



EUROPEAN COMMISSION

Brussels,

**COMMISSION DECISION**

**of 9.12.2009**

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the  
European Union and Article 54 of the EEA Agreement**

**Case COMP/38.636 – RAMBUS**

**(Only the English text is authentic)**

**Text with EEA relevance**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission Decision of 27 July 2007 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections the Commission adopted on 27 July 2007,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer<sup>2</sup>,

WHEREAS:

## **1. SUBJECT MATTER AND PARTIES**

- (1) This Decision is addressed to Rambus, a company incorporated in Delaware (USA) and concerns the claiming of potentially abusive royalties for the use of certain patents for “Dynamic Random Access Memory” (hereinafter referred to as "DRAM") chips subsequent to allegedly intentional deceptive conduct in the context of the standard-setting process. The alleged deceptive conduct relates to the non-disclosure of the existence of patents and patent applications which were later claimed to be relevant to the adopted standard.
- (2) In its Statement of Objections of 27 July 2007, which constitutes a preliminary assessment within the meaning of Article 9(1) of 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 ("Regulation (EC) No 1/2003"), the Commission came to the provisional conclusion that, at the point when it started asserting its patents in January 2000, Rambus held a dominant position on the worldwide technology market for DRAM interface technology (whether there is a single market for the full package of DRAM interface technologies, or whether there are separate worldwide markets for individual DRAM interface sub-technologies). Rambus has continued to hold that dominant position since.

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the TFEU; the two sets of provisions are in substance identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate.

<sup>2</sup> Hearing Officer final report of 29.9.2009.

- (3) The Commission took the preliminary view that Rambus' practice of claiming royalties for the use of its patents from industry standard-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge raised concerns as to the compatibility with Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Furthermore, the Commission came to the provisional conclusion that Rambus' behaviour undermines confidence in the standard-setting process given that 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.
- (4) Rambus was incorporated in 1990 in California and reincorporated in Delaware, USA, in 1997. Its principal place of business is Los Altos, California. Rambus designs, develops and licenses high bandwidth chip connection technologies for computers, consumer electronic and communication products (including systems memory, PC graphics, multimedia, workstations, video game consoles and network switches).

## **2. PROCEDURAL STEPS UNDER REGULATIONS NO 17/62 AND (EC) NO 1/2003**

- (5) On 18 December 2002, Infineon Technologies AG, a company with its principal place of business in Munich, Germany ("Infineon") and Hynix Semiconductor Inc., a company with its principal place of business in Ichon, Korea ("Hynix"), lodged a joint complaint against Rambus pursuant to Article 3 of Council Regulation No. 17/62<sup>3</sup> for the initiation of proceedings against Rambus.
- (6) On 5 April 2005, Infineon informed the Commission that it withdrew its complaint.
- (7) On 27 July 2007, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and adopted a Statement of Objections setting out the Commission's competition concerns which constitutes a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003.
- (8) This assessment was notified to Rambus by letter of 30 July 2007. Access to the file was granted to Rambus on 10 August 2007. Rambus responded to the Statement of Objections on 31 October 2007.
- (9) At Rambus' request, an Oral Hearing took place on 4 and 5 December 2007. Five companies were admitted as interested third parties. They provided comments on the Statement of Objections.
- (10) On 8 June 2009, Rambus submitted commitments ("the Commitments") to the Commission in response to the Statement of Objections while disagreeing with the Commission's provisional findings.

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<sup>3</sup> Regulation No. 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ No. 13, 21.2.1962, p. 204).

- (11) On 12 June 2009, a notice was published in the Official Journal of the European Union<sup>4</sup> pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to submit their observations on the Commitments within one month following publication.
- (12) On 23 July 2009, the Commission informed Rambus of the observations on the Commitments received from interested third parties following the publication of the notice. On 14 August 2009, Rambus submitted amended commitments.
- (13) On 28 September 2009, the Advisory Committee on Restrictive Practices and Dominant positions was consulted. On 29 September 2009, the Hearing Officer issued her final report.
- (14) On 13 October 2009, the Commission informed Hynix, in accordance with Article 7(1) of Commission Regulation (EC) No 773/2004,<sup>5</sup> that it took the preliminary view that there was no sufficient degree of Community interest for conducting a further investigation into the alleged infringement.
- (15) On 12 November 2009, Hynix submitted further comments.

### **3. PRELIMINARY ASSESSMENT**

#### **3.1. Relevant markets**

##### *3.1.1. Product market*

- (16) The relevant market is a technology market for DRAM interface technology. DRAM chips 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. The interface technology allows interoperability between a DRAM chip and other computer components which need to access the data stored in the DRAM chips. For the purpose of these proceedings, it may be left open whether there is a single market for the full package of DRAM interface technologies or whether there are separate worldwide markets for individual DRAM interface sub-technologies.

##### *3.1.2. Geographic market*

- (17) Synchronous DRAM licences are granted on a worldwide basis, and the resulting products are both manufactured and sold worldwide to uniform specifications. Synchronous DRAM chips are made in a few production sites throughout the world. They are distributed globally before incorporation into PCs and other equipment manufactured in a range of countries across the world.<sup>6</sup> Therefore, the

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<sup>4</sup> OJ C 133, 12.6.2009, p. 16.

<sup>5</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.04.2004, p. 18).

<sup>6</sup> See also Commission Decision of 03 May 2000 declaring a concentration to be compatible with the common market (Case No IV/M.0044 - HITACHI/NEC - DRAM/JV) according to Council Regulation (EEC) No 4064/89, OJ C 153, 1.6.2000, p. 8, paragraph 21.

market for the licensing of synchronous DRAM interface technology is global in its geographic scope.

### **3.2. Position of the parties on the relevant market**

- (18) JEDEC, an industry-wide US-based standard setting organisation, developed a standard for DRAMs. JEDEC SDR DRAM standard-compliant chips were the main type of DRAM chip on the market as early as 1999, accounting for 84% of DRAM chips sold. By August 1999, the JEDEC DDR DRAM standard had been agreed, further entrenching the evolutionary path of the JEDEC DRAM standards in question.
- (19) JEDEC-compliant synchronous DRAM chips account for the vast majority of DRAM chips currently sold worldwide, representing more than 96% in terms of overall sales of DRAM chips between 2004 and 2008. Virtually all market participants confirmed that it is commercially indispensable to comply with JEDEC standards in order to be able to sell DRAM chips on the Community or worldwide market. Rambus' RDRAM technology and its successor, XDR DRAM, represent the main non-JEDEC-compliant DRAM interface technologies.
- (20) As Rambus asserts patents on all JEDEC-compliant SDRAM chips and owns the proprietary RDRAM and XDR DRAM technology, the percentage of worldwide commercial DRAM production exposed to Rambus' patent claims is thus more than 90%. Rambus has been and remains the only company asserting patents on DRAM interface technology.
- (21) Every manufacturer wishing to produce synchronous DRAM chips or chipsets complying with JEDEC standards must therefore either acquire a patent licence from Rambus or litigate its asserted patent rights.
- (22) There are substantial barriers to entry on the market, primarily due to the fact that the industry is locked in to JEDEC standards. Firstly, the initial costs and efforts relating to standards development are substantial. Furthermore, there are significant costs associated with switching from a standard once it has been adopted.
- (23) First and foremost, the specifications of a new standard would need to be agreed with the companies active in the sector (DRAM manufacturers, microprocessor manufacturers, component manufacturers, original equipment manufacturers (OEMs) and others). This in itself would take a significant amount of time. Moreover, the marketing burden for a new standard and related technology would also be significant.
- (24) As adoption of a new technology would also carry high risk and substantial costs for customers, those customers would in fact need to be convinced that the new technology was viable and would be available in sufficient volume at an acceptable cost. Companies producing PCs and servers would need to develop and test new system architectures. Microprocessor and chipset manufacturers would also need to design chips to accommodate the new standard.
- (25) In parallel with the development of a new standard, DRAM manufacturers would need to consider the design of compliant parts and the new chips would need to be tested before mass production.

- (26) On the basis of the above, the Commission provisionally considered that Rambus held a dominant position on the market at the point when it started asserting its patents and has continued to hold that dominant position since.

### 3.3. Practices raising concerns

- (27) In the preliminary assessment, the Commission considered that Rambus may have engaged in intentional deceptive conduct in the context of the standard-setting process by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standard. Such behaviour is known as a "patent ambush."
- (28) The Commission took the view that Rambus may have been abusing its dominant position by claiming royalties for the use of its patents from JEDEC-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge. In the preliminary assessment, the Commission provisionally concluded that claiming such royalties was incompatible with Article 102 TFEU, in light of the specific circumstances of this case, including Rambus' intentional breach of JEDEC policy and the underlying duty of good faith in the context of standard-setting, which resulted in a deliberate frustration of the legitimate expectations of the other participants in the standard-setting process.
- (29) Furthermore, the Commission considered that such alleged behaviour by Rambus undermined confidence in the standard-setting process, given that 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.

#### The standard-setting context and patent ambushes

- (30) In the preliminary assessment, the Commission considered that the specific context relating to standard-setting was important to properly assess Rambus' conduct. The process of standard-setting amounts to collective decision-making where there is a risk of anti-competitive outcome. In essence, standard-setting provides a forum where companies come together and agree to exclude certain products or technologies from the market.
- (31) However, standards can have a positive economic effect insofar as they promote economic interpenetration on the internal market or encourage the development of new markets and improved supply conditions.<sup>7</sup> Standards tend to increase competition and lower output and sales costs, benefiting economies as a whole. Standards ensure interoperability, maintain and enhance quality, and provide information.<sup>8</sup>

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<sup>7</sup> Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2, paragraph 169.

<sup>8</sup> Commission Communication "The role of European standardisation in the framework of European policies and legislation", COM(2004) 674 final.

- (32) For these benefits to be realised, and given the risk of anti-competitive outcomes, particular attention must be given to the procedures used to guarantee that the interests of the users of standards are protected. The Commission has therefore set forth the conditions that constitute appropriate behaviour in standard-setting organisations. In its 1992 Communication entitled "*Intellectual Property Rights and standardisation*",<sup>9</sup> the Commission stated that an intellectual property right holder would act in bad faith if it was aware that its intellectual property read on a standard in development and did not disclose its intellectual property rights until after the adoption of the standard. This would force its competitors to accept higher licencing fees than those which could have been negotiated at an earlier stage before the adoption of the standard.<sup>10</sup> The Communication also stated that in order to ensure that a standard-setting process yields its benefits, intellectual property right holders should be required to identify and report any intellectual property rights reading on a standard in development.<sup>11</sup>
- (33) The Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements<sup>12</sup> ("Horizontal Guidelines") also provide a framework for the analysis of the effects of standardisation on competition. The Horizontal Guidelines state that standards must be set on a non-discriminatory basis, and that it must be justifiable why one standard is chosen over another.<sup>13</sup> By their nature, standards will not include all possible specifications or technologies and in some cases, it can be necessary for the benefit of the consumers or the economy at large to have only one technological solution.<sup>14</sup> The Horizontal Guidelines therefore stress the importance of "*non-discriminatory, open and transparent procedures*"<sup>15</sup> to safeguard against anti-competitive outcomes.
- (34) Given these factors, standard-setting bodies generally adopt intellectual property rights policies which are designed to prevent or minimise the risk of anti-competitive outcomes. Such policies, including JEDEC's patent policy, generally stress the importance of good faith.
- (35) In order to ensure that any accepted open standard is accessible to the industry, JEDEC's policy was to exercise particular care when considering standards that might require the use of proprietary technology. Standards that require the use of a patent could not be considered by JEDEC unless all of the relevant technical information covered by the patent or pending patent was made known.

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<sup>9</sup> Commission Communication "*Intellectual Property Rights and standardisation*", COM(1992) 445, paragraph 4.2.10.

<sup>10</sup> COM (1992) 445, paragraph 4.4.1.

<sup>11</sup> COM (1992) 445, paragraph 4.4.3 and 6.2.6.

<sup>12</sup> OJ C 3, 6.1.2001, p. 2.

<sup>13</sup> Horizontal Guidelines, paragraph 171.

<sup>14</sup> Horizontal Guidelines, paragraph 171.

<sup>15</sup> Horizontal Guidelines, paragraph 163.

- (36) To give effect to this policy, all members were required, or at the very least expected, to disclose to JEDEC any and all issued or pending patents of which they were aware and which might be involved in the standard-setting work of JEDEC. The patent policy provided for a number of rules ensuring that the policy was effectively made known to all JEDEC members.
- (37) The Commission provisionally concluded that JEDEC and its members relied upon compliance with the patent policy in developing industry standards. Compliance with JEDEC patent policy, and in particular rules relating to disclosure of issue or pending patents, allowed JEDEC and its members to choose alternative technologies or to design around such potential or actual patents should JEDEC members be unable to obtain an assurance from the patent (application) holder that a licence would be available under satisfactory terms consistent with the JEDEC patent policy.
- (38) The Commission provisionally concluded that the JEDEC patent policy and the underlying duty of good faith intended to provide members with an opportunity to develop open standards free from potential patent claims. In other words, the policy was aimed at preventing one member company from secretly capturing the standard by not disclosing to JEDEC that technologies being included were covered by the member's granted patent or pending patent application and at preventing the manipulation of the standard-setting process by filing patent applications on technologies discussed for inclusion by JEDEC and finally, at ensuring that licences for technologies protected by patent rights included in the standard are offered to JEDEC members on reasonable terms.
- (39) It should be noted, however, that while the Commission considered that Rambus may have breached JEDEC's patent policy in its preliminary assessment, an actual breach of the precise rules of a standard-setting body would not be a necessary requirement for a finding of abuse in this context. The finding of abuse would rather be conditioned by the conduct that has necessarily influenced the standard process, in a context where suppression of the relevant information necessarily distorted the decision making process within a standard-setting body.

#### Rambus' capture of the JEDEC standards

- (40) The Commission provisionally considered that Rambus planned to capture the standard for DRAM interface technology from the outset and that, pursuant to its business strategy, Rambus may have deliberately used its participation in JEDEC to revise and tailor its pending patent applications in an effort to gain control over JEDEC standard-compliant synchronous DRAM chips.
- (41) In the preliminary assessment, the Commission considered that as a member of JEDEC from 1991 to 1996, Rambus was duly informed and aware of the obligation to disclose issued and pending patents relating to the standard-setting work of JEDEC incumbent upon every member of the organisation. Rambus was perfectly aware of the expectations of other participants and of the fact that, as a consequence of its failure to disclose issued or pending patents, standards would not be adopted on the basis of all the relevant information.
- (42) The Commission took the preliminary view that pursuant to its business strategy, and notwithstanding: (i) its knowledge of the requirements of the JEDEC patent policy and of the underlying duty of good faith that is binding on a participant in

a standard-setting process; and (ii) its awareness of the relationship between its patents and patent applications and JEDEC's standard-setting work, Rambus was indeed aware of the benefits of keeping its patent positions secret and intentionally did not disclose any patents or patent applications which related to the relevant JEDEC standards to JEDEC.

#### The effects of the capture of the JEDEC standards

- (43) In the preliminary assessment, the Commission considered that, save for Rambus' alleged deceit, JEDEC Members were likely to have designed a "patent-free" standard around Rambus' patents. The Commission provisionally concluded that a number of factors pointed clearly in this direction.
- (44) The Commission took the preliminary view that there was wide-ranging evidence that the industry was concerned about costs associated with any DRAM interface technology. In this regard, the Commission provisionally concluded that payment of royalties on memory interfaces has been very much the exception, rather than the rule, in the DRAM industry, showing a disposition against including patents in standards.
- (45) Indeed, the Commission concluded that users were willing to forego increases in performance in order to keep costs down. In this regard, several higher performance alternative solutions were not selected as they were not essential for the PC market.
- (46) Moreover, it was the preliminary view of the Commission that there was significant evidence that during Rambus' membership of JEDEC, a broad range of alternative technologies to those that were eventually included in the JEDEC DRAM standard was available. The alternative technologies to the ones which were eventually included in the standard were technically and commercially feasible. There is no evidence indicating that there were patents reading on the alternatives that could have been incorporated into the standards.

#### Industry locked in to the JEDEC standards

- (47) In the preliminary assessment, the Commission considered that there were substantial barriers to entry on the market and that the industry was locked into the JEDEC DRAM standards. Moreover, the Commission took the view that for these reasons, the effects of the alleged abusive behaviour also extend to subsequent JEDEC standards and not only the SDR and DDR DRAM standards that were adopted during the time in which Rambus was a member of JEDEC.

### **3.4. Effect on trade between Member States**

- (48) In its preliminary assessment, the Commission considered that Rambus' practices could have an effect on trade between Member States given that synchronous DRAM licences are granted on a worldwide basis, and the resulting products are both manufactured and sold worldwide to uniform specifications.

#### 4. PROPOSED COMMITMENTS

- (49) The key elements of the Commitments offered voluntarily by Rambus on 8 June 2009 are as follows:
- (a) Rambus will offer a bundled five-year worldwide licence for future DRAM products for all of its patents for SDR, DDR, DDR 2 and DDR 3 DRAMs, whereby it will commit not to charge for SDR and DDR DRAMs. The offer will not cover past royalties. Rambus will offer a similar licence for products based on future JEDEC standards.
  - (b) For DRAM chips, the maximum royalty rates will be as follows:
    - (i) 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.
    - (ii) 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.
    - (iii) DDR 2, GDDR3 and GDDR4 DRAMs: 1.5% per unit of selling price.
    - (iv) DDR 3 DRAMs: 1.5% per unit of selling price.
  - (c) For Memory Controllers, the maximum royalty rates will be as follows:
    - (i) SDR Memory Controllers: 1.5% per unit of selling price until April 2010, then dropping to 1.0% per unit of selling price.<sup>16</sup>
    - (ii) DDR, DDR2, DDR3, GDDR3 and GDDR4 Memory Controllers: 2.65% per unit of selling price until April 2010, then dropping to 2.0% per unit of selling price.
  - (d) The Commitments will be valid for a period of five years from the date of adoption of this Decision. The licence grant will expire at the end of this five-year period, irrespective of the signing date of the licensing agreement. After a one year minimum licence period, licensees will have an unconditional opt-out to the licenses before expiry of the duration of the contract.
  - (e) Rambus will provide to licensees under this proposal a most-favoured-licensee assurance that the rates provided to the licensee will be the lowest per unit rates, under similar terms, conditions and business circumstances, including the forward-looking-only nature of the license, offered to any other party during the duration of the license.
- (50) In annex to the Commitments, Rambus also submitted two default licence agreements for chips and memory controllers, respectively. Rambus stated that

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<sup>16</sup> Unless Rambus has no remaining patents which read on SDR Memory Controllers, in which case there will be no royalty on SDR Memory Controllers.

the default contracts complied with the Commitments. They are to be published on Rambus' website for prospective licensees to download and sign to obtain a license, if the Commission makes the Commitments binding on Rambus. Parties will remain free to negotiate different terms and conditions should they so choose.

## **5. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO. 1/2003**

- (51) In response to the publication on 12 June 2009 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003<sup>17</sup>, the Commission received six responses from interested third parties, including from three major DRAM-chip manufacturers.

### **5.1. Comments on commitments and response**

- (52) With regard to the scope of the Commitments, some respondents considered that the Commitments should specify the existing standards that are covered in greater detail, with particular reference to mobile and low power variants of the existing JEDEC DRAM chip standards. Some respondents argued that the Commitments should be extended to include future generations of JEDEC standards that have not yet been adopted.
- (53) A number of respondents argued that the Commitments should not include a most-favoured-licensee clause as Rambus would likely refuse to agree to any royalty rate below those specified in paragraph (49) above because it arguably would have to offer those rates to every other licensee, thereby preventing licensees from obtaining better rates through negotiations.
- (54) As for the royalty caps set in the Commitments, all respondents generally considered the proposed rates to be too high. A number of respondents submitted (different) calculations with the aim to show that certain companies could have been paying a lower rate at a certain moment. In its comments of 12 November 2009, the complainant, Hynix submitted additional calculations. In this respect, the Commission considers that it must evaluate the whole package of the Commitments and not its individual elements. In this regard, even if the possible, minor shortcomings of certain aspects of the remedies were to be considered to be substantiated, the whole package of Commitments substantially addresses the concerns expressed by the Commission in the present case. In this context, in the light of all relevant circumstances and in particular of the complex and difficult nature of the case, the Commission considers that the Community interest does not warrant continuing the investigation any further and that there are thus no longer any grounds for action by the Commission.
- (55) Firstly, the Commission observes that Rambus agrees not to charge any royalties for the SDRAM and DDR standards that were adopted during the time in which Rambus was a member of JEDEC. Secondly, Rambus commits to a maximum royalty rate of 1.5% for the subsequent standards, that is, below the 3.5% it had previously been charging for DDR in its existing contracts. The Commitments

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<sup>17</sup> OJ C 133, 12.6.2009, p. 16.

extend this rate to all market participants and guarantee that industry will not have to pay more than the capped rates. This predictability and certainty has a clear value for business. Potential new entrants will also have a clear perspective of future royalty costs, facilitating a decision to enter the market.

- (56) Several respondents commented that, as the licence is worldwide and royalties due are calculated on worldwide sales, the Commitments would require them to also pay royalties for countries where Rambus has no patents.
- (57) The Commission considers that, since the market is worldwide, and in the context of the present case, it is not unreasonable to calculate the royalties on the basis of worldwide sales, even if Rambus may not have patents in certain countries.
- (58) In response to comments received on the Commitments pursuant to the Article 27(4) Notice, Rambus modified its proposed commitments with a revised proposal on 14 August 2009. It amended the Commitments to clarify that all existing JEDEC standards for DRAM chips and Memory controllers, including GDDR2, LPDDR and LPDDR2, are covered and that Rambus will offer licence grants under similar conditions for future JEDEC Standards<sup>18</sup>. Rambus furthermore removed the most-favoured-licensee clause.

## **5.2. Comments on default license agreements and response**

- (59) Together with the Commitments, the default licence agreements submitted by Rambus were also published on the website of the Directorate-General for Competition for public consultation. A number of respondents found that several terms and conditions of the default contracts would pose practical difficulties to potential licensees.
- (60) Some respondents stated that the terms left open the possibility for Rambus to extract royalties based not on the price of the individual chips and controllers, but on the value of the end-product (such as PCs, mobile phones and other devices integrating DRAMs), even if the licensed technologies only represent a small percentage of such end-products.
- (61) The DRAM-chip manufacturers stated that the clauses which aimed to ensure that licensees take up the bundled licence and not just parts of it were disproportionate. For example, one clause put a maximum for SDRAM and DDR chips on the percentage that could be royalty free, limiting it to 10% of a manufacturer's turnover. The manufacturers stated that the clause reduces and restricts the value of the commitment as SDRAM and DDR represent more than 10% of their business. They also stated that another clause could imply that a licensee would be required to realise a significant portion of its revenue from the licensed products, thereby preventing licensees from producing potential alternative, competing products.
- (62) Finally, a number of respondents pointed out that in the default licence agreements, Rambus was not offering protection against claims of indirect infringement, as opposed to past contracts. Some respondents raised the concern

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<sup>18</sup> See annex at p. 4, § 5.

that they would then be exposed to excessive liability demands for alleged inducement of infringement for the sale of supposedly licensed products.

- (63) In light of the comments received on the default licence agreements, Rambus modified the Commitments to clarify the contested points. The terms and conditions of these default licence agreements do not form an integral part of the Commitments but are the means by which the Commitments will be implemented in practice. Rambus commits that the terms and conditions of such licences will be compliant with the Commitments and that it will publish those terms and conditions on its website.
- (64) Rambus clarified that it intends to collect royalties on the individual device, such as a DRAM or a Memory Controller from the manufacturer and commits not to seek royalties for the same device from the manufacturer's customer.
- (65) Rambus clarified in the Commitments that the licence will be a package licence that will need to be entered into for all companies of a group, making the challenged clauses on turnover superfluous.
- (66) Rambus clarified that the royalty shall be determined on the basis of the price of an individually sold chip and not of the end-product. If they are incorporated into other products, the individual chip price remains determinative. Rambus introduced a royalty cap for memory controllers that are part of a chip having multiple functions.
- (67) Rambus amended the Commitments to include all patents Rambus acquires during the lifetime of the Commitments insofar as they relate to the standards covered by the Commitments.

### **5.3. Conclusion**

- (68) Overall, the observations received did not lead the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the preliminary assessment.
- (69) In view of the results of the market test, the Commission considers that, with the clarification on the scope, the package licence and the basis for calculating the royalty, the removal of the most-favoured-licensee clause and the clarification that future patents are covered by the Commitments, the Commitments proposed by Rambus are adequate to meet the competition concerns expressed in the preliminary assessment.

## **6. PROPORTIONALITY OF THE AMENDED COMMITMENTS**

- (70) According to settled case law, the principle of proportionality requires that the measures adopted by Community institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.<sup>19</sup> Where

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<sup>19</sup> Judgement of the Court of First Instance of 19.7.1997 in case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraph 201.

there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued.<sup>20</sup> For the assessment of the proportionality of commitments submitted within the framework of Article 9 of Regulation (EC) No 1/2003, the Commission takes into account that the Commitments are not imposed by the Commission for an established infringement under Article 7(1) of Regulation 1/2003, but voluntarily proposed by the undertaking seeking to bring the procedure to an end without a formal decision on the existence of an infringement.

- (71) The Commission takes the view that the Commitments in their final form are sufficient and necessary to address the concerns identified by the Commission in its preliminary assessment. As the competition concerns arise from the fact that Rambus may be claiming abusive royalties for the use of its patents at a level which it would not have been able to charge absent its conduct, the Commission considers the Commitments are proportionate as they address the royalty rates and only those for JEDEC standards.
- (72) Rambus agrees not to charge royalties for the SDRAM and DDR standards that were adopted during the time in which the Commission provisionally considered Rambus may have engaged in intentional deceptive conduct in the context of the standard-setting process, by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standards.
- (73) Given the Commission's preliminary view that there are substantial barriers to entry on the market, which are primarily due to the fact that the industry is locked into the JEDEC standards, and that the effects of the alleged abusive behaviour extend to subsequent standards, the fact that Rambus commits to maximum royalty rates for those subsequent standards is adequate and proportionate.
- (74) Secondly, Rambus commits to a maximum royalty rate of 1.5% for the subsequent standards. That is below the 3.5% it has been charging before for DDR in its existing contracts. The Commitments extend this rate to all market participants and guarantee that industry will not have to pay more than the capped rates. This predictability and certainty has a clear value for business. Potential new entrants will also have a clear perspective of future royalty costs, facilitating a decision to enter the market.
- (75) The Commitments will be binding on Rambus for a total period of five years. This duration is necessary and proportionate as Rambus' previous DRAM chip and memory controller license agreements were concluded for a term of five years.

## 7. CONCLUSION

- (76) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes Commitments, offered by the undertakings concerned to

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<sup>20</sup> Judgement of the Court of 11.7.1989 in case 265/87, *Schröder* [1989] ECR 2237, paragraph 21, and judgement of the Court of 9.3.2006 in case C-174/05, *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I – 2243, paragraph 28.

meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the Commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

- (77) In light of the Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (78) The Commission retains full discretion to investigate and open proceedings under Article 102 TFEU and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision,

HAS ADOPTED THIS DECISION:

*Article 1*

The Commitments as listed in the Annex shall be binding on Rambus Inc. for a total period of five years from the date of adoption of this Decision.

*Article 2*

It is hereby concluded that there are no longer grounds for action in the present case.

*Article 3*

This Decision is addressed to:

Rambus Inc.  
4440 El Camino Real  
Los Altos  
CA 94022  
USA

Done at Brussels,

*For the Commission*

Neelie KROES

*Member of the Commission*

ANNEX

THE COMMITMENTS