to entering the market, Lundbeck did not prevent market entry by successfully enforcing its patent rights. Rather, it simply paid off these other companies. In particular, generic producers agreed not to enter the market in exchange for a substantial sum of money and other inducements (Lundbeck purchased generics' stock for the sole purpose of destroying it), as well as guaranteed profits in a distribution agreement. Indeed, internal documents discovered by the Commission refer to a "club" being formed and "a pile of $$$" to be shared among the participants.

According to Commissioner Almunia, generics competition brings about substantial benefits in terms of lower prices. In the UK once generic versions of citalopram did enter the market, prices dropped on average by 90%. Furthermore he stressed that "…once the patent over the molecule has lapsed, price competition between the pharmaceutical companies that invented the original medicines and the generic makers plays a crucial role" and that "…competition by generics is also a dynamic force which stimulates pharmaceutical companies to continue to invest in research and to develop innovative treatments, as they cannot rely forever on their blockbuster products."

Commissioner Almunia confirmed that these so-called "pay-for-delay" deals constitute severe infringements of EU competition law, and must be sanctioned accordingly: "It is unacceptable that a company pays off its competitors to stay out of its market and delay the entry of cheaper medicines. Agreements of this type directly harm patients and national health systems, which are already under tight budgetary constraints. The

Commission will not tolerate such anticompetitive practices". [Gabriele Accardo and Anthony Reda]

European Commission publishes proposal on damage claims by victims of antitrust violations

The European Commission published on 11 June 2013 a directive proposal for damage claims by victims of antitrust violations, bringing an outcome to the public consultation organized by the competition directorate general services in early 2012, after the initial publication of an external study on damages awarded by the EU courts for antitrust violations.

Unlike regulations, directives do not have a direct effect in EU law. This directive would organize a minimum harmonization between member states, leaving them free to implement stricter rules as long as those would not curtail the effectiveness of the core provisions of the directive.

Disclosure of evidence is addressed by the draft directive in articles 5 to 8 that balance the right to gain access to documentary evidence with trade secrets protection and leniency-related documents. On the other hand, member states will have to ensure that courts sanction the destruction of relevant evidence.

Article 12 provides that a passing-on defense should be implemented in national laws. The procedure for antitrust damage claims remains inquisitorial, as the defendant will have the reverse the burden of the proof. Accordingly, pursuant to article 16, any infringement of antitrust legislation will be presumed to have caused harm. The defendant could rebut such a presumption, but we may believe that such an exercise would be extremely difficult, as there will be little room for demonstrating lack of damages when the rationale of the whole directive is precisely based on that presumption.

We regret that the draft directive does not address the interaction with class actions procedures, although such procedure would likely be adopted soon at the EU level. If competitors may not have suffered harm – especially when cartels involve most of the existing undertakings – consumers' organizations may almost systematically support such claims. We expect the directive to better take into account this the interface between competition policy and consumer protection.

Along with the directive proposal, the Commission released a communication, a staff working document (a practical guide for quantifying harm in action for antitrust damages) and an impact assessment study on damage claims. These documents anticipate the harmonization to be effective within the next three years. In the meantime, national courts could use them as guidelines when dealing with antitrust violations claims.

The draft directive will now follow the ordinary legislative procedure under which the European Parliament and the Council must now decide on the Commission's proposal. On June 18, 2013, the Economic and Monetary Affairs committee, responsible for this procedure at the European Parliament, appointed MEP Andreas Schwab as rapporteur. Two other committees have decided to give an opinion (Internal Market and Consumer Protection, Legal Affairs) while the Industry, Research and Energy committee has decided not to give one. The vote in committee is scheduled on December 5, 2013 and the plenary sitting would normally take place on March 11, 2014. [Anthony Bochon]

European Commission consults on registers for nanomaterials

Since 1 January 2013, all manufacturers, importers and traders in France must fulfill the requirements established by the mandatory registration system for nanomaterials. Facing an obvious lack of self-compliance, the French environment minister decided to extend the deadline for the registration to July 1, instead of April 30. This French register is, until now, an isolated national initiative on the monitoring and surveillance of manufactured nanomaterials.

However, other countries such as Italy, Denmark and Belgium are preparing their own national nano-registers. Belgium introduced its draft Royal Decree under the TRIS procedure on July 4, 2013, confirming thereby the growing divergence between EU member states on nanotechnologies regulation. Some countries such as the United Kingdom and Germany are said to be reluctant towards similar projects, which may lead to overregulation, overlaps and conflicting provisions applying to nanomaterials.

The European Commission remains skeptical about the opportunity of providing a specific legal framework for nanomaterials safety, since REACH – the chemicals regulation similar to the US Chemicals Safety Act – already encompasses nanomaterials within its scope of application. As a result, the Commission launched a public consultation on the revision of REACH to include nanomaterials. This deadline expires on September 13, 2013. In the meantime, the Commission also published a call for tender to make an economic impact assessment of the creation of an EU-wide register for nanomaterials and organized a workshop on such project. No EU register appears to be in sight before at least 2015, three years before the next REACH review. [Anthony Bochon]

European Commission clears Syniverse's acquisition of MACH, subject to conditions

On 29 May 2013 the European Commission issued a press release approving the proposed acquisition of Mach by U.S.-based Syniverse, subject to some of Mach's assets being divested in order to ensure that

the merger will not have anticompetitive effects within the European Economic Area, notably that the merger does not hamper the smooth functioning of wholesale roaming services through an increase in price or a decrease in quality.

The Commission was concerned that without divestiture, the merger would allow the top two providers of mobile phone roaming services to merge into one entity, essentially creating a monopoly. The Commission was also concerned with a possible increase in prices or a decrease in the quality of the service provided.

In particular, the merger has been cleared subject to the divestiture of Mach's Data Clearing services and Near Trade Roaming Data Exchange, which are services that consumers use on their mobile phones when travelling abroad. In order to maintain competition in the Data Clearing House market, Mach's assets are to be sold to viable competitors that will ensure the development of the divested activities at a global level, and thus preserve competition in the market.

The Commission was previously able to clear Syniverse's acquisition of BSG, the third largest Data Clearing House, because Mach was still a strong competitor. [Anthony Reda]

European Commission approves acquisition of NYSE Euronext by InterContinental Exchange

On 24 June 2013, the European Commission issued a press release stating that it has cleared the acquisition of NYSE Euronext ("NYX") by the InterContinental Exchange ("ICE"). Both NYX and ICE operate in future exchanges, derivative trading platforms, and clearing services. NYX is an operator of exchanges in the U.S. and Europe, and ICE is a global operator of exchanges in the U.S., Canada and Europe.

The Commission confirmed that the transaction would not raise competition concerns due to the fact that NYX and ICE are not direct competitors and due to the presence of other competitors that would continue to compete with both exchange operators.

It may be recalled that last December 2012, the European Commission prohibited the merger between Deutsche Börse and NIX, based on concerns that the merger would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges (together, the two exchanges control more than 90% of global trade in these products.)

The Commission investigated the proposed acquisition on multiple market platforms, notably the market for trading and clearing services for exchange traded derivatives ("ETDs") such as agricultural commodities, soft commodities and U.S. equity derivatives. Additionally, the

Commission found minor overlaps in the areas of other agricultural ETDs, foreign exchange derivatives and bonds trading.

Finally, the Commission did not identify any vertical competition concerns with respect to trading and clearing of derivatives, as well as the provision of exchange connectivity services and front-end trade execution services. [Anthony Reda]

European Commission approve the acquisition of Central European Media Enterprises by Time Warner

On 14 June 2013 the European Commission issued a press release stating that it approved Time Warner's acquisition of Central European Media Enterprises ("CME").

According to the Commission, the two entities are not in direct competition with each other (Time Warner is a U.S. based media provider, while CME broadcasts its television networks in a limited number of European countries, notably in Bulgaria, Czech Republic, Hungary, Romania, the Slovak Republic and Slovenia).

In terms of the licensing of TV content, TV advertising, wholesale supply of TV channels and the distribution of films for theatrical release the Commission found that there would be no anticompetitive effects. This is due to the fact that there is no overlap in TV content. CME generally operates free-to-air channels, while Time Warner provides basic Pay TV channels or premium film channels. Additionally, the Commission has concluded that the acquisition will not increase the merged entity's buyer power. The merged entity of CME and Time Warner will not have the combined economic power to shut out any other competitors from the media market. [Anthony Reda]

European Commission approves Honeywell's acquisition of Intermec

On 14 June 2013 the European Commission cleared the proposed acquisition of Intermec by Honeywell (both U.S. entities). Intermec manufactures and supplies barcode scanners and ruggedized mobile computers.

The Commission assessed the possible anticompetitive effects within the ruggedized mobile computer, barcode scanner, and scanning engine markets, as well as the possible vertical relationships of the parties in voice recognition software. In all cases, the Commission concluded that due to the presence of other competitors/suppliers of scanning engines in the market, competition would not be significantly impeded within the European Economic Area. [Anthony Reda]

UK High Court finds for Interflora in the long running AdWords dispute with Mark & Spencer

On 21 May 2013, the UK High Court of Justice handed down a long awaited decision in the long running dispute between Interflora and Mark & Spencer (M&S).

In this case, Interflora had commenced an action against M&S after M&S purchased from the Google AdWords service several keywords including Interflora's registered trademarks with a view to triggering advertisements for its own flower delivery service.

The case was referred to the CJEU (see Case C-323-09 Interflora v. Marks & Spencer; Newsletter 6/2011 p.9) for which the key issue was whether M&S's use of Interflora's trademarks adversely affected "the origin function" of these marks i.e. whether such use "enabled reasonably well-informed and reasonably observant internet users to ascertain whether M&S's flower delivery service originated from Interflora or an undertaking economically connected with Interflora or originated from a third party".

The judgment, delivered by Judge Richard Arnold, concluded that by using Interflora's trademarks as AdWords to trigger advertisements to their own benefit, without making sure that this would not lead a significant proportion of the consumers who searched for Interflora to believe, incorrectly, that M&S's flower delivery service was part of the Interflora network, M&S had infringed Interflora's registered trademarks.

To reach this conclusion, Judge Arnold notably mainly considered the following factors:

Whether the relevant Internet user (i.e. reasonably well-informed and observant) should be deemed to be aware, on the basis of her general *knowledge of the market*, that M&S's flower delivery service was not part of – but rather in competition with - the Interflora network. On the facts, the judge found that this circumstance was not generally known.

Whether *M&S's advertisements* enabled the relevant user to tell that M&S's flower delivery service was not part of the Interflora network. On the facts, the judge found that M&S had not adequately informed the user that M&S's flower delivery service was not part of the Interflora network

Whether, in view of the *nature of the Interflora network* (i.e. a network of a large number of retailers of varying sizes) the relevant Internet user could determine that these two services were in competition

In view of these findings, the Court concluded that M&S was liable for trademark infringement since it had failed to make clear in its advertisement that its flower delivery service did not originate from

Interflora or an economically-connected undertaking. [Béatrice Martinet Farano]

Milan Court finds that Ryanair abused its dominant position in the market for online travel agencies

On June 4, 2013, the Milan Court's company law section handed down a ruling (only available in Italian) holding that Ryanair abused its dominant position in the downstream market for online travel agencies in breach of article 102 of the Treaty on the Functioning of the European Union (TFEU), and ordered Ryanair to pay damages to the online travel agent Viaggiare.

In essence, the abuse consisted of the refusal to allow the "scraping" of its website by online travel agents in order to retrieve and compile the set of data required to provide travel services to potential customers.

The Court first held that screen scraping is not an illegal activity *per se*, but only to the extent that it affects the *sui generis* right of a database compiler to have its investment protected (not vis-à-vis the data as such, but rather the "structure" of the data set). In the circumstances, the Court found that Viaggiare's activity on Ryanair's website did not affect such investment (in particular, it did not alter the functionalities of the website – in fact Ryanair would have permitted the consultation of the website for a symbolic fee that it would donate to charity), whereas the refusal opposed by Ryanair was specifically aimed at excluding the travel agent operator from selling Ryanair tickets. In this respect, the Court recalled that the exercise of intellectual property rights must be assessed in the light of competition law, so that such rights cannot be enforced to partition the market or harm competition in the EU.

In a tricky passage of the ruling, the Court found that Ryanair holds a dominant position in the air transportation market as whole (without defining its exact scope) whereas its market position in Italy was "growing". The Court then held that Ryanair holds a monopoly in the downstream market for the provision of information for its own flights.

Based on such premise, the Court held that the information concerning Ryanair's flights should ultimately be deemed an essential facility whose access is necessary for online travel agents who seek to offer competing services. Moreover, according to the Court, Ryanair's refusal to allow the consultation of its website is capable of hampering the development of new services provided by online travel agencies (consultation of multiple flights, intermediation and sale of tickets), and as such cannot prevail even if Ryanair's refusal was objectively justified (which the Court found it was not, because of the specific exclusionary aim of Ryanair's conduct). [Gabriele Accardo]

OSP liability: Paris Court of appeal confirms the abandon by French Courts of the "notice and stay down" doctrine

In a decision of 21 June 2013, the Paris Court of Appeal has confirmed that the obligation for an Online Service Provider (OSP) to take down infringing content is limited to content specifically notified by right holders. Endorsing the reasoning adopted by the French Supreme Court last year in three decisions involving Google, the Court held, in contrast with French case law prior to these decisions, that there was no obligation for a hosting provider to prevent the reappearance of contents that had been previously notified.

In this case, the SPPF (Société des Producteurs de Phonogrammes en France), representing a collective of video and record producers, sued YouTube after noticing that several of the videos they had notified as infringing to YouTube (which YouTube had promptly taken down) had reappeared on YouTube shortly after being taken down. SPPF therefore claimed damages for the loss sustained due to the unauthorized use of these videos as well as an injunction ordering YouTube to make sure that such content would not reappear for a 10-year period. Confirming the decision issued by the trial Court (see Newsletter 3/2011 p.10), the Paris Court of appeal held that YouTube, as a hosting provider, had no liability for the reappearance of infringing content since this would amount to a general monitoring obligation, prohibited by both the Directive and the French implementing provision (law for the Confidence in Digital Economy or LCEN dated 21 June 2004). Going beyond the reasoning of the Supreme Court in the decision above referred, the Paris Court of Appeal also pointed out that SPPF's refusal to subscribe to the filtering technology "Content ID" offered by YouTube that would have allowed them to claim their content was a fault on the right holders's part. [Béatrice Martinet Farano]

Spain's antitrust authority brings infringement proceedings against the Association of Intellectual Property Agents

On 21 June 2013, Spain's antitrust investigations authority, the Comision Nacional de la Competencia (CNC), brought infringement proceedings against the Association of Intellectual Property Agents, in relation to possible anti-competitive conduct resulting from the criteria for drawing up lists of experts in court, fee schedules, and the collection of contributions.

In particular, alleged violations of the Spanish Competition Act 15/2007 concern, firstly, the collection of court experts based on seniority in the Spanish Patents and Trademarks Office; secondly, a fee schedule that is set by exclusive guidelines; and thirdly, a collection of contributions that is based upon the professional activities of the Intellectual Property Agent before the Spanish Patents and Trademarks Office. [Anthony Reda]

Announcement of forthcoming conferences

- *Advanced Antitrust U.S.*, 7 November 2013, Chicago. For details regarding the conference please visit http://www.ibclegal.com/FKW82425TTLF
- *Advanced Antitrust U.S.*, 6 February 2014, San Francisco. For details regarding the conference please visit http://www.ibclegal.com/FKW82425TTLF (see link in the right hand corner)

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.