

EU: antitrust and merger review within the IT sector

Antitrust issues in the IT industry are high on the European Commission's agenda. In a world dominated by technology, the Commission continues to play an active role in maintaining the innovative freedom of the IT markets and is particularly concerned with entry barriers, interoperability and industry standards. Susanne Zuehlke and Tomas Nilsson, of Latham & Watkins in Brussels, examine recent developments in antitrust and discuss mergers within the IT sector.

Antitrust

The IT industry has attracted some of the most headline grabbing antitrust investigations of the last 20 years. This trend is continuing with the Commission's probe into Google's conduct in online search and into the alleged strategic use of standard essential patents by various companies in the mobile industry engaged in what is commonly referred to as the mobile patent wars.

Google's online search

The Commission opened antitrust proceedings against Google in November 2010 to investigate whether the company abuses a dominant position in online search. The alleged abusive conduct involves delisting or lowering the ranking of unpaid search results of services that compete with Google in providing specific online content and giving its own services preferential placement in search results. The investigation furthermore focuses on certain alleged exclusionary practices such as imposing exclusivity

obligations on advertising partners that prevent them from placing competing ads on their web sites. Finally, the Commission is investigating suspected restrictions on the portability of online advertising campaign data to competing online advertising platforms¹.

After investigating Google's practices for more than one and half years the Commission recently invited the company to offer remedies to settle the probe. One of the challenges of course is to find a remedy that satisfies the many different complainants, which include Microsoft, price comparison sites Foundem, Ciao and Twenga, mapping firms Euro-Cities and Streetmaps, the French legal search engine ejustice.fr, travel sites Expedia, Tripadvisor and online travel group Odigeo, and newspaper publishers in Germany and Spain. The Commission has nonetheless made it clear to Google that it will face antitrust charges unless it volunteers a suitable remedy. Reports suggest that Google has submitted certain proposals to the Commission², although the details have not been made public at the time of publication.

Strategic use of standard essential patents

Abuses concerning standard essential patents are a recurrent hot topic in EU competition law. The Commission has recently opened antitrust proceedings against Samsung and Motorola Mobility ('Motorola') to investigate whether they have distorted competition in European mobile device markets by using certain standard essential patents in a manner contrary to commitments given to standard setting organisations, including the European Telecommunications Standards Institute ('ETSI').

In 2011, Samsung sought

injunctions in various Member States against competing smartphone and tablet makers based on alleged infringements of its patents implemented in the European 3G mobile and wireless communications system standards. The Commission is investigating whether these enforcement actions are contrary to the irrevocable commitments Samsung gave in 1998 to the ETSI to license any standard essential patents relating to the European 3G standards on fair, reasonable and non-discriminatory ('FRAND') terms and whether this constitutes an abuse of a dominant position prohibited by Article 102 TFEU³.

Motorola is being investigated for similar conduct following complaints by Apple and Microsoft. The investigation is focusing on whether Motorola by seeking and enforcing injunctions against products such as the iPhone, iPad, Windows and Xbox has failed to honor its irrevocable commitments made to standard setting organisations to license its standard essential patents on FRAND terms. Motorola gave such FRAND commitments when the standards for 2G and 3G mobile and wireless telecommunications system, H.264 video compression and wireless local area network technologies were adopted. The Commission will assess whether Motorola's conduct amounts to an abuse of a dominant position⁴.

Competition Commissioner Joaquin Almunia has declared that the Commission remains "determined to use antitrust enforcement to prevent the misuse of patent rights to the detriment of a vigorous and accessible market"⁵. Although owners of standard essential patents may have legitimate reasons to seek and enforce an injunction, there may be instances where enforcement leads to severe anticompetitive

effects. For example, as raised in the Rambus case, claiming unreasonable royalties for essential patents after a 'patent ambush' - a situation where a patent owner intentionally conceals the existence of its patent during the standardisation procedure until its patented technology is implemented in the standard - might be considered an abuse of a dominant position⁶. The investigations against Samsung and Motorola are ongoing so it remains to be seen whether the Commission decides to take any action against the companies.

Mergers

The Commission has in the recent term unconditionally cleared two high-profile mergers in the IT sector involving some interesting horizontal, vertical and conglomerate relationships, namely, Microsoft's acquisition of Skype and Google's acquisition of Motorola Mobility.

Microsoft/Skype

In Microsoft/Skype the Commission focused its review on the horizontal overlaps between the parties as competitors in communication services and the conglomerate effects resulting from the complementary nature of Microsoft's and Skype's products⁷.

The Commission quickly discharged horizontal concerns in consumer communication services where Microsoft's Windows Live Messenger competes with Skype despite high combined market shares on some segments, such as in video call services on Windows-based PCs where the combined EEA share amounts to 80-90%⁸. Several factors led the Commission to conclude that the transaction did not raise horizontal concerns, including the dynamic nature of the markets, the ease of entry and alternative communication services

A number of conglomerate concerns were expressed by third parties during the Commission's market testing. Conglomerate concerns may arise in mergers between companies that are active in closely related markets where the relationship is neither purely horizontal nor vertical

available to consumers such as those provided by Google, Facebook, Yahoo!, AOL and ICQ⁹. It also noted that if Microsoft started charging for the services or reduced innovation, consumers would switch to another service. Similarly the Commission also discharged horizontal concerns in the market for enterprise communication services where Microsoft's Lync competes with Skype, primarily because Skype was not seen as a real competitive force in the enterprise market¹⁰.

A number of conglomerate concerns were expressed by third parties during the Commission's market testing. Conglomerate concerns may arise in mergers between companies that are active in closely related markets where the relationship is neither purely horizontal (as competitors in the same market) nor vertical (as supplier and customer). Such concerns normally only arise if the combined entity has the ability and incentive to leverage a strong market position from one market to another by tying, bundling, full-range forcing or other similar exclusionary practices. The concerns raised in consumer communication services included the potential ability of Microsoft to degrade the interoperability of Windows with competing consumer communication services or Skype's interoperability with competing operating systems ('OSs'), integrating Skype with Windows or Office, as well as potentially tying or bundling Skype with Windows or Office¹¹. The Commission acknowledged that Microsoft has the ability to engage in all these practices but concluded that its incentives to do so are unlikely. The Commission considered that the value of Skype lies in its large active user base and to maintain this Microsoft has to continue ensuring interoperability

with other platforms. It considered that any tying and bundling would also jeopardise Skype's customer base, especially in light of alternatives available to consumers¹². In any case, the Commission concluded that the effects from any foreclosure strategy would at most be minimal *inter alia* because Skype already operates as a closed system, is already pre-installed on a significant number of PCs and there is an increasing trend among consumers to use smartphones and tablets instead of PCs¹³.

Conglomerate concerns in the enterprise communication service markets were also dismissed because Skype was not deemed to be a real competitive force in this market and any tying or bundling with Windows, Office or Outlook would therefore have little effect¹⁴.

Following the Commission's decision to unconditionally clear Microsoft/Skype, Cisco Systems and MessagenNet appealed the decision. Both these companies are competitors of Microsoft in enterprise communication services and claim that the Commission committed a manifest error in assessment of the horizontal and conglomerate effects of the merger as well as failing to state sufficient reasons to justify the approval¹⁵. The appeal is currently pending before the EU General Court and it remains to be seen if the Court finds that the Commission has met its burden of proof for approving the merger.

Google/Motorola Mobility

In Google/Motorola Mobility the Commission primarily focused its review on potential foreclosure concerns relating to the Android mobile OS and standard essential patents as a key input into smart mobile devices¹⁶. The Commission also noted that the transaction gave rise to certain conglomerate

relationships between smart mobile devices and related IP rights, and Google's mobile online services.

Android is the leading mobile OS with a projected EEA share of 40-50% for 2012 and a share of 70-80% if only considering OSs available for licensing¹⁷. Third parties suggested that Google could favour Motorola's business post-transaction by foreclosing or degrading access of other original equipment manufacturers ('OEM's') to the Android mobile OS and ecosystem. Google could allegedly do this in various ways, such as abandoning its practice of choosing a lead manufacturer for each version of Android based on performance, interfering with the approval process of other OEMs using Android and hindering innovation by setting certain compatibility requirements¹⁸. Acknowledging that these methods could be used to favour a specific OEM, the Commission noted that none of them are merger specific. Google's possibilities to favour one OEM over another do not change as a result of the merger¹⁹. The Commission furthermore found it unlikely that Google would have an incentive to benefit Motorola's smart mobile devices by restricting third party access to Android. On the contrary, the Commission considered that Google has strong incentives to favour its more successful higher-margin Android business instead of Motorola's device business²⁰. Favouring Motorola over other device OEMs would also risk jeopardising Google's mobile search and advertising revenues. The Commission further noted that any foreclosure would likely only affect smaller players. Of the smaller players using Android, 60-70% are also using other mobile OSs and so have another option²¹.

In explaining its rationale for the

acquisition of Motorola, Google stated that Motorola's patent portfolio would enable it to better protect the Android ecosystem from "vexatious patent litigation"²². Third parties nonetheless raised concerns that Google would strategically use the acquired standard essential patents to seek or enforce injunctions against good faith competitors in order to gain more onerous licensing terms or cross-licenses. The Commission discharged these concerns and found it unlikely that Google would have the incentives to act in such a manner and noted that it would be contrary to a pledge Google made to standard setting organisations to engage in FRAND licensing and good faith negotiations. This pledge was characterised by Google as 'irrevocable' and 'legally binding' and therefore deemed reliable. The Commission noted that Google was restrained by the threat of antitrust enforcement and counter suits for patent infringement and that there was nothing in Google's internal documents that suggested it would use the patents to impede competition²³.

Although Google/Motorola was cleared unconditionally by the EU and US authorities, Google had to offer commitments to appease the Chinese Authorities. These commitments include keeping the Android platform free and open-source, treating all OEMs in a non-discriminatory manner and honoring Motorola's existing commitment to license its patents on FRAND terms²⁴. This divergence on the need for commitments shows that authorities in other parts of the world may take different views on competition in technology markets. Competition authorities are facing more mergers in technology markets and there has been a surge of patent-driven

transactions lately. For example, Apple, Microsoft and RIM jointly paid US\$4.5 billion to acquire thousands of patents from Nortel Networks during the company's bankruptcy proceedings. Microsoft also recently agreed to buy more than 800 patents from AOL for US\$1.06 billion and in turn agreed to sell about two-thirds of these patents for US\$550 million to Facebook. Many more are sure to follow with patents becoming more important to compete in various evolving technology markets.

Susanne Zuehlke Partner
Tomas Nilsson Associate
Latham & Watkins, Brussels
Susanne.Zuehlke@lw.com
Tomas.Nilsson@lw.com

1. Commission Press Release, 30 Nov 2010.
2. Foo Yun Chee, Reuters, 2 July 2012, Google offers to settle EU antitrust probe.
3. Commission Press Release, 31 Jan 2012.
4. Commission Press Release, 3 April 2012.
5. Joaquín Almunia Vice President of the European Commission responsible for Competition, Industrial and Competition policy: *Quo vadis Europa? New Frontiers of Antitrust 2012* - Revue Concurrences Paris, 10 Feb 2012 (SPEECH/12/83).
6. See e.g. Commission Decision of 9 Dec 2009 in Case COMP/38.636 - Rambus, OJ 2010 C 30/17, recitals 27-28.
7. Commission Decision of 7 Oct 2011, COMP/M.6281 - Microsoft/Skype, OJ C 341, 22.11.2011, p. 2.
8. Ibid. recitals 109 and 132.
9. Ibid. recitals 103-131.
10. Ibid. recitals 187 and 194.
11. Ibid. recitals 135-138.
12. Ibid. recitals 143-158.
13. Ibid. recitals 160-163.
14. Ibid. recital 203.
15. Case T-79/12 Cisco Systems and Messagenet v Commission, Action brought on 15 Feb 2012 (OJ 2012, C109, p. 62).
16. Commission Decision of 13 2012, COMP/M.6381 - Google/Motorola Mobility, not yet reported, recital 63.
17. Ibid. recital 76.
18. Ibid. recital 81.
19. Ibid. recital 85.
20. Ibid. recital 92.
21. Ibid. recital 98.
22. Ibid. recital 86.
23. Ibid. recital 128.
24. Jessica Hua Su, China's Ministry of Commerce Conditionally Clears the Google/Motorola Mobility Deal, Kluwer Competition Law Blog 19 May 2012.