

## Recent Developments in EU Competition Law

August, 2011

The following is a summary of key developments in EU Competition Law from the last year.

### Exploitative Abuses of a Dominant Position

Although the application of Article 102 the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of a dominant position, has been concerned mainly with exclusionary abuses, two recent cases—concerning Qualcomm and Rambus—appear to indicate that the European Commission is shifting its focus from exclusionary abuses to exploitative abuses.

#### *Qualcomm*

In 2006, following a complaint filed by six mobile phone manufacturers, the Commission opened formal proceedings against Qualcomm, concerning allegedly abusive royalties Qualcomm was said to have charged in breach of its fair, reasonable, and non-discriminatory (FRAND) commitments. However, as a result of a settlement between Nokia and Qualcomm, all the complainants withdrew their complaints and the Commission closed the proceedings without issuing a Statement of Objections. As a result, the Commission's views on excessive prices in breach of a FRAND commitment remained unknown.

Qualcomm was a holder of essential patents in the code division multiple access (CDMA) and wideband code division multiple access (WCDMA) standards. It was dominant in an upstream CDMA technology market and in a downstream market for CDMA mobile phone chipsets with high market shares. At the time of the complaint, Qualcomm had a limited market share in both an upstream WCDMA market and a downstream WCDMA market.

The complainants argued that by leveraging its market power over CDMA technology, Qualcomm licensed its WCDMA patents together with its CDMA portfolio at CDMA rates, which were not in proportion to the value of Qualcomm's patents for WCDMA. In particular:

- Qualcomm had far fewer patents considered to be essential in WCDMA standards (not more than approximately 20 per cent) than in CDMA standards (around 80 per cent).
- Other businesses that had approximately 20-25 per cent of the patents considered essential for WCDMA standards were charging lower royalties (approx. 1 to 1.8 per cent).
- In China, Qualcomm was charging lower royalties (2.65 per cent) than in Europe.

The complainants found that Qualcomm was charging unfair and excessive royalties in breach of the FRAND commitments it made to standards setting organisations (SSOs).

Qualcomm countered that the standardisation did not put Qualcomm in a dominant position because it was subject to a series of competitive constraints. The competitive constraints included competition between rival standards and potential punishment in future standardisation processes. Qualcomm also pointed out the Commission's inappropriateness and inability to act as a price regulator.

*Key Point to Note*

The Horizontal Guidelines, published in January 2011, provide us with some insight into this issue of standards-related excessive prices, but uncertainty remains as to the application of competition law in these types of cases.

*Rambus*

Rambus was alleged to have engaged in "patent ambush", which is another type of exploitative abuse in a standard-setting process. In a standard set by the Solid State Technology Association, formerly known as the Joint Electron Devices Engineering Council (JEDEC), Rambus intentionally hid the existence of the patents and patent applications that it later claimed were relevant to the adopted standard and subsequently claimed unreasonable royalties for.

In its Statement of Objections sent to Rambus in 2007, the Commission took the preliminary view that this conduct constituted an abuse of a dominant position as Rambus deliberately frustrated the legitimate expectations of the other participants in the standard-setting process and undermined confidence in it.

This case concluded with the adoption of a commitments decision under which the commitments offered by Rambus were rendered legally binding. Rambus committed itself, among other things, to put a worldwide cap of five years on its royalty rates for products compliant with the JEDEC standards and set a maximum royalty rate of 1.5 per cent for the later generations of JEDEC dynamic random-access memory standards.

*Key Point to Note*

The Commission rightly removed a breach of a private rule and abusive conduct, which can amount to a breach of Article 102 TFEU. In its decision on commitments, the Commission clarified that "an actual breach of the precise rules of a standard-setting body would not be a necessary requirement for a finding of abuse".

## Parent Companies Liable For Subsidiaries' Conduct

In Europe, a parent company is held liable for infringements of competition law committed by its wholly-owned subsidiaries when they are considered a single economic unit and an “undertaking” under EU competition law. Where a parent company exercises decisive influence over the commercial policy of its subsidiary, the parent and the subsidiary are deemed to form a single economic unit. In respect of wholly-owned subsidiaries, *AKZO Chemie BV v Commission of the European Communities* established a presumption that the parent company exercises decisive influence over the conduct of the subsidiary, making it unnecessary for the Commission to show the actual exercise of influence.

Although the Commission and the courts repeated that the presumption was rebuttable, concern has grown that it may be de facto irrebuttable since it had never been rebutted. However, in July 2010, in *L’Air Liquide v Commission* and in *Edison v Commission*, parent companies finally escaped the presumption of liability. The General Court annulled the Commission’s decision in both cases as the Commission had failed to take detailed positions on the evidence and counter-arguments adduced in order to rebut the presumption. The General Court also shed some light on the arguments that might succeed in the future.

In another judgment handed down on the same day, the General Court also annulled the Commission’s decision in *Gosselin Group and Stichting dministratiekantoor Portielje v Commission*, finding that Portielje was not even an “undertaking” and was not therefore capable of exercising decisive influence.

These two cases appear to suggest that the Courts will scrutinise the Commission’s analyses more carefully when they impute liability to parent companies.

On another occasion, the General Court also carefully analysed the Commission’s reasoning behind catching repeat offenders by applying the concept of an “undertaking”. In *Eni SpA v Commission and ThyssenKrupp et al. v Commission*, the Court cautioned that the Commission must produce enough detailed and specific evidence in order to demonstrate that the addressee of the contested decision had repeated an infringement. The Court reduced the fines imposed on the companies concerned.

### *Key Point to Note*

Although the Commission is still entitled to use the presumption, it will be required to analyse the corporate structure and any other elements related to decisive influence more closely.

## Exchange of Information Between Competition Authorities

The multi-jurisdictional effects of anti-competitive conduct and mergers has necessitated global co-operation amongst competition authorities, mainly to avoid divergent outcomes and jurisdictional conflicts.

With regard to an exchange of information, explicit provisions are included in bilateral co-operation agreements that have undoubtedly contributed to case resolution. For instance, in an investigation relating to heat stabilisers and impact modifiers, surprise inspections were carried out simultaneously by the European Commission, the US Department of Justice, the Japan Fair Trade Commission and the Canadian Competition Bureau.

However, the exchange of confidential information is not permitted under co-operation agreements unless the companies under investigation grant waivers. The investigation into fine art auction houses is a rare case where the parties did grant waivers. In this instance, even the transcripts of the cross-examinations at the US Court proceedings were transmitted.

Although the Commission encourages exchange of confidential information among competition authorities for the purpose of more effective enforcement, it is opposed to disclosure of its investigation files under the US discovery rules. It considers that this would undermine the effectiveness of the leniency programme. US courts appear to agree with the Commission.

### *Key Point to Note*

In respect of access to Commission files in EU Member States, the Court of Justice of the European Union (CJEU) ruled that “[i]t is...for Member States to establish and apply national rules on the right of access...to documents relating to leniency procedures”. This may lead to different standards of disclosure in different Member States, eventually impeding the exchange of information between the Commission and the national competition authorities.

## Akzo Nobel and Legal Professional Privilege

In an investigation at Akzo’s premises, carried out in 2003, Commission officials seized documents, including emails, exchanged between Akzo’s coordinator for competition law (who is a member of the Netherlands Bar) and the General Manager of Akcros, which is a joint venture partner of Akzo. Claiming that the emails were subject to legal professional privilege, Akzo requested the return of the documents, but the Commission rejected and the General Court supported the Commission’s decision. Akzo appealed to the CJEU.

In September 2010, the CJEU ruled that internal company communications with in-house lawyers are not covered by legal professional privilege, on the ground that an in-house lawyer does not enjoy a level of professional independence comparable to that of an external lawyer. Consequently, EU law recognises only legal professional privilege for legal advice given by external EU-qualified lawyers.

*Key Point to Note*

This decision is restricted to Commission investigations. Where investigations are undertaken by national competition authorities, national privilege rules will continue to apply. However, it leaves uncertainty as to the use of EU documents in national proceedings and as to disclosure of documents in the European Union that are privileged in the United States.

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