

Coty, Hoffmann-La Roche II, EAEPC, Commission SEP Communication and others: A Survey of Developments at the Intersection between Competition Law and IP Law in the Past Year

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Key Points

- Significant preliminary rulings on issues of concern for IP owners, including distribution of luxury branded goods, patent licensing and price discrimination, were given this year by the CJEU (Coty Germany; Hoffmann-La Roche; MEO).
- The European Commission published an important Communication on Standard Essential Patents; two of its decisions to reject complaints were upheld by the European Courts (Agria Polska in the CJEU and GSK/EAEPC in the General Court).
- The Commission took a decision on the IP-rich merger between Qualcomm and NXP

This Survey reviews EU competition law developments involving or relevant to intellectual property ('IP') rights in the year to October 2018.

The Survey covers: (i) Commission Communication on Standard Essential Patents; (ii) judgment of the Court of Justice ('CJEU') on selective distribution of luxury brands (*Coty Germany*); (iii) CJEU judgment on conduct under a pharmaceutical licence (*Hoffmann-La Roche II)*; (iv) CJEU judgment on price discrimination under Article 102 of the Treaty on the Functioning of the EU ('TFEU') (*MEO*); (v) CJEU judgment upholding rejection of complaint alleging vexatious use of regulatory procedures (*Agria Polska*); (vi) General Court judgment upholding the Commission's rejection of request to reopen pharma dual pricing complaint (*EAEPC*); and (vii) Commission merger decision on transaction combining patent portfolios (*Qualcomm/NXP*).

1. EUROPEAN COMMISSION COMMUNICATION ON STANDARD ESSENTIAL PATENTS

On 29 November 2017, the European Commission released a Communication: 'Setting out the EU approach to Standard Essential Patents'.[1] The Communication formed part of a 'package'[2] of documents relating to the

1 Commission Communication, '*Setting out the EU approach to Standard Essential Patents*' COM(2017) 712 final (the 'Communication').

2 See Commission press release IP/17/4942: '*Intellectual property: Protecting Europe's know-how and innovation leadership*', 29 November 2017.

protection of IP, which also included guidance clarifying the application of the Intellectual Property Rights Enforcement Directive ('IPRED').[3]

Although not binding on the Commission (or any court) when applying Articles 101 and 102, the Communication is a useful indication of the Commission's current position on the licensing of standard essential patents ('SEPs').

A. Background

The Communication is intended to address some of the uncertainties in SEP licensing left unresolved following the judgment of the Court of Justice in *Huawei v ZTE*.[4] It is written in the context of imminent roll-out of 5G standards across Europe; smooth adoption of the technologies is considered vital to the EU economy.

Huawei v ZTE was a preliminary ruling arising out of patent litigation in Germany, where Huawei had enforced SEPs reading onto mobile telephony standards in relation to which it had (like most other owners of SEPs for the relevant standards) entered into a commitment to license its patents on fair, reasonable and non-discriminatory ('FRAND') terms.[5] The judgment applied Article 102 TFEU to Huawei's seeking of an injunction for infringement of those SEPs. In its judgment, the Court set out a framework for SEP licensing negotiations with steps to be followed by SEP holders and implementers (ie, those using patents in products) wishing to ensure that their conduct was compliant with their FRAND obligations and competition law.

However, considerable lack of clarity remained over matters such as how the steps should be applied in a portfolio cross-licensing context and what kind of methodologies are acceptable in valuing a FRAND royalty.

B. What does the Communication cover?

i) FRAND licensing

Section 2 of the Communication addresses the central topic of FRAND licensing principles. Consistently with the CJEU in *Huawei v ZTE*,[6] the Commission seeks to adopt an approach which ensures a balance between the interests of patentees and of implementers of standard essential technology. To that end, it notes that both parties must be willing to conduct FRAND negotiations in good faith.

The CJEU did not address how to value a FRAND royalty in *Huawei v ZTE*. The Communication states that FRAND licensing terms must '*bear a clear relationship to the economic value of the patented technology*'; '*in principle'*, FRAND values should not include value attributable to the inclusion of the technology in the standard.[7] This is in line with previous statements in the Commission's Horizontal Guidelines, which endorsed an '*ex ante*' approach to valuation of SEPs, recommending assessment 'in a competitive environment before the industry has been locked into the standard'.[8] The Communication acknowledges that *ex ante* valuation may be difficult, in particular where '*technology is developed mainly for the standard and has little market value outside [of it]*'.[9] In such cases, an alternative approach may be needed.

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3 Directive 2004/48 EC.

4 Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp,* EU:C:2015:477 ('*Huawei v ZTE*').

5 *Huawei v ZTE* concerned the ETSI IPR Policy; requirements of other standards bodies may not be identical.

6 *Huawei v ZTE*, 12, 42 and 55.

7 Communication, section 2.1.

8 Commission Guidelines on the applicability of Article 101 TFEU to horizontal Cooperation Agreements, OJ [2011] C11/01, para. 289.

9 Communication, section 2.1.

In other respects, the Communication is more prescriptive: for example, it states that parties 'need to' take into account a reasonable aggregate rate for a standard.[10] This suggests that a 'top-down' calculation (ie, valuation of a given portfolio of SEPs based on its share of total royalties payable in respect of all SEPs applicable to the standard) should be used at least as a cross-check on the royalties to be charged under the licence (as in the *Unwired Planet* judgment).[11] However, the Communication does not address the difficult question of the level of the total aggregate royalty.

FRAND should be assessed on the basis of 'net value added', suggesting a contextual valuation is required, which may change over time. Similarly, the Commission considers that there is 'no one-size-fits-all solution' to FRAND: what can be considered fair and reasonable differs from sector to sector and over time.[12] This approach legitimizes use-based licensing, which is likely to be an important business model in future standards, where the same technologies may be included in a wide variety of products (eg, the 'Internet of Things').

SEP holders cannot discriminate between implementers that are 'similarly situated'.[13] The Communication refers in this context to the 2017 judgment of the English High Court in *Unwired Planet v. Huawei*, which involved the determination of FRAND licensing terms.[14] However, it is unclear whether it endorses other aspects of the approach to non-discrimination in that case. In holding that a SEP holder can discharge its obligations by offering a fair and reasonable benchmark rate to any licensee, the English Court found that the 'ND' aspect of FRAND will not be engaged unless there is actual competitive harm.[15] This approach arguably diverges from the normal competition law standard of 'capability for harm',[16] and is certainly not a strict 'regulatory'-type of standard such as may have been the original intention of those drafting the ETSI IPR Policy.

A number of the valuation principles mentioned by the Commission may seem to favour lower royalty rates. However, perhaps mindful of the significant role that European companies and standards development organisations have played in developing global standards, the Communication notes that any valuation of FRAND-encumbered patents must '*ensure continued incentives for SEP holders to contribute their best available technology to standards*'.[17]

As well as valuation concerns, this section of the Communication addresses the geographic scope of a FRAND licence, noting that for products with a global circulation, a worldwide licence can be FRAND. By contrast, a country-by-country licensing approach may be inefficient.[18]

10 Ibid.

11 *Unwired Planet International v Huawei Technologies* [2017] EWHC 711 (Pat), 268.

12 Communication, section 2.2.

13 Ibid.

14 [2017] EWHC 711 (Pat). Case confirmed on appeal, including on discrimination: *Unwired Planet International v Huawei Technologies* [2018] EWCA Civ 2344. See also, SA Lawrance and FE Brooks, 'Unwired Planet v Huawei: The First UK FRAND Determination', *Journal of European Competition Law & Practice*, Volume 9, Issue 3, 1 March 2018, pp.170–175.

15 *Unwired Planet v Huawei* [2017] EWHC 711 (Pat), 486.

16 See, for example, Section 4 below in relation to *MEO*.

17 Communication, section 2.1.

18 Ibid, section 2.2, citing *Unwired Planet v Huawei* [2017] EWHC 711 (Pat).

ii) Interpretation of the licensing framework in Huawei v ZTE[19]

Section 3 of the Communication contains guidance on the licensing framework established by the CJEU in *Huawei v ZTE*. The guidance applies to patent portfolios, which were not considered in that case, as well as individual patents. The Commission considers that in order for an implementer to assess a FRAND offer and make an appropriate counter-offer, it must be provided with a clear explanation of: the essentiality of the SEPs to be licensed, the implementer's allegedly infringing products, the proposed royalty calculation, and the non-discrimination element of FRAND. These rules apply equally to all SEP holders, including 'patent assertion entities' (ie, patent holders who license patents without themselves being on the market).[20]
Regarding counter-offers, the Commission notes that an implementer's counter-offer should contain information on the exact use of the standard in the relevant products, and should be an offer to accept a licence for all SEPs used by the implementer.[21]
The Commission also states that security provided by an implementer in accordance with the *Huawei v ZTE* criteria, should be fixed at a level that discourages patent hold-out strategies. Conversely, while injunctive relief should be '*effective, proportionate and dissuasive*' (as provided for by IPRED),[22] in this field, it is recognized that injunctive relief may have a '*broad impact … on businesses, consumers and the public interest*', such that its proportionality should be considered on a case-by-case basis.[23]

iii) Processes for declaring and identifying SEPs

The Communication also considers questions of transparency and the problem of over-declaration (where more patents are declared to be SEPs than is in fact the case – a problem that results from a number of issues, including the timing of declarations compared to the setting of the standard; changes in the scope of granted patents compared to applications; the risk for patentees of under-declaration;[24] and the potential benefits for negotiating positions that may be derived by holding larger numbers of SEPs). It calls for standard developing organisations to identify methods for patent databases to provide more up-to-date and precise information on SEPs.

Pursuant to this goal, on 5 July 2018, the Commission adopted a decision establishing an expert group to gather industry practice and expertise on FRAND licensing that would support the Commission's policy making (the 'Expert Group').[25] It is intended that the Expert Group should comprise up to 15 members with substantial experience in licensing and/or valuation of SEPs. The decision notes that the Commission may consult the Expert Group on any matter within their expertise, and explains how members of the Expert Group will be selected.[26]

Other points covered in the Communication include the benefits of patent pools, the merits of alternative dispute resolution and a recognition of the utility of open source solutions.[27]

19 Ibid, section 3.1.

20 Ibid, section 3.5.

21 Ibid, section 3.3.

22 Directive 2004/48/EC of 29.4.2004 on the enforcement of intellectual property rights, OJ L195 of 2.6.2004, page 16.

23 Ibid, section 3.2.

24 Eg, Commission Investigation AT.38636 *Rambus* (alleged 'patent ambush'); see Commission MEMO/07/330. The case was closed by way of commitments on 9 December 2009; OJ [2010] C30/17 (Summary Decision).

25 Commission Decision of 5.7.2019 C(2018)4161, '*Setting up a group of experts on licensing and valuation of standard essential patents*'.

26 Expert group members were appointed during 2018.

27 Communication, sections 2.3, 3.4 and 4.

C. Issues not covered by the Communication

Two of the most controversial debates about SEP licensing relate to 'chipset' and 'use-based' licensing. However, while a nod is given towards the latter (in the suggestion that different valuations may apply in different sectors), the Communication does not address either of these issues directly. In particular, it does not address the question of whether all SEP holders have an obligation to license anyone who requests a licence, including component manufacturers. Where mobile handset manufacture is concerned, the prevailing industry practice is to license the end manufacturer, rather than at the 'chipset' level. At the time of writing, this issue is the subject of litigation in the United States in enforcement action brought by the Federal Trade Commission ('FTC') against Qualcomm in relation to its refusal to license direct competitors on the chipset market. Further European guidance on this issue may therefore have to wait for litigation to work its way through national courts, with scope for diverging approaches in different Member States.

D. Comment

The FRAND licensing principles espoused by the Commission appear intended to strike a fair balance between the differing interests of SEP holders and implementers, and go some way towards filling in the gaps left by *Huawei v ZTE*. However, there remain a number of significant areas of uncertainty, and the advisory status of the Communication gives national courts scope to develop their own solutions.

While not specifically engaging with competition law, the Communication is written against the background of relevant case law addressing Article 102 TFEU in particular. Previous Commission guidance and enforcement make clear that the creation of industry standards, the terms of licences to essential technologies, and the manner in which such IP is enforced, are capable of engaging competition law. The Communication provides further guidance on such topics and the contents of the Communication have already been cited in national court judgments.[28]

2. CJEU JUDGMENT IN CASE C-230/16 *COTY GERMANY*

On 6 December 2017, the CJEU gave a significant preliminary ruling in relation to selective distribution of luxury goods.[29] The ruling addressed the topical question of restrictions on online selling, and in particular whether it is permissible to prohibit distributors from using non-authorized third party websites (such as Amazon Marketplace or eBay) in the context of internet sales.

A. Background

Coty Germany ('Coty') is a supplier of luxury cosmetics and it sells a number of brands through a selective distribution network, which it justifies on the basis of '*the character of Coty Prestige's brands … in order to support the luxury image of these brands*'.[30]

Parfümerie Akzente ('Akzente') was an authorized distributor of Coty's brands. It sold products both in bricks and mortar stores and over the internet. Its online sales were conducted through its own online store and via 'amazon.de'.

Coty's selective distribution agreement included certain obligations relating to environment, décor and furnishing. These were said to be required in order to promote the luxury character of Coty Prestige's brands. Internet sales were governed by a separate agreement that prohibited the reseller from using a different name or from selling via an unauthorized third party. An amendment to Coty's agreement, following the entry into force of the Commission's revised Vertical Agreements Block Exemption Regulation ('VBER')

28 Eg, *Unwired Planet v Huawei* [2018] EWCA Civ 2344, 60-61,74.

29 Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, judgment 6 December 2017, EU:C:2017:941.

30 Ibid, 10.

in 2010,[31] permitted internet sales if they were '*conducted through an "electronic shop window" of the authorized store and the luxury character of the products [was] preserved*'. The agreement further prohibited the reseller '*from collaborating with third parties if such collaboration is … effected in a manner that is discernible to the public*'.

Akzente refused to accept those amendments and Coty brought national court proceedings, seeking an order prohibiting Akzente from distributing Coty-branded products via the platform 'amazon.de'.

In July 2014, the Frankfurt Regional Court dismissed Coty's application, holding that the prohibition on third party internet platforms was contrary to Article 101(1). Coty appealed to the Higher Regional Court ('the referring court'), which decided to refer questions to the CJEU for a preliminary ruling.

B. Advocate General Wahl's Opinion

Advocate General ('AG') Wahl's opinion of July 2017 gave an opinion which was favourable to Coty, recognising that trademark law allows brand owners to protect the luxury image of their products, and concluding that – at the current stage of development of internet sales – Article 101(1) would not be infringed by contractual terms designed to maintain such a luxury image.[32] The Opinion explicitly recognized the significance of product image as a parameter of competition, which can be legitimately fostered at the expense of pure price competition.[33]

C. The CJEU's findings

The CJEU held that a selective distribution system for luxury goods, designed primarily to preserve the luxury image of those goods, is compatible with Article 101(1), provided resellers are chosen on the basis of objective qualitative criteria which are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion, and that the criteria do not go further than necessary.[34]

The Court recognized that an aura of luxury was a legitimate criterion for selective distribution, as it enabled consumers to distinguish goods and was therefore a factor on which companies compete. Resellers do not have the same incentives as the brand owner in that regard, as they are likely to wish to maximize sales even if that means reduced prices. Like the AG, the CJEU distinguished the situation under consideration in *Coty* from its earlier decision in *Pierre Fabre Dermo-Cosmétique*.[35] That earlier case had related to a total ban on internet sales on the stated justification of preserving a luxury image. This was held to infringe Article 101 by object. By contrast, Coty's agreements permitted online selling through the authorized reseller's (approved) own online store, and imposed a more limited prohibition on the use of third party websites. The Court (again in line with the AG)[36] cited its previous judgment in *Copad* in which it had held that: '*the quality of [luxury] goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect*

31 Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ [2010] L102/1.

32 Case C-230/16, Opinion of AG Wahl, 2017, para. 33. A fuller report on the opinion of AG Wahl was included in last year's Survey: SA Lawrance, ET Bond and MJ Hunt, *'AKKA/LAA, Coty, Hoffmann-La Roche II* and Others: A Survey of Cases at the Intersection between Competition Law and IP Law in the Past Year', *Journal of European Competition Law & Practice*, Volume 9, Issue 8, 1 October 2018, pp.537–550.

33 Ibid, 84.

34 Supra n. 29, 36.

35 Ibid, 35; supra, n. 32, 78-88, Case C-439/09 *Pierre Fabre Dermo-Cosmetique* EU:C:2011:649.

36 Supra n. 32, 89.

the actual quality of those goods'.[37] The implication is that the way in which such goods are displayed – whether in a bricks and mortar store or online – is relevant to maintaining that aura of luxury.

The CJEU therefore held that a prohibition in a selective distribution system for luxury goods on using third party internet platforms, in a manner discernible to the public, was not contrary to Article 101, provided that the policy was applied in a non-discriminatory fashion and was proportionate in the light of the objective pursued.[38] In other words, if selective distribution is an appropriate means by which to preserve the luxury image of trademarked goods, then a limitation on online sales must also be regarded as legitimate to achieve the same end.

In the course of its judgment, the CJEU also confirmed that the type of contractual provision in question was compatible with Article 4 of the VBER.[39] Specifically, such a provision does not constitute a customer restriction, within the meaning of Article 4(b), or a restriction of passive sales to end users, within the meaning of Article 4(c) of that Regulation.[40]

D. Comment

In reaching its conclusions, the Court places relatively little emphasis on the role of Coty's trademarks. Unlike in cases concerning exhaustion of trademark rights, where the Court has relied on the 'essential function' of a trademark being to guarantee the origin of a product to the consumer,[41] this judgment focuses on the ability to command value from a more generalized luxury allure.

Coty is nevertheless a significant judgment, addressing an issue that has been the subject of diverging national enforcement in recent years. The German competition authorities and courts have taken a notably tough line on limitations on the use of the internet like those considered in *Coty*.[42] *Coty* suggests that the more interventionist authorities may need to reconsider their enforcement in this area, at least for luxury goods.

It also suggests that while the VBER is fit for purpose (so far as concerns its application to selective distribution), in that it appropriately balances the needs of brand owners with competition law considerations, the accompanying guidelines[43] may need updating to reflect developments in online distribution. It remains to be seen whether national authorities, including the UK's Competition and Markets Authority, which has recently published a study noting the importance of digital price comparison tools in fostering price competition and product availability,[44] will remain in line with the approach of the CJEU in *Coty*. Indeed, this may not be the final word on the matter even at EU level: the AG opinion explicitly limited its conclusions to '*the present state of development of e-commerce*'.[45]

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37 Supra n. 29, 25; Case C-59/08 *Copad* EU:C:2009:260, 24 to 26.

38 Supra n. 29, 58.

39 Ibid, 69.

40 Ibid.

41 Eg, Case C-10/89 *Hag II* EU:C:1990:359, 14.

42 For example, Bundeskartellamt cases against Adidas (Case B3-137/12; https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.html) and Asics (upheld by Federal Court of Justice, case KVZ 41/17; https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/25_01_2018_Entscheidung_Asics.html).

43 Commission Notice, Guidelines on Vertical Restraints OJ [2010] C/130. The Commission launched a review of the VBER in early 2019: http://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

44 CMA *Final report, Digital Comparison Tools Market Study*: https://www.gov.uk/cma-cases/digital-comparison-tools-market-study.

45 Supra n. 32, 111.

Coty also leaves open the question of whether partial restrictions on internet selling in the context of selective distribution systems for non-luxury products will be considered to restrict competition. The strong reliance on the need to ensure an appropriate selling environment for luxury products suggests that more everyday products will be less likely to warrant the types of restrictions imposed by Coty.

3. CJEU JUDGMENT IN CASE C-179/16 *HOFFMANN-LA ROCHE*

On 23 January 2018, the CJEU released its judgment in *Hoffmann-La Roche & Novartis Italia v AGCM*.[46] The judgment contains some rare judicial interpretation of the Technology Transfer Block Exemption Regulation ('TTBER'), considers object infringements in agreements between non-competitors, and expands the categories of such infringements to include the making of misleading statements. It also contains significant analysis of the role of regulation (in this case, the regulation that applies to companies marketing pharmaceutical products) in shaping the obligations which apply under competition law. For this reason, the case is of particular relevance to companies in the bio-pharmaceutical sectors.

A. Background

The case related to the medicinal products Avastin and Lucentis. Both were developed in the United States by Genentech (a subsidiary of Roche): Avastin as an oncology drug, and Lucentis for the treatment of eye diseases. The rights for the commercial exploitation of Avastin were retained within the Roche group. However, as Roche was not active in the field of ophthalmology, Genentech granted a licence to Novartis in June 2003 for the commercial exploitation of Lucentis outside of the United States.[47] The Commission granted a marketing authorisation for the use of Avastin to treat certain tumorous diseases in January 2005, and for Lucentis for the treatment of eye diseases in January 2007.

During the period in which Avastin was available, but before Lucentis was on the market, some doctors started to use a weak dose of Avastin 'off-label' (ie, outside the scope of the authorized uses) for ophthalmology. Although these prescriptions were initially intended '*to fill a therapeutic lacuna*' in the absence of any other equally efficacious medicinal products, they continued after Lucentis was placed upon the market due to the significant difference in price; an intravitreal injection of Avastin cost at least ten times less than an injection of Lucentis.[48]

According to the Italian Competition Authority ('AGCM'), in response to this development, Novartis and Roche engaged in a concerted practice to disseminate information claiming that the off-label use of Avastin for ophthalmology raised safety concerns. The AGCM found that the companies did not have scientific proof to support their claims and that this practice constituted a restriction of competition by object. During Roche and Novartis' appeal of the AGCM's decision, the Consiglio di Stato referred questions to the CJEU relating to the scope of Article 101(1), market definition, and by object restrictions.

B. The relevant product market

A number of the questions centred on whether an off-label use falls within the same relevant market as a medicinal product being used in accordance with its marketing authorisation.

The CJEU began by reaffirming its previous judgments that the '*relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason*

46 C-179/16, *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato*, EU:C:2018:25. Hoffmann-La Roche is referred to as 'Roche'.

47 Ibid, 23.

48 C-179/16 Opinion of AG Saugmandsgaard Øe, 21 September 2017, EU:C:2017:714, 46. For a more detailed consideration of the AG's Opinion, see last year's Survey, supra n. 32.

of their characteristics, their prices, and their intended use'.[49] Roche had claimed that the majority of Avastin intended for off-label use did not comply with EU rules as it was repackaged and sold to healthcare providers before individual prescriptions had been submitted. The CJEU confirmed that pharmaceutical products sold illegally could not be substitutable.[50] However, it noted that there was nothing in the case file to suggest that any national court or pharmaceutical authority in fact considered the repackaging of Avastin to be unlawful.[51]

In those circumstances, the CJEU accepted the AGCM's conclusion that Avastin and Lucentis were in the same relevant market. It held that in principle, the relevant market can comprise medicinal products capable of being used for the same therapeutic indications, as '*prescribing doctors are primarily guided by considerations of therapeutic appropriateness and the efficacy of medicines*'.[52] In this case, as Avastin was subject to prescription, it was possible to assess accurately the extent to which it was prescribed for eye diseases, which revealed the '*existence of a specific relationship of substitutability*'.[53]

C. The scope of Article 101(1)

The Consiglio di Stato's first question asked whether parties to a licensing agreement can be considered competitors if the licensee operates on the relevant market solely because of the licence agreement. The AG pointed out that it is clear from the TTBER[54] that in that situation, the parties to the licensing agreement are not considered competitors, although he also noted that this would not prevent any collusive conduct by the parties from being caught by Article 101(1).[55] The CJEU did not address this point directly. Instead, it moved straight into considering whether the arrangement between the parties could constitute an ancillary restraint (ie, a restriction necessary to the implementation of a main agreement that is not anticompetitive in nature).

The CJEU noted that the conduct in question was agreed upon only several years after the licensing agreement had been signed.[56] Moreover, it was not designed to restrict the commercial autonomy of the parties themselves, but rather sought to affect the conduct of third parties (healthcare professionals) regarding Avastin and Lucentis, in an attempt to generate increased sales of Lucentis – a more profitable drug. In those circumstances, the conduct could not be objectively necessary for the implementation of the licence agreement.[57] The CJEU also confirmed that conduct of this kind (ie, the dissemination of misleading information in respect of a medicinal product) would not be exempt under Article 101(3), as it could not be considered an 'indispensable' restriction.[58]

D. 'By object' restriction

The Consiglio di Stato's final question asked whether a concerted practice, intended to emphasize that a medicinal product is less safe or efficacious (in the absence of clear scientific evidence), could constitute a restriction of competition by object.

49 Supra n. 46, 50.

50 Ibid, 52.

51 Ibid, 62.

52 Ibid, 65.

53 Ibid, 66.

54 Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (later replaced by Regulation 316/2014).

55 Supra n. 48, 91-97.

56 Supra n. 46, 73.

57 Supra n. 46, 72-74.

58 Ibid, 98.

The CJEU noted that the AGCM had found that the purpose of the arrangement between Roche and Novartis was '*to create an artificial differentiation*' between Avastin and Lucentis by '*manipulating the perception of the risks associated with the use of Avastin*', based on '*alarmist*' interpretations of medical publications. This strategy involved disclosing information to the EMA intended to exaggerate the perception of risks associated with the off-label use of Avastin.[59]

The CJEU left it to the referring court to determine whether the information disseminated by the parties was actually misleading. However, it suggested that it would be misleading if its purpose was to: (i) confuse the EMA and Commission, and/or (ii) emphasize the risks associated with the off-label use of Avastin despite the context of scientific uncertainty.[60]

As to whether the dissemination of such information would constitute a restriction of competition by object, the CJEU applied the *Cartes Bancaires*[61] interpretation, noting that 'by object' '*must be interpreted strictly*' and can be applied only to '*certain types of coordination between undertakings which reveal a degree of harm to competition that is sufficient for it to be held that there is no need to examine their effects*'.[62] Nevertheless, it confirmed that the dissemination of misleading information of the kind considered in this case could constitute a by object infringement.[63]

E. Comment

This judgment indicates that pharmaceutical companies (or undertakings in similar markets) should be careful when marketing medicinal products, in particular where there is scientific uncertainty about the safety of a product. In such cases, an objective overview of the relevant scientific data should be given, without any coordination by others. The Court emphasized in its introduction to the case that this was in line with relevant pharmaceutical regulation, which requires '*the holder of the [MA] for a medicinal product for human use [to] …. take account of technical and scientific progress and make any variations that may be required to enable the medicinal products to be manufactured and checked by means of generally accepted scientific methods*'.[64]

Although this case involved a common communication strategy, unilateral dissemination of misleading information by a dominant company may also give rise to risks. Indeed, in *AstraZeneca*, the CJEU confirmed that the provision of misleading information about entitlement to a patent constituted an abuse.[65]

The CJEU's finding on the relevant product market has the potential to cause some tensions in the future. The CJEU held that the reason Avastin and Lucentis were in the same product market was because they were both used to treat the same therapeutic indications. However, it also noted that pharmaceutical products that are manufactured or sold illegally would not be in the same market. This appears inconsistent with the approach taken by the GC in the 'pay-for-delay' cases. In *Lundbeck* for example, the GC held that the generic manufacturers were potential competitors with Lundbeck despite the existence of Lundbeck's citalopram patent (which the Court stated should be presumed valid), and despite the fact the generic companies would have been launching at risk (ie, subject to infringement being proven, illegally).[66]

59 Ibid, 89-90.

60 Ibid, 92.

61 C-67/13P, *CB v Commission*, EU:C:2014:2204.

62 Supra n. 46, 78.

63 Ibid, para. 94. Note that the CJEU did not go as far as confirming the AG's view that concerting to disseminate information that was not misleading would fall outside the scope of Article 101, supra n. 48, 182.

64 Ibid, 10-17, citing Article 16 of amended Regulation (EC) No 726/2004, OJ 2004 L 136.

65 Case T-321/05 *AstraZeneca v Commission* EU:T:2010:266, upheld on appeal before the Court of Justice, Case C-457/10P *AstraZeneca v Commission* EU:C:2012:770.

66 Case T-472/13, *Lundbeck v European Commission*, EU:T:2016:449, Case T-691/15, *Servier v Commission*, EU:T:2018:922 (to be covered in next year's Survey).

The CJEU's acceptance of the relevance of off-label use to market definition is helpful, and sensibly aligns the Court's approach with real world practice. Its guidance on the dissemination of misleading information is also helpful, and is consistent with its previous cases. However, until the CJEU hears an appeal in the pay for delay cases, some uncertainty will remain as to how pharmaceutical product markets should be defined.

4. CJEU JUDGMENT IN CASE C-525/16 *MEO*

A. Introduction

In this case, the CJEU was asked to consider the situations in which price differentiation by a dominant company amounts to an abuse of a dominant positon. Although the case did not directly concern IP rights, it is likely to be relevant in cases involving issues such as valuation of IP rights or licensing obligations (*eg*, obligations requiring the licensing of SEPs on FRAND terms).[67]

B. Background

The case concerns a dispute between Serviços de Comunicações e Multimédia SA ('MEO'), a pay-TV operator and customer of a Portuguese not-for-profit copyright collecting society ('GDA').

In 2014, MEO complained to the Portuguese Competition Authority ('PCA') that GDA had breached Article 102(c) by charging discriminatory prices for television rights between 2010 and 2013. This resulted in MEO paying higher royalty rates than GDA's other customers with whom it competed, in particular NOS Comunicações SA ('NOS'), a direct competitor.

In 2016 the PCA closed the case on the basis that there was insufficient evidence of an abuse. Subsequently, MEO appealed this decision to the Portuguese court, which in turn requested a preliminary ruling from the CJEU.

The CJEU considered the following questions:

- whether the concept of 'competitive disadvantage' requires an analysis of the specific effects of differential prices being applied by an undertaking in a dominant position on the competitive situation of its customer; and

- whether the seriousness of those effects should be taken into account (ie, is there a *de minimis* threshold).

The referring court assumed that GDA was in a dominant position. As GDA is not present on the downstream market, this case has the unusual feature of being primarily concerned with 'secondary line' price discrimination (i.e. discrimination between customers).[68]

C. AG opinion

AG Wahl's opinion began with some general observations on the applicability of Article 102 to the case.[69]

First, he questioned whether GDA was actually in a dominant position, in the sense of being able to act independently of its customers (not an issue which had actually been referred to the CJEU). Although GDA is the only Portuguese collecting society, Portuguese law requires GDA to seek arbitration if it cannot agree

67 Case C-525/16 *MEO v Autoridade da Concorrência*, EU:C:2018:270 ('*MEO*').

68 R O'Donoghue and J Padilla, *The Law and Economics of Article 102* (2nd edn, 2013) 810-814.

69 Case 525/16 Opinion of AG Wahl, 20 December 2017, EU:C:2017:1020, 33.

a price with its customers. Furthermore, since GDA is not vertically integrated it has no interest in the downstream market; the AG noted that it was therefore unclear what interest GDA could have in imposing discriminatory prices that could foreclose a customer or weaken its own competitive position.[70]

Second, he questioned whether the case in fact concerned 'dissimilar conditions' applied to 'equivalent transactions', as the prices charged to MEO were determined by an arbitral decision, in contrast to those charged to NOS which were set by GDA.[71] These points led him to conclude '*that there are a number of uncertainties regarding the application of Article 102 […] which go beyond the issue of the identification of a 'competitive disadvantage'* [i.e. the issue that had been referred]. *[…] These uncertainties call for particular care to be exercised when examining the differential pricing at issue*'.[72]

In relation to 'competitive disadvantage', he observed that differential pricing can be pro-competitive and will not necessarily breach Article 102: '*it should only be possible to penalise price discrimination […] if it creates an actual or potential anticompetitive effect*'[73] and that '*a price discrimination practice places the customers of a company in a dominant position in a disadvantageous competitive situation when it is actually capable of having a negative effect on competition on the market in which its customers operate. […] it is therefore not sufficient merely to evaluate the impact of the discriminatory practice on a specific trading partner. In particular, it is necessary to examine whether the price discrimination at issue is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured.*'[74]

On the question of a *de minimis* threshold, he noted that while a distinction must be drawn between conduct which is intrinsically harmful to competition and other types of conduct, including second degree price discrimination – akin to the object / effect distinction under Article 101.[75] However, the AG went on to confirm that 'in principle' Article 102 does not permit a *de minimis* threshold: '*[i]t is, rather, a question of identifying the existence of an actual restriction of competition in addition to, and quite distinct from the price discrimination*'.[76]

D. The CJEU's findings

The CJEU's short judgment appears to confirm the AG's views. According to the court, there is there is no *de minimis* threshold for the purpose of determining whether there is an abuse of a dominant positon.[77] This is in line with its clear position in *Post Danmark II*, in which it was held that: '*fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. [An] anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates*'.[78]

The discussion of price discrimination itself is very brief. The CJEU notes a requirement for a 'competitive disadvantage' to be identified, which '*must affect the interests of the operator which was charged higher tariffs compared with its competitors*'. This could suggest that the CJEU has not fully adopted the AG's view

70 Ibid, 45-55.

71 Ibid, 58.

72 Ibid, 59.

73 Ibid, 63.

74 Ibid, 98-99.

75 Ibid, 102.

76 Ibid, 103.

77 *MEO*, supra, n. 67, 29.

78 Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, 73.

that it is necessary to identify an effect on competition in the broad sense, as well as a specific effect on the discriminated competitor. However, the judgment goes on to note that the analysis must address all of the relevant circumstances of the case, and indicates a number of the factors in the case which appeared relevant to it. These included the fact that the amounts in question '*represented a relatively low percentage of the total costs borne by MEO*' and '*the differentiation in tariffs had a limited effect on MEO's profits*'; the Court notes that it may therefore be deduced that '*tariff differentiation is not capable of having any effect on the competitive position of that operator*'.[79] Although the CJEU's conclusion arguably lacks absolute clarity, it appears that for abusive price discrimination to be established, it is necessary to demonstrate a potential or actual effect on competition generally, as opposed to merely on one particular market player.[80]

E. Comment

Price discrimination is ubiquitous in business relationships and it often has strong economic justifications as a way of maximising economic efficiency.[81]
Against that background, the CJEU has confirmed that a dominant undertaking, supplying downstream customers and charging these customers different prices, will infringe Article 102(c) only if its conduct has at least a potential effect on the customer's competitive position.

This guidance is likely to be useful for licensors of IP rights portfolios who may have marked power, for example television broadcasters in relation to video-on-demand content[82] or owners of SEPs.

5. CJEU JUDGMENT IN CASE C-373/17P *AGRIA POLSKA*

Agria Polska is a September 2018 judgment of the CJEU, rejecting an appeal against a Commission decision to reject a complaint brought by Agria Polska ('AP'), a company involved in the parallel importation of plant protection products.[83]

The case turns, in part, on a simple question of the Commission's discretion as to which investigations it can pursue. Of interest for this Survey, however, is the background to the issues under consideration, which involve competing claims of the right to protect IP and the right not to be exposed to a campaign of (claimed) vexatious litigation.

A. Background

AP alleged that 18 undertakings, including companies such as BASF and Monsanto, had infringed Articles 101 and 102 TFEU by engaging in an orchestrated campaign against it over a number of years. It claimed that these undertakings had made a series of misleading statements to administrative and criminal authorities in Austria and Poland calling into question the legality of AP's commercial activities. This prompted a series of inspections, on-the-spot product seizures, fines and other sanctions that led to AP losing significant market share.

AP's complaint was lodged with the Commission in 2010. The alleged infringers submitted observations claiming that the various actions taken were legitimate attempts to protect their IP rights, and had not been coordinated. The Commission considered that the likelihood of establishing an infringement was low, and that any investigation would require disproportionate resources. It adopted a decision rejecting the complaint.

79 *MEO*, 34.

80 Ibid, 37.

81 See, for example, S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurements* (3rd Edn, 2010) 6.34-6.36.

82 See, for example, UK Competition Commission, *Report on the anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector* (2009), 4.60.

83 Case C-373/17P, *Agria Polska and Others v Commission*, EU:C:2018:756.

Following a failed appeal to the General Court,[84] AP appealed to the CJEU on three main grounds.

i) Manifest error of assessment

AP argued that the Commission had committed a manifest error when assessing the European Union's interest in opening an investigation and in refusing to apply the principles laid down *ITT Promedia*[85] and *AstraZeneca*.[86] These cases established that, in certain situations, initiating legal actions or making use of regulatory procedures can constitute an abuse of a dominant position.

The CJEU confirmed that the Commission has wide discretion to assess whether there is EU interest in opening an investigation: '*the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be required to recourse exclusively to certain criteria*'.[87] It also confirmed that the Commission is not required to launch an investigation simply because it would be cross-border and require considerable resources.[88]

The CJEU stated that AP's arguments in relation to *ITT Promedia* and *AstraZeneca* were based upon a misreading of the GC's judgment. The GC had held that it could be legitimate for a company to inform national authorities of possible infringements by their competitors.[89] It had distinguished *ITT* and *AstraZeneca* on the grounds that in those cases the administrative and judicial authorities to which complaints had been made had no discretion as to whether or not it was appropriate to act, whereas in the present case the relevant authorities did have such discretion.[90] The CJEU concluded that as the GC had distinguished those cases, it had not ruled on whether the conditions for applying *ITT / AstraZeneca* were met, and so AP's argument on this point was ineffective. The CJEU also stated that AP's further argument that the GC had misinterpreted *ITT / AstraZeneca* (by interpreting them as applying only where the relevant authority lacked discretion) was insufficiently substantiated and thus inadmissible.[91]

ii) Commission's inaction and practical effect of Articles 101 and 102

AP claimed that it: (i) had adduced evidence showing that an infringement of Articles 101 and 102 TFEU was likely in several Member States; (ii) could not obtain effective protection at a national level due to the expiry of the relevant one year limitation period; and (iii) did not have a genuine possibility of bringing an action for compensation before national courts. In those circumstances, AP submitted that the Commission had deprived Articles 101 and 102 of their effectiveness by failing to open an investigation.

The CJEU confirmed the GC's endorsement of the Commission's finding that the likelihood of establishing infringement was low. It reiterated that the Commission is not obliged to open an investigation solely on the grounds that the alleged infringements concern several Member States.[92] Further, the CJEU held that AP had not proved that the national limitation period was contrary to EU law, and so had not shown that it was impossible to achieve a resolution before the national competition authority – any issues were the result of AP's own lack of diligence.[93] Finally, the CJEU stated that it is the responsibility of Member States to ensure

84 Case T-480/15 *Agria Polska sp. z.o.o. and Others v European Commission*, EU:T:2017:339.

85 Case T-111/96 *ITT Promedia v Commission*, EU:T:1998:183.

86 Case T-321/05 *AstraZeneca v Commission*, EU:T:2010:266.

87 Supra, n. 84, 61.

88 Ibid, 65.

89 Ibid, 53.

90 Ibid, 56.

91 Ibid, 58.

92 Ibid, 79-80.

93 Ibid, 82.

effective judicial protection for individual parties, and it is not the responsibility of the Commission to make up for any shortcomings by opening an investigation requiring considerable resources when the likelihood of infringement is low.[94]

Finally, AP claimed that by endorsing the Commission's decision without fully examining the substance of the case, the GC had infringed the right to effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights of the EU. The CJEU held that the GC had not erred in law; it was not required to adjudicate on the substance of the alleged infringement as complainants do not have a right to insist that the Commission takes a final decision as to the existence of an alleged infringement.[95]

B. Comment

This judgment confirms previous case law that the Commission has significant discretion over whether to launch an investigation. AP attempted to characterize the significance of the alleged infringement both in terms of territorial and temporal scope. However, its arguments were not accepted; the low likelihood of a finding of infringement coupled with the considerable costs of any cross-border investigation became a reason not to take on the complaint. The CJEU was not sympathetic to AP's failure to obtain redress before the national competition regulators or courts, and confirmed that this is no reason to require the Commission to open an investigation.

The approach to *ITT Promedia* and *AstraZeneca* re-confirms that 'vexatious proceedings' will be considered abusive only in exceptional circumstances. However, by focussing solely on the issue of the authorities' discretion to act, the CJEU did not consider the potentially significant impact upon an undertaking of facing multiple (even legitimately started) regulatory and legal proceedings, which could be capable of causing foreclosure. It appears likely that if the relevance of discretion had been fully addressed, it would not have been considered a requirement for a finding of abuse: the case of *Hoffmann-la Roche II* (examined above)[96] established that it will be contrary to Article 101 to provide potentially misleading statements to regulatory authorities, even where they enjoy considerable discretion and the ability to collect their own data (as in the case of granting of pharmaceutical marketing authorisations).

6. GENERAL COURT JUDGMENT IN CASE T-574/14 *EAEPC*

On 26 September 2018, the GC handed down judgment on an appeal against a decision of the Commission to reject a complaint into so-called dual-pricing practices carried out by GlaxoSmithKline ('GSK') in the Spanish market.

A. Background

The case dates back to the late 1990s when Glaxo Wellcome asked the Commission for an individual exemption (under rules then applicable)[97] for its Spanish distribution arrangements. Relatively low regulated prices in Spain encouraged the flow of parallel exports out of the country. GSK's scheme (and similar schemes used by other pharmaceutical manufacturers) involved wholesalers paying for products sold in Spain at the price set by the Spanish government, and at a higher price where goods were exported to other Member States. While not explicitly prohibiting parallel trade, such practices could reduce the incentive for wholesalers to export. As a result, the European Association of Euro-Pharmaceutical Companies ('EAEPC') lodged a complaint.

94 Ibid, 87.

95 Ibid, 97.

96 Supra, n. 46.

97 Regulation 17/62 EC.

The notification[98] and complaint were handled together, leading to a Commission decision refusing the exemption and requiring GSK to terminate the agreements.[99] In 2006, the GC rejected the Commission's finding that GSK's agreements restricted competition by object, but agreed that they restricted competition by effect; nevertheless it also found that the Commission had not adequately examined the conditions for exemption under (what is now) Article 101(3) TFEU.[100] In 2009, the Court of Justice reinstated the original finding that the agreement restricted competition by object, but maintained the conclusion that the Commission had not fully examined GSK's arguments in relation to the claimed exemption.[101]

Shortly after the CJEU judgment, GSK withdrew its original application for an individual exemption. However, that was not the end of the matter, as EAEPC's complaint remained live. By this time, however, GSK had changed its distribution practice, so in May 2014 the Commission rejected the complaint on grounds, citing a lack of Union interest, and of any evidence that the presumed infringements had continuing effects.[102] EAEPC lodged an appeal with the GC, leading to this judgment.[103]

B. The GC Judgment

The GC upheld the Commission's decision, on the basis that (*inter alia*) the Court was unable to identify any continued Union interest. The Court agreed with the applicant that the previous judgments have generated legal interest in relation to the '*analysis of … dual-pricing systems in the light of Article 101*'.[104] The judgment deals in detail with the pleas raised by EAEPC, which in overview argued that the Commission had not complied with the rulings in the earlier GC and CJEU judgments which had declared GSK's wholesale terms and conditions to be contrary to Article 101 TFEU; had failed to fulfil its obligation pursuant to Article 105 TFEU to ensure compliance with Article 101 itself; had misapplied the criteria relating to the existence of Union interest; and had failed to state its reasons.

Each of these pleas was rejected. The GC held that it was not enough for there to be an '*abstract and academic interest*' in a case; rather there must be a '*specific and genuine*' Union interest is required to justify use of the Commission resources.[105] EAEPC's contention that GSK's practices and the Commission's '*inaction*' in the late 1990s led to the adoption of dual pricing by other manufacturers was not accepted as good reason for requiring the Commission to act now.[106] The GC noted that the Commission had in any event opened a separate further investigation into dual pricing practices by pharmaceutical manufacturers in Spain more generally (although the outcome of this investigation is unclear).[107]

C. Comment

The distribution of pharmaceuticals remains – in part as a results of diverging pricing and reimbursement policies around the EU – an area where there are considerable differences between national markets in

98 Case IV/36.957/F3 *Glaxo Wellcome* (notification)

99 Decision 2001/791/EC *Glaxo Wellcome*.

100 Case T-168/01 *GlaxoSmithKline & Others v Commission* EU:T:2006:265.

101 Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services and Others* v *Commission*, EU:C:2009:610.

102 Decision C(2014) 3654 final *Glaxo Wellcome*.

103 Case T-574/14 *European Association of Euro-Pharmaceutical Companies v Commission & GlaxoSmithKline plc & others*, judgment of 26 September 2018, EU:T:2018:605.

104 Ibid, 104.

105 Ibid.

106 Ibid, 119.

107 The Commission website shows gives no result for case number AT.39973 *Pricing schemes for distribution of medicines in Spain* (cited in *EAEPC*, para. 119).

terms of prices charged to local customers or health services. Pharmaceutical manufacturers seek to protect their margins in countries where health policies allow them to do so, giving rise to fertile conditions for parallel trade, and also to incentives for manufacturers to find lawful methods to reduce disruption to their distribution networks and, in particular, to ensure that sufficient product is available in each Member State.

At the heart of the earlier rulings of the GC and the CJEU was the finding that GSK was entitled to have its arguments relating to the application of Article 101(3) taken into account with proper regard for the industry context, in which competition was already distorted by national regulations.[108] The fact that the long-running saga underlying this case has not led to greater legal clarity is in some senses regrettable, both for parallel traders and for pharmaceutical companies. Nevertheless, the outcome is not especially surprising, given the high bar faced by appellants of decisions to reject complaints.

As relevant geographical markets are usually national in the pharmaceutical industry, issues relating to distribution often fall to be reviewed nationally rather than at EU level. In fact, the Spanish competition authorities have also reviewed dual pricing (by a range of pharmaceutical manufacturers) in the years since the earlier GC and CJEU decisions, but with a similar outcome to the European cases. During 2018, Spanish Supreme Court rejected an appeal by the EAEPC against a lower court rejection of a complaint against Janssen-Cilag's drug supply scheme, finding that the scheme did not breach competition law.[109] More recently, the Spanish competition authority closed an investigation into alleged collusion between pharmaceutical manufacturers in relation to the introduction of such schemes in the mid-2000s.[110] The authority found that the companies' schemes were the result of changes in pharmaceutical legislation, not of anticompetitive agreements.

Despite the successes for the pharmaceutical manufacturers, it remains the case that agreements which seek to limit parallel trade within the EU run appreciable risks of being found to restrict competition by object, and (despite the ultimate outcome of the case described in this section) may not benefit from the Article 101(3) exception criteria. Meanwhile, another long-running case relating to GSK, considering limitations to parallel trade under Article 102, concluded in 2018 with a finding of infringement by the Greek competition authority.[111] The Commission has also stated that it is considering potential infringements arising from '*EEA-wide stock allocation strategies*' in its ongoing investigation into Aspen Pharmacare.[112]

7. COMMISSION MERGER DECISION *QUALCOMM / NXP*

In January 2018, the Commission approved Qualcomm's proposed acquisition of semiconductor manufacturer NXP under the EU Merger Regulation, following a Phase II investigation.[113] The approval was conditional on compliance with commitments offered by Qualcomm. Although the US chipset manufacturer subsequently abandoned the acquisition after failing to secure Chinese regulatory approval,[114] the EU decision provides insight into the Commission's approach to IP licensing issues in the mobile communications sector.

108 Supra, n. 100 at 104, 276; supra, n. 101 at 74.

109 Case 348/2016, Tribunal Supremo, ES:TS:2019:3868A.

110 S/DC/0608/17, *EAEPC vs Laboratorios Farmaceuticos Consejo. Sala de Competencia.*

111 Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline* AEVE EU:C:2008:504; Hellenic Competition Commission press release, 11 July 2018, available at https://www.epant.gr/en/?AspxAutoDetectCookieSupport=1

112 Case AT.40394; see Case Opening Report: http://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_235_3.pdf.

113 Case M.8306 *Qualcomm / NXP Semiconductors*, Commission decision of 18 January 2018.

114 See for example, https://www.wired.com/story/china-blocks-qualcomms-attempt-to-buy-a-dutch-chipmaker/

A. The parties and their technologies

Qualcomm and NXP are important players in the semiconductor industry, supplying components used in the manufacture of smartphones. Qualcomm is the world's largest developer and manufacturer of baseband chipsets, which enable smartphones to connect to cellular networks. It also licenses the rights to its IP portfolio, which includes patents that are essential to the implementation of mobile telecommunications standards. NXP manufactures and sells different categories of semiconductors, including near-field communication ('NFC') and secure element ('SE') chips. NFC chips are used to establish a wireless link between two devices at close proximity, over which data can be transferred. SE chips control interactions between trusted sources; for instance, when used with NFC, they facilitate mobile payments between a smartphone and a contactless card machine. NXP also developed and owns MIFARE, a leading technology used as a contactless ticketing/fare collection platform.[115]

B. The Commission's competition concerns and Qualcomm's commitments

The parties notified the transaction to the Commission in April 2017. After opening an in-depth Phase II investigation, the Commission found that each of Qualcomm and NXP had strong or dominant market positions, offered highly complementary products, and owned a significant amount of IP relevant to smartphone manufacturers. The Commission had three main competition concerns, as explained below.

i) NFC patent licensing

The merged entity would have combined the two companies' significant IP portfolios relating to NFC technology, which included both standard and non-standard essential NFC patents. In the Commission's analysis, this would have increased the bargaining power of the merged entity, enabling it to charge significantly higher royalties for NFC licences than the parties would have been able to charge absent the transaction.

To address the Commission's concerns on this issue, Qualcomm offered not to acquire (i) NXP's standard essential NFC patents and (ii) some of NXP's non-essential NFC patents. Instead, it was proposed that NXP would transfer these patents to a third party, who would be required to grant worldwide, royalty-free licences to the patents for three years. Under the commitments, Qualcomm would still acquire some of NXP's other non-essential NFC patents. However, the US chipset manufacturer promised, for as long as it owned these patents, not to enforce them against other companies, and to grant worldwide, royalty-free licences to them.

ii) Interoperability

In the Commission's assessment, the merged entity would have had the ability and incentive to degrade the interoperability of Qualcomm's baseband chipsets and NXP's NFC and SE chips with rivals' products. As a result, downstream smartphone manufacturers would have preferred the merged entity's chips over those of competing suppliers, who risked being marginalized. To address this concern, Qualcomm committed to ensure that, for an eight-year period, it would provide the same level of interoperability between its own baseband chipsets and NXP's NFC and SE chips with the corresponding products manufactured by rival companies.

iii) Access to technology

The Commission was also concerned about the potential impact of the acquisition on royalty rates for NXP's MIFARE technology. It considered that the merged entity would have had the ability and incentive to limit competitors' access to MIFARE, either by raising the licensing royalties or by ceasing to license MIFARE completely. In response, Qualcomm committed to offer licences to NXP's MIFARE technology and trade marks for an eight-year period, on terms at least as advantageous as those currently available. The

115 For example, London's Oyster card system makes use of MIFARE technology.

Commission was satisfied that this would enable rivals of the merged entity to continue to compete effectively. This commitment is significantly longer in duration than the three-year commitment offered in relation to NXP's NFC patents. Eight years is a relatively long period in an industry driven by high levels of technical innovation, although as new technology generations frequently build on the innovations of earlier generations, it will often be the case that implementers will need access to foundational technology as well as the latest developments.

In light of the commitments offered by Qualcomm, the Commission concluded that the proposed transaction would not give rise to competition concerns. It is also worth noting that the Commission initially had concerns about competition in the markets for semiconductors used in the automotive sector. However, these concerns fell away following the detailed Phase II review.

C. Comment

Given that Qualcomm and NXP both own significant mobile communications patent portfolios, it is perhaps unsurprising that a number of the Commission's concerns centred on patent licensing royalty rates. This is a complex area of law and practice, which is still developing.[116] In the UK, the High Court has recently given detailed consideration to how FRAND rates should be calculated in *Unwired Planet v Huawei.*[117] On the other side of the Atlantic, Judge Selna performed a similar analysis in *TCL v Ericsson*.[118]

More broadly, the decision illustrates the Commission's determination to ensure that consumers can continue to benefit from innovative electronic devices in everyday life. As Commissioner Vestager put it on the day the decision was announced: '*We use our smartphones for many different things and now also more and more as mobile wallets, to pay for public transport or make other secure payments. With this decision, we ensure that Qualcomm's takeover of NXP will not prevent consumers from continuing to enjoy the benefits of these innovative technologies at competitive prices*.'[119]

116 See also section 1 of this Survey

117 [2017] EWHC 711 (Pat).

118 *TCL Communications Technology Holdings Inc v Telefonaktiebolaget LM Ericsson & Ericsson Inc*, Case No: SACV 14-341 NS(DFMx) consolidated with CASE 0:CV 15-2370 NS(DFMx).

119 Commission Press release IP/18/347 'Commission approves Qualcomm's acquisition of NXP, subject to conditions', 18 January 2018.