

# CLIENT ALERT

## Electronic Communications & IT

April 2, 2010

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*On 9 December 2009, the European Commission adopted a decision that makes legally binding commitments offered by Rambus which put a cap on royalty rates for certain of Rambus' patents on "Dynamic Random Access Memory" (DRAM) chips.*

Most standard setting organizations have rules that require participants to disclose patents and patent applications that are essential to the standard prior to its adoption, and to license patents incorporated into the standard on terms that are fair, reasonable and non-discriminatory (FRAND).

The transparency created by such disclosure is intended to foster competition for incorporation into the standard between different technologies. The FRAND requirements ensure that royalties charged for essential patents do not impede adoption of the standard.

A failure to disclose essential patents that leads to the incorporation of the patented technology into the standard is called a "patent ambush".

On 30 July 2007, the European Commission sent Rambus a Statement of Objections asserting that it had abused its dominant position contrary to article 102 TFEU by failing to disclose during the standard setting process that it owned patents or patent applications that were essential to the DRAM standards and subsequently claiming unreasonable royalties for these patents.

Rambus subsequently proposed commitments addressing the competition concerns raised by the Commission. These commitments include a royalty free license for certain patents (patents essential to the SDRAM and DDR standards developed during Rambus' membership of JEDEC) and a reduced royalty for other patents (patents in technologies incorporated in later versions of the DDR standard). Rambus disclosed standard 5 year license agreements that will be made available to all potential licensees.

On 9 December 2009, the European Commission accepted these commitments and made them binding.

In parallel proceedings, the US Federal Trade Commission (FTC) decided in 2006 that Rambus' conduct amounted to unlawful monopolization under Section 2 of the Sherman Act (Federal Trade Commission, 2 August 2006, *Rambus*, Docket No. 9302). This decision was however set aside by the D.C. Circuit Court in 2008 (*Rambus v. FTC*, No. 07-1086 (D.C. Cir. 2008)).

**Practical relevance**

This case emphasizes the importance of adequate intellectual property disclosure rules in standard setting organizations and the availability in Europe of antitrust remedies against players who do not comply with these rules.

It also illustrates the continued difference in the approach of similar issues by European and US antitrust laws, in particular in the field of exploitative abuses.

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