

Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C-3/38636 — Rambus

(Text with EEA relevance)

(2009/C 133/13)

1. INTRODUCTION

1. According to Article 9 of the Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission may decide — in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the parties concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment — to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. Such a decision would not conclude whether or not there has been or still is an infringement. According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. SUMMARY OF THE CASE

2. On 30 July 2007, the European Commission adopted a Statement of Objections thereby initiating proceedings against Rambus, a company incorporated in Delaware, USA. The Statement of Objections, which constitutes a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003, outlines the Commission's preliminary view that Rambus has infringed EC Treaty rules on abuse of a dominant position (Article 82) by claiming unreasonable royalties for the use of certain patents for 'Dynamic Random Access Memory' chips subsequent to a so-called '*patent ambush*'.
3. Dynamic Random Access Memory chips (DRAMs) are a type of electronic memory primarily used in computer systems, but also used in a wide range of other products which need to temporarily store data, including servers, workstations, printers, PDAs and cameras.
4. DRAMs have been standardised by an industry-wide US based standard setting organisation — JEDEC. Rambus owns and is asserting patents which it claims cover the technology included in these JEDEC standards. Therefore, every manufacturer wishing to produce synchronous DRAM chips or chipsets complying with these JEDEC standards must consequently either acquire a licence from Rambus or litigate its asserted patent rights.
5. The Statement of Objections outlines the Commission's preliminary view that Rambus engaged in intentional deceptive conduct in the context of the standard-setting process, for example by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standard. This type of behaviour is known as a '*patent ambush*'.
6. Against this background, the Commission provisionally considers that Rambus is abusing its dominant position by claiming unreasonable royalties for the use of its patents against the JEDEC-compliant DRAM manufacturers at a level which absent its conduct, it would not have been able to charge. The Commission provisionally considers that claiming unreasonable royalties in such circumstances amounts to an abuse of dominant position under Article 82.
7. The Commission provisionally considers in particular that the reasonableness of the royalties claimed by Rambus must be assessed in the light of its previous conduct consisting of an intentional deceptive capture of a standard incorporating technologies protected by those patents. The Commission's preliminary view is that without its '*patent ambush*', Rambus would not have been able to charge the royalty rates it currently does.
8. Furthermore, the Commission provisionally considers that behaviour such as that carried out by Rambus undermines confidence in the standard-setting process, whereas an effective standard-setting process is, in the sector relevant to the present case, a precondition to technical development and the development of the market in general to the benefit of consumers.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS

9. Rambus, the party subject to the proceedings, does not agree with the Commission's preliminary assessment as regards both the factual and legal elements, but has notwithstanding this disagreement nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns.
10. The commitments are briefly summarised below and published in full in English on the website of the Directorate-General for Competition at:

http://ec.europa.eu/comm/competition/index_en.html
11. Rambus's 13 May proposal offers a bundled five-year worldwide licence for future DRAM products for all of its patents for SDRAM, DDR, DDR 2 and DDR 3, whereby it commits not to charge for SDRAM and DDR. The offer does not cover past royalties.
12. For chips, the following would be the maximum royalty rates:
 - (a) SDR DRAMs — subject to compliance by the licensee with the terms of the license, the licensee will be granted a royalty holiday during the term of the license on SDR DRAM devices;
 - (b) DDR DRAMs — subject to compliance by the licensee with the terms of the license, the licensee will be granted a royalty holiday during the term of the license on DDR DRAM devices;
 - (c) DDR 2, GDDR3 and GDDR4: 1,5 %;
 - (d) DDR 3: 1,5 %.
13. For Memory Controllers, the following would be the maximum royalty rates:
 - (a) SDR Memory Controllers: 1,5 % per unit of selling price until April 2010, then dropping to 1,0 % ⁽¹⁾;
 - (b) DDR, DDR2, DDR3, GDDR3 and GDDR4 Memory Controllers: 2,65 % per unit of selling price until April 2010, then dropping to 2,0 %.
14. The commitment will be valid for a period of five years from the adoption date of the Article 9 Decision. The licence grant will expire at the end of this five-year period, irrespective of the signing date of the licensing agreement. Licensees will have, after a one year minimum licence period, an unconditional opt-out to the licenses before expiry of the duration of the contract.

4. INVITATION TO SUBMIT COMMENTS

15. The Commission intends, subject to market testing, to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring the commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition, to be binding on Rambus.
16. In accordance with Article 27(4) of Regulation (EC) No 1/2003, the Commission invites interested third parties to submit their observations on the proposed commitments. These observations must reach the Commission not later than one month following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which commercial secrets and other confidential passages are deleted and are replaced as required by a non-confidential summary or by the words 'commercial secrets' or 'confidential'. Legitimate requests will be respected.
17. Observations can be sent to the Commission under reference number COMP/C-3/38636 — Rambus,

either by e-mail COMP-GREFFE-ANTITRUST@ec.europa.eu
by fax +32 2 2950128
or by post, to the following address:
European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

⁽¹⁾ Unless Rambus has no remaining patents which read on SDR Memory Controllers, in which case there will be no royalty on SDR Memory Controllers.