



# Stanford – Vienna Transatlantic Technology Law Forum

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## Transatlantic Antitrust and IPR Developments

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# U.S. DEVELOPMENTS

## FTC settles complaint against Intel

On 4 August 2010 the U.S. Federal Trade Commission (“FTC”) [approved a settlement](#) with Intel Corp. on charges that the company violated Section 5 of the FTC Act by engaging in unfair methods of competition and deceptive acts and practices in commerce, including but not limited to exclusionary conduct subject to Section 2 of the Sherman Act. According to the FTC’s complaint, Intel unlawfully maintained its monopoly in the relevant Central Processing Unit (“CPU”) markets and attempted to acquire a monopoly in the relevant Graphics Processing Unit (“GPU”) markets as well as made deceptive disclosures regarding its compilers and the performance of CPUs (see [Newsletter 6/2009](#), p. 2).

The settlement, subject to a period of public comments before finalization, would remedy Intel’s alleged exclusionary, unfair and deceptive practices as follows:

- Intel would be prohibited from conditioning benefits to customers on them purchasing a certain share of CPUs, chipsets and/or GPUs from Intel or purchasing those products exclusively from Intel, or on a customer limiting, delaying or refusing its purchases from others than Intel. Intel would also be prohibited from threatening to retaliate against customers that do business with others than Intel, bundling CPUs with its chipsets at prices below Intel’s product cost, and offering lump sum payments for reaching a particular threshold of purchases from Intel.
- Intel would be required to modify its licensing agreements with AMD, Nvidia and Via so that the companies gain better assurances on using third party foundries for chip production and against Intel filing patent infringement suits in case they undergo a change of control. Intel would also be required to offer Via a five year extension to their cross-licensing agreement. These remedies would allow the companies to expand their output by contracting production with chip foundries and to become stronger rivals by partnering with third parties.
- Intel would be required to maintain an open PCI Express Bus Interface on its CPU platforms for six years and would be prohibited from limiting the graphics performance and General Purpose GPU functions of the bus. This would provide assurances to manufacturers of GPUs and other peripheral products that rely on the bus architecture and thereby maintain their incentives to innovate. In particular, this would allow the

continued development of General Purpose GPU as an alternative computing architecture.

- Intel would be prohibited from designing CPUs and GPUs that solely disadvantage the performance of competing or complementary products, that is, without demonstrated benefits to the Intel product in question. This would address allegations that Intel engaged in predatory design by cutting down access to its CPU and slowing down its competitors' connections to the CPU.
- Intel would be prohibited from disclosing inaccurate or misleading roadmaps and, a year after disclosing a roadmap, be required to respond to inquiries regarding potential roadmap changes. Intel would also be required to disclose to Nvidia which bus interfaces it will use. These remedies would address allegations that Intel misrepresented its roadmap especially Nvidia and would reduce uncertainty faced by manufacturers whose products interconnect with Intel's platform.
- Intel would be required to take steps to prevent misrepresentations concerning its compilers and libraries and to make certain disclosures regarding the reliability and relevance of certain performance benchmarks. These would address charges that Intel made deceptive disclosures regarding the relative performance of its CPUs.

The settlement achieves most of the remedies sought by the FTC in its complaint filed in December 2009. The settlement also extends beyond the recent decisions and settlements of antitrust cases involving Intel. The settlement, in particular, not only covers companies other than AMD which recently settled its antitrust suit with Intel but also addresses practices and products beyond the recent cases, such as the recent European Commission decision on exclusionary rebates and payments in the relevant CPU markets (see [Newsletter 3/2009](#), p. 4). [Juha Vesala]

### **U.S. Federal Circuit (en banc) finds no patent misuse in Princo**

On 20 August 2010 the U.S. Court of Appeals for the Federal Circuit (en banc, 8-2) found – in contrast to an earlier ruling by a panel of the Court – that an alleged agreement between Philips Corp. and Sony Corp. to suppress a technology which could have formed a basis for a competitor to their CD-R/RW standard could not amount to patent misuse (see [Newsletter 3/2009](#) p. 2 for background).

Following a review of Supreme Court case-law and the legislative history of provisions limiting the scope of patent misuse, the Federal Circuit considered that patent misuse requires 1) that the scope of the patent is sought to be expanded and 2) that an anti-competitive effect thereby results. Under these conditions the Federal Circuit held that the alleged

horizontal agreement between Philips and Sony could not constitute patent misuse because it did not extend the scope of the patent or otherwise leverage the patent.

The Federal Circuit considered that the alleged agreement also failed the second prong of the defense, as Princo, the party invoking patent misuse, had not established that the alleged agreement produced anti-competitive effects. The Court rejected arguments that a naked restraint of competition or a presumptively anti-competitive restraint was concerned, considering that the alleged agreement was ancillary to a joint venture to develop an industry standard and therefore subject to rule of reason analysis along with the joint venture. The Court further considered that Princo had not established that the alleged agreement between Philips and Sony had an effect of suppressing a competing technology. Instead, there was evidence before the U.S. International Trade Commission that the allegedly suppressed technology lacked both technical and commercial prospects for developing into a rival of the CD-R/RW standard in question.

In contrast, the concurring and dissenting opinions question whether it was necessary or appropriate to apply the patent misuse doctrine as narrowly as the majority did. [Juha Vesala]

### **U.S. Department of Justice and Federal Trade Commission issue revised Horizontal Merger Guidelines**

On 19 August 2010 the U.S. Department of Justice and Federal Trade Commission (“agencies”) [issued](#) revised [Horizontal Merger Guidelines](#) which outline how the agencies evaluate the likely competitive impact of mergers and their compliance with U.S. antitrust laws (for background see [Newsletter 5/2009](#) p. 4).

Among other more general changes, the Guidelines now address more extensively the unilateral effects of mergers on innovation. According to the Guidelines, the agencies may consider whether a merged firm would be encouraged to reduce its efforts in existing product development or to reduce incentives to initiate the development of new products. The former effect is most likely when new products in development would capture substantial revenue from the other merging firm, whereas the second effect is most likely if one of the merging firms has the capability to develop new products that would capture substantial revenues from the other merging firm. The agencies therefore consider whether innovation competition will be diminished by the combination of two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Guidelines also extend the discussion on innovation related efficiency benefits of mergers. In considering the effects of a merger, the agencies

consider whether a merger allows the merged firm to conduct research and development more effectively, for instance, by bringing together complementary capabilities. The agencies also consider whether the merged firm is able to appropriate a greater fraction of the benefits from innovation, taking into account especially how the licensing and intellectual property conditions affect the appropriation conditions. The Guidelines note, though, that R&D efficiencies, while potentially substantial, are generally less susceptible to verification than some other types of efficiencies. Further, cost savings from research and development can result from anti-competitive reductions in innovative activities. [Juha Vesala]

### **Attorney General of Connecticut investigating agreements on e-books**

On 2 August 2010 the Attorney General of Connecticut [announced](#) an investigation into agreements between e-book publishers and sellers that may encourage coordinated pricing and prevent discounting of e-books.

In particular, so-called “most favored nation” provisions in agreements between sellers of e-books such as Amazon and Apple and publishers such as Macmillan, Simon & Schuster, Hachette, HarperCollins and Penguin may deter publishers from offering discounts to Amazon and Apple’s competitors as any lowered prices would have to be offered also to Amazon and Apple. Coupled with the switch from a wholesale pricing model to an “agency model” (in which publishers instead of the sellers set the prices), the Attorney General raised concerns about the agreements achieving or maintaining uniform prices for e-books. In fact, a preliminary review by the Attorney General’s office showed that the prices of Amazon, Apple, Borders and Barnes and Noble for certain e-book bestsellers were identical. [Juha Vesala]

### **U.S. In brief**

- FTC prepared [statement](#) before U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts and Competition Policy (27 July 2010)
- FTC files [amicus brief](#) in TiVo v. Echostar on standards for contempt of a previously granted injunction against patent infringement (2 August 2010)
- U.S. senators' (Wisconsin and Minnesota) [letter](#) to U.S. Department of Justice regarding investigation into Monsanto’s conduct in patented seeds (9 August 2010)

# EU DEVELOPMENTS

## ECJ upholds European Commission decision against AstraZeneca

On 1 July 2010, the European Union's General Court (or "GC", formerly the Court of First Instance) handed down its [judgment](#) against the AstraZeneca Group ("AZ") for having abused its dominant position by preventing the market entry or the parallel imports of generic medicinal products competing with Losec, its anti-ulcer product. While the GC substantially upheld the European Commission's decision, however it reduced AZ's fine from Euro 60 million to Euro 52.5 million, because, according to the GC, the Commission failed to prove restriction of parallel imports in two of the three countries concerned.

In its [press release](#), the Commission stressed that the significance of this judgment goes beyond its decision against AZ (the first abuse of dominance case in the pharmaceutical sector), as it will also have a bearing at least in the follow-up to the Commission's final report on its competition inquiry into the pharmaceutical sector. Currently, there are two ongoing Commission investigations with respect to patent settlements against Les Laboratoires Servier (see [Newsletter 4/2009 p. 7](#)) and [Lundbeck](#).

In fact, the judgment establishes that the misuse of regulatory procedures, including the patent system, which has the effect of blocking or delaying entry to the market of cheaper medicines, mainly by creating hurdles for generic products beyond the period of protection granted by the legislator, may constitute an abuse under Article 102 of the TFEU. In this respect, the GC found that AZ made misleading representations to the national patent offices, notably by adopting "*a consistent and linear course of conduct, characterized by the communication to the patent offices of misleading representations for the purposes of obtaining the issue of Supplementary Patent Protection Certificates to which it was not entitled, or to which it was entitled for a shorter period.*"

As to the second abuse, the GC confirmed that while pharmaceutical companies are normally entitled to request the deregistration of marketing authorizations for their products, the goal AZ wanted to achieve with the deregistration of market authorizations for Losec in selected countries (Sweden, Denmark and Norway) was to exclude competition from generic firms and parallel traders. (See also the ongoing investigation by the UK Office of Fair Trading investigation into Reckitt Benckiser in [Newsletter 2/2010 p. 12.](#))

The Court ruled that the purpose of a market authorization is to confer the right to market a pharmaceutical product and not to exclude competitors

from the market. AZ's deregistration of the Losec capsule's marketing authorizations had the effect of preventing the use of that simplified procedure and thus of making the acquisition of marketing authorizations for generic medicinal products more time-consuming and more difficult, thereby delaying their marketing. Yet, the GC held that the Commission failed to prove that the deregistrations of the marketing authorizations were capable of preventing parallel imports of Losec in Denmark and Norway. As a result, the GC reduced the fine imposed on AZ. [Gabriele Accardo]

### **European Commission report shows decrease of potentially problematic patent settlements**

On 5 July 2010, the Commission [published](#) its second [report](#) on the monitoring of patent settlements in the pharmaceutical sector.

The report shows that the number of patent settlements that may fall afoul the EU antitrust rules decreased to 10% of total patent settlements in the sector in the period July 2008 to December 2009 compared with 22% in the previous period. The report further shows a substantial decrease in the value transferred in such settlements between pharmaceutical companies (so-called "originators") and producers of generic products. According to the Commission, this may suggest an increased awareness of the industry of which settlements might attract the watchdog interest, but other factors may have had an impact on such results (e.g. cyclical patent expiry and fluctuations in the amount of litigation).

Normally, patent settlements that may limit generic entry and entail a substantial value transfer from the originator to a generic company are seen as potentially problematic. The report clarifies that, in this context, transfer of value is not limited to a direct monetary transfer but may take other forms (e.g. distribution agreements relating to a different product manufactured by the originator company or granting a license enabling the generic company to enter the market). However, even settlements which foresee no value transfer may be problematic in exceptional circumstances, e.g. settlements outside the exclusionary zone of the patents and/or the settlement agreements on a patent for which the patent holder knows that it does not meet the patentability criteria. [Gabriele Accardo]

### **European Commission investigates IBM's conduct on the mainframe market**

On 26 July 2010, the European Commission issued a [press release](#) stating that IBM is subject to a formal investigation for two alleged abuses

of its dominant position on the market for mainframe computers in breach of Article 102 TFEU.

The first investigation concerns alleged illegal tying of IBM's mainframe hardware products to its dominant mainframe operating system. T3 and Turbo Hercules, two emulator software vendors, have complained with the European Commission that IBM's tying would keep emulating technology out of the mainframe market, ultimately preventing consumers from using certain applications on non-IBM hardware.

The other investigation, which the Commission started on its own initiative, focuses on IBM's alleged discriminatory behavior aimed at foreclosing the market for maintenance services, by restricting or delaying access to spare parts for which IBM is the only source. [Gabriele Accardo]

### **Google under investigation in France for alleged abuse in the online advertising market**

On 30 June 2010, the French Competition Authority ("FCA") issued an [interim decision](#) opening an investigation to ascertain whether Google abused its dominant position, as well as Navx's state of economic dependence, by terminating its AdWords contract and refusing to display Navx's advertisements. Pending the full investigation, the FCA also ordered Google to implement in an objective, transparent and non-discriminatory manner the content policy of its AdWords service. On 13 July 2010, in order to address the competition concerns raised by the FCA and to close the dispute, Google offered certain [commitments](#).

The case was prompted by a complaint filed by Navx, a content provider for mapping services for GPS navigation devices (online databases showing the location of speed cameras, fuel prices and restaurants). Navx heavily relied on Google's AdWords advertising services (accounting for 85% of its advertising expenses), which is Navx's preferred sales channel (customers can reach directly the commercial website and buy the product in a few minutes).

Navx complained that Google was illegally blocking its adverts of speed cameras databases (AdWords' general conditions were lacking objectivity and transparency as regards the possibility for manufacturers of speed camera databases to advertise), and that, partly because of the lack of clarity and objectivity of its AdWords policy, Google behavior resulted in a discriminatory treatment between suppliers of such databases (e.g. GPS manufacturers, like TomTom and Garmin, could continue to promote the supply of such databases on their websites without being excluded from the AdWords service).

While Google had originally stated that its terms and conditions did not authorize adverts that encourage illegal practices, such as sale of services aimed at evading road traffic speed cameras, it then offered the following [commitments](#) applicable to its AdWords services in France:

- Clarify whether its policy conditions apply to speed camera warning systems and speed camera databases;
- Clarify whether the ban concerns only the use of keywords and the advertising of products in the text of the announcement or on the page accessible via the commercial link, or if it also concerns further pages accessible from the latter;
- Publish all the changes in the conditions concerning speed camera warning systems and speed camera databases in a new “log history page” in the AdWords blog;
- Clarify that the violation of AdWords policy concerning speed camera warning systems and speed camera databases may lead to the refusal of displaying the advertisement, the suspension of the account and/or the prevention of opening new accounts.

Interested third parties may submit comments on the above commitments before 13 September 2010. The FCA may then decide whether such commitments are sufficient to address the competition concerns it has raised and make them binding on Google. [Gabriele Accardo]

### **Google acquitted in French trademark dispute**

On 13 July 2010, the [French Cour de Cassation](#) (French Court of Cassation) quashed a ruling of the Court of Appeal in Paris which held that Google breached trademark rules by allowing advertisers to use terms similar to those owned by brand-owners such as LVMH when advertising counterfeit goods through AdWords via its search engine’s website

The French Court of Cassation judgment, which was partially based on a preliminary (i.e. interpretative) ruling by the European Court of Justice (see [Newsletter 2/2010 p. 7](#)), held that Google has not infringed trade-mark law by allowing advertisers to bid for keywords corresponding to their competitors’ trademarks.

The Court of Appeal in Paris will have to rule again on the merits of the case. [Gabriele Accardo]

## EU In brief

- European Commission issues [Statement of Objections](#) to Servier for providing misleading and incorrect information in reply to a request for information in the context of the pharmaceutical competition sector inquiry (26 July 2010)
- Competition Commissioner Almunia's speech "[Competition in Digital Media and the Internet](#)" (7 July 2010)

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.