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# A Busy Year for the European Commission

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In the year following the Court of First Instance's *Microsoft* judgment of September 2007 (CFI Judgment),<sup>1</sup> we have seen many important developments in the growing interest on the technology sector and in particular, the relationship between competition law and intellectual property rights. The past 12 months have seen the levelling of new record fines – above those in the *Microsoft* case – the publication by the European Commission (Commission) of its enforcement priorities regarding abusive exclusionary conduct<sup>2</sup> (the Guidance Paper) as well as the issue of the interim and final reports by the Commission in its inquiry of the pharmaceutical sector. This has been a busy year; a short overview is presented below. Upon announcing record fines against Intel for abusing its dominant position, Competition Commissioner Neelie Kroes commented that 'Intel has harmed millions of European consumers for many years' and that 'such a serious and sustained violation of the EU's antitrust rules cannot be tolerated'.<sup>3</sup> The Commission is more and more focusing its efforts on effects-based investigations and results.

## Interlocking directorships

Issues of interlocking directorships are always a concern from a competition law point of view, particularly in the technology sector where potential overlaps in technologies or vertical relationships can encourage the disclosure of competitive sensitive information and coordinated behaviour. However, at least in Europe, little guidance has been issued in the past and this remains the case. On 3 August 2009, Google's CEO, Eric Schmidt, resigned from Apple's board of directors.<sup>4</sup> The resignation announcement followed a US Federal Trade Commission (FTC) inquiry into whether Mr Schmidt's role on Apple's board breached competition laws, as well as other overlaps between the two companies. Richard Feinstein, director of the FTC's Bureau of Competition, stated: 'We have been investigating the *Google/Apple* interlocking directorates issue for some time and commend them for recognising that sharing directors raises competitive issues, as Google and Apple increasingly compete with each other'.

Google recently unveiled a new computer-operating system, Chrome OS, as well as Android, a mobile internet platform, in competition with Apple. Apple's CEO, Steve Job, commented that 'as Google enters more of Apple's core business [...] Eric's effectiveness as an Apple Board member will be significantly diminished' due to conflicts of interest.<sup>5</sup> The FTC was concerned that Apple and Google's two overlapping directorships, those of Schmidt, now resigned, and the former Genentech CEO Arthur Levinson, could infringe the Clayton Act's 'interlocking directorate' prohibition. While both the FTC's and the Commission's investigations are ongoing, both authorities applauded the step taken by Google's CEO.

## Microsoft

Back in January 2008, the Commission commenced formal proceedings against Microsoft in two cases under article 82 of the EC Treaty: the European Committee for Interoperable Systems (ECIS) complained that Microsoft refused to supply interoperability information (ECIS Complaint);<sup>6</sup> and Opera, a browser vendor, com-

plained that Microsoft was engaging in illegal tying conduct (Opera Complaint).<sup>7</sup> Both proceedings followed the CFI judgment, which confirmed Microsoft's obligation to make interoperability information available and to cease from tying separate software products (the CFI judgment concerned the tying of Microsoft's Windows Media Player).

## ECIS complaint

ECIS complained to the Commission that Microsoft refused to disclose interoperability information. The Commission investigation is focussed on Microsoft's Office suite, some of Microsoft's server products, and the .NET framework. The Commission is particularly interested in examining whether Microsoft's Office Open XML file format is sufficiently interoperable with competitor products. This investigation is still ongoing.

## Opera complaint

On 15 January 2009, the Commission sent a statement of objections to Microsoft detailing its assessment that Microsoft had unlawfully tied its Windows operating system (OS) to its Internet Explorer browser product. In the statement of objections, the Commission determined that Microsoft's tying practices meant that Internet Explorer was found on 90 per cent of PCs globally, and that this gave it an artificial distribution advantage in addition to shielding Microsoft from competition. The prevalence of Internet Explorer in the market effectively incentivised content providers and software developers to design websites or software primarily for Internet Explorer, undermining competition and innovation to the detriment of consumers.

In its Guidance Paper, the Commission discusses tying cases, drawing on the CFI judgment. The Commission explains that it will normally take action under article 82 where an undertaking is dominant in the tying market and where: the tying and tied products are distinct; and the tying practice is likely to lead to anti-competitive foreclosure. The Commission explains that, 'whether the products will be considered [...] to be distinct depends on consumer demand'; that is, in the absence of tying, would a substantial number of consumers purchase the tying product without the tied product. The Commission notes that, where the tied product is 'an important complementary product' for customers of the tying product, which is the case as concerns Internet Explorer, a reduction of alternative suppliers of the tied product and, therefore, its availability, can make entry into the tying market harder.<sup>8</sup>

Microsoft recently announced that the Windows 7 OS will be released globally in October 2009, but that it will be launched in the EEA without Internet Explorer in order to comply with European competition law. The Commission responded by releasing a statement that, for retail sales, it had suggested that consumers be provided with a choice of web browsers and that 'rather than more choice, Microsoft seems to have chosen to provide less'.<sup>9</sup> In the statement of objections, the Commission suggested that consumers be allowed to choose from different web browsers presented to them through a 'ballot screen' in Windows because 'a lack of real

consumer choice on this market would undermine innovation'.<sup>10</sup> Microsoft has recently proposed a consumer ballot screen as a solution to the pending antitrust case about the tying of Microsoft Internet Explorer web browser with Windows.<sup>11</sup> In addition, OEMs would be able to install competing web browsers, set those as default and disable Internet Explorer should they so wish. The Commission has stated that it welcomes this proposal and will investigate its practical effectiveness in terms of ensuring genuine consumer choice.<sup>12</sup>

It has recently been announced that Microsoft has entered into preliminary settlement discussions with the Commission to resolve the Opera Complaint.<sup>13</sup> In addition, Microsoft is also allegedly discussing a separate case regarding a complaint by eSys Technologies about the interoperability of Microsoft's spreadsheet programme, Excel, and word-processing software, Word.

### IBM

On 20 January 2009, T3 Technologies, Inc (T3) announced that it had filed a formal complaint against International Business Machines (IBM) alleging abuse of a dominant position in the mainframe industry.<sup>14</sup> T3 accuses IBM of preventing the sales of competing mainframe hardware products by tying the sale of its OS to its mainframe hardware, as well as withholding patent licences and certain intellectual property. According to T3, 'through its focused action against mainframe competitors, IBM now has an exclusive lock on the mainframe market'.<sup>15</sup> The case is ongoing.

### Intel

In 2000, 2003 and 2006, AMD complained that Intel was abusing its dominant position in the x86 central processing unit (CPU) market. In July 2007, the Commission sent Intel a statement of objections, which was supplemented in July and December 2008.<sup>16</sup> In May 2009, the Commission found that, from October 2002 to December 2007, Intel had a dominant position in the worldwide x86 CPU market with at least a 70 per cent market share.

Intel was held to have engaged in two forms of illegal exclusionary conduct: it gave wholly or partially hidden conditional rebates to computer manufacturers to ensure they purchased their x86 CPU requirements from Intel and made direct payments to a major retailer on the condition that it only stocked computers containing Intel x86 CPUs; and it paid computer manufacturers to halt or delay the launch of competitor products and to limit the sales channels available to these products. The Commission stressed that 'this case is about the conditions associated with Intel's rebates and payments, not the rebates and payments themselves',<sup>17</sup> a useful comment to give context to the decision as the practice of rebates is common in the technology sector. The fine is the biggest imposed by the Commission yet for a single company; although it represents only 4.15 per cent of Intel's 2008 turnover – less than half the allowable maximum of 10 per cent.

The Commission's Guidance Paper was issued after proceedings were commenced against Intel. While it did not therefore apply to this case, the Commission's decision is consistent with the principles contained in the Guidance Paper and includes 'a rigorous, effects-based analysis which has demonstrated that Intel's conduct has reduced consumer choice and limited innovation in the market'. In the Guidance Paper, the Commission recognises that conditional rebates are not an uncommon practice and that they may be offered to attract demand, and in doing so, stimulate demand and benefit consumers. However, when they are granted by a dominant undertaking, they can result in foreclosure effects similar to exclusive purchasing obligations.<sup>18</sup>

Intel has stated that it intends to appeal the Commission's final decision, considering that it concerns a highly competitive micro-processor marketplace with 'absolutely zero harm to consumers'.<sup>19</sup>

### Rambus

On 30 July 2007, the Commission sent an statement of objections to Rambus, a US company that designs, develops and licences high bandwidth chip connection technologies for computers and various consumer communication products. Dynamic Random Access Memory chips (DRAMs) are a type of electronic memory primarily used in computer systems, but also used in a wide range of other products that need to temporarily store data, including servers, workstations, printers PDAs and cameras. Rambus owns and asserted patents covering the technology needed to comply with DRAMs standardised by the US standard setting organisation (SSO), Joint Electron Device Engineering Council (JEDEC). In essence, every manufacturer wishing to produce DRAMs complying with the JEDEC standard must obtain a licence from Rambus or litigate against its asserted patent rights. The Commission considered that Rambus engaged in a patent ambush by intentionally concealing the existence of the patents and patent applications, which it later claimed were relevant to the adopted standard. Absent the patent ambush, Rambus would not have been able to charge such high and unreasonable royalties.

*Rambus* and *Qualcomm*<sup>20</sup> are two cases currently before the Commission involving SSOs and questions as to whether royalties were FRAND. Both are being closely watched by the technology industry to see whether the Commission will interfere in the standard-setting process and the licensing of intellectual property rights, bearing in mind that it avoids the role of price regulator where possible. Rambus does not accept the Commission's preliminary assessment, including that it holds a dominant position within the EEA for DRAMs. However, since Rambus has recently offered commitments<sup>21</sup> and is seeking a settlement with the Commission, it is unlikely to set a precedent.<sup>22</sup> Under the proposed commitments, the Commission would make no finding of liability under the JEDEC-related charges and no fine would be levied against Rambus. Rambus has committed to offer bundled five-year worldwide licences for future DRAM products for all of its patents for SDRAM, DDR, DDR 2 and DDR3 (with no charge for SDRAM and DDR). In addition, Rambus has offered maximum royalty rates for its chip products and memory controllers.

The Commission is currently market testing Rambus' commitments and has stated that 'an effective standard setting process should take place in a non-discriminatory, open and transparent way to ensure competition on the merits and to allow consumers to benefit from technical development and innovation'.<sup>23</sup> Furthermore, in specific cases raising competition concerns, the Commission will 'investigate and intervene as appropriate'.

### Pharmaceutical sector inquiry

On 16 January 2008, the Commission opened a sector inquiry<sup>24</sup> into the pharmaceutical sector in the EU, with particular regard to the introduction of innovative and generic medicines for human consumption onto the market. The sector inquiry began with what was a first for a sector inquiry – multiple dawn raids, which remain highly controversial. The primary focus of the inquiry was on the competitive relationship between originator and generic companies and amongst originator companies (as concerns prescription medicines for human use within the 27 member states).

The Commission published its findings in a final report on 8 July 2009 (the Pharma Report), finding, inter alia, that originator

companies have used a number of methods to extend the commercial life of their medicines; for example, patent clusters (numerous patent applications for the same medicines) are a common means of delaying the entry of generic medicines. From a commercial perspective, a challenger to a patent may need to analyse all existing patents and pending patent applications in those member states in which the generic company wishes to enter. The Commission stated that this issue could be resolved by a legislative solution: ‘the adverse effects of the current situation would be addressed by the rapid adoption of the Community patent’,<sup>25</sup> a project which at least until recently has always failed.

The Commission also found that voluntary divisional patent applications are often filed to extend the examination period at the patent office, since the examination of divisional applications continues even when the parent application is withdrawn or revoked. The Commission further found that originator companies also used litigation as a means of creating obstacles for generic companies, not necessarily on merits, but as a signal for deterrence.<sup>26</sup> Furthermore, the Commission found that the opposition rate before the European Patent Office is consistently higher for the pharmaceutical sector and the length of the opposition and appeal procedures limits the ability of generic companies to clarify the patent situation of potential generic products in a timely manner. The Commission also expressed concerns with settlement agreements, noting that many restricted the generic company’s ability to market its medicine and that many involved a value transfer such as a direct payment, licence, distribution agreement or ‘side deal’.

The Commission also discussed the impact of intervention by originator companies before marketing authorisation and pricing or reimbursement bodies as well as supply sources and health-care professionals, claiming that generic products are less safe, less effective or of inferior quality. Such intervention in the administrative and supply process also delays generic market entry. Another issue raised by the Commission was tactics used by originator companies with respect to the launch of second generation medicines to further delay generic entry. Originator companies often undertake intensive marketing efforts for such second generation products in order to switch as many patients to the new medicine as possible prior to the market entry of a generic version of the first generation originator product. The Commission noted that originator companies often combined a number of strategies to prolong the life-cycle of their products and hamper the market entrance of generics. However, it did warn that ‘a case-specific analysis would be required to establish the precise effects of company behaviour on generic entry’.

As between originator companies, many were found to engage in defensive patent strategies, focussing on excluding competitors without pursuing innovative efforts. These strategies not only create an enforceable right but also a prior art. In addition, originator companies might find their research activities blocked (and innovation detrimentally affected) where the patents held by one originator company overlap with the medicines, R&D activities or patents held by another originator company for their medicine, or both. This is particularly significant when considering that opposing originator companies are generally successful when challenging the patents (generally secondary patents) of other originator companies. In addition to settlement agreements, originator companies often conclude other agreements between them, for example at the commercialisation phase. The Commission found that 81 per cent of the agreements where the relevant parties had market shares exceeding 20 per cent contained some form of exclusivity provisions, for example, an exclusive supply obligation, exclusive sourcing, exclusive licensing

or any other kind of exclusivity, or a non-compete obligation, or all of the above.

Neelie Kroes commented that ‘we must have more competition and less red tape in pharmaceuticals’.<sup>27</sup> The Commission intends to intensify competition law scrutiny, level the playing field for generic medicines and speed up the establishment of the Community Patent and a specialised patent litigation system, both of which are currently under discussion. The Pharma Report is likely to give rise to further investigation in the sector but falls short of giving clear guidance on all the topics reviewed by the Commission, in particular what amounts to patent abuse or misuse.

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The Commission is clearly keen to ensure that the technology markets are open to competition by taking a tough stance under article 82 against those companies that appear to abuse their position, setting out its enforcement priorities in this regard in its recent Guidance Paper. The Commission has indicated its willingness under the Pharma Report to take action against originator and generic companies where necessary to ensure healthy competition in the market. It has already instigated proceedings against Les Laboratoires Servier and a number of generic pharmaceutical companies,<sup>28</sup> while this investigation did not form part of the sector inquiry, the knowledge acquired during the sector inquiry allowed the Commission to draw conclusions on the areas where action based on competition law could be appropriate and effective.

It can be expected that there will be a growth of enforcement activity in the coming year, as competitors become more confident and aware of the application of the European competition rules and how they may be able to use them to their advantage, and the Commission continues its scrutiny of the activities of many players in the broader technology sector and the pharmaceutical sector in particular.

## Notes

- 1 Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.
- 2 ‘Communication from the Commission: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’, C(2009) 864 final, Brussels, 9 February 2009.
- 3 ‘Antitrust: Commission imposes fine of €1.06 billion on Intel for abuse of dominant position; orders Intel to cease illegal practices’ IP/09/745, Brussels 13 May 2009. Decision yet to be published.
- 4 Press Release, ‘Dr. Eric Schmidt Resigns from Apple’s Board of Directors’: [www.apple.com/pr/library/2009/08/03bod.html](http://www.apple.com/pr/library/2009/08/03bod.html).
- 5 ‘Google chief Eric Schmidt resigns from Apple board’, *The Times*, 3 August 2009: [http://business.timesonline.co.uk/tol/business/industry\\_sectors/technology/article6737484.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article6737484.ece).
- 6 Case COMP / 39.294.
- 7 Case COMP / 39.530.
- 8 *Ibid.*, see paragraph 58.
- 9 ‘Antitrust: Commission statement on Microsoft Internet Explorer announcement’, MEMO/09/272, Brussels 12 June 2009.
- 10 *Ibid.*
- 11 [www.microsoft.com/presspass/presskits/eu-msft/docs/07-24-09Commitment.doc](http://www.microsoft.com/presspass/presskits/eu-msft/docs/07-24-09Commitment.doc).
- 12 ‘Antitrust: Commission welcomes new Microsoft proposals on Microsoft Internet Explorer and Interoperability’, MEMO/09/352, Brussels 24 July 2009.
- 13 [www.bloomberg.com/apps/news?pid=newsarchive&sid=ay35nJkEoMio](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ay35nJkEoMio).

- 14 'T3 Technologies, Inc Files Formal Complaint against IBM with the European Commission for Violations of EU Antitrust Law – Accuses IBM of Illegal Tying and Other Anti-Competitive Actions', Press release, T3 Technologies, Inc.
- 15 Ibid.
- 16 See press release cited at footnote 3 above.
- 17 Ibid.
- 18 Guidance Paper at para 37.
- 19 [www.intel.com/pressroom/archive/releases/20090513corp.htm](http://www.intel.com/pressroom/archive/releases/20090513corp.htm). It should also be noted that news reports issued on 10 August 2009 state that the European Ombudsman has found that the Commission committed 'misadministration' of some of the evidence: [www.online.wsj.com/article/SB124967239079915187.html](http://www.online.wsj.com/article/SB124967239079915187.html). However, as of the date of writing this article, the report from the European Ombudsman and the Commission's decision remain confidential and as such, it is not possible to assess the impact of the findings of the European Ombudsman.
- 20 COMP/39.247, *Texas Instruments/Qualcomm*.
- 21 Market test notice: Notice published pursuant to article 27(4) of Council Regulation (EC) No. 1/2003 in Case COMP/C-3/38636 - Rambus, 2009/C 133/13.
- 22 Rambus Reaches Tentative Settlement with the European Commission, Press Release, June 2009: [www.rambus.com/us/news/press\\_releases/2009/090611.html](http://www.rambus.com/us/news/press_releases/2009/090611.html).
- 23 'Antitrust: Commission market tests commitments proposed by Rambus concerning memory chips', MEMO/09/273, Brussels, 12 June 2009.
- 24 Under article 17 of Regulation 1/2003.
- 25 Pharma Report at footnote 27.
- 26 Pharma Report, page 12.
- 27 'Antitrust: shortcomings in pharmaceutical sector require further action', Press Release, IP/09/1098, Brussels, 8 July 2009.
- 28 'Antitrust: Commission opens formal proceedings against Les Laboratoires Servier and a number of generic pharmaceutical companies', MEMO/09/322, Brussels, 8 July 2009.

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Recent transactions include representing Bain Capital in its acquisition of the Bath and Kitchen Business of American Standard and its acquisition of Brake Brothers; representing Daikin Industries with respect to the acquisition of OYL Industries Behard (two of the largest air conditioning manufacturers in the world); representing Syniverse Technologies Inc in relation to its acquisition of the data-clearing business of the BSG Group (a '3 to 2' merger cleared in phase II without conditions); representing CCMP Capital in its acquisition of the pump business of the Linde Group; representing Société de Mécanique in its sale to SKF (cleared in Phase II without conditions); representing KEMET Corporation in relation to its acquisition of the tantalum capacitors business of EPCOS AG and its acquisition of Arcotronics; representing Solutia Inc in its acquisition of the joint venture interest in Flexsys; representing Bain Capital in the club deal for the acquisition of the semiconductor business of Philips (now known as NXP); representing Madison Dearborn Partners in relation to its acquisition of VWR; interventions on behalf of third parties in a number of cases including *Nokia/NAVTEQ* and *Tom Tom/Tele Atlas*; and representing various third parties in current patent ambush and FRAND-related investigations before the European Commission.



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