

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN**

APPLE INC., and NEXT SOFTWARE,  
INC. (f/k/a NeXT COMPUTER, INC.),

Plaintiffs and  
Counterclaim-  
Defendants,

v.

Case No. 10-CV-662 (BBC)

MOTOROLA, INC. and MOTOROLA  
MOBILITY, INC.

Defendants and  
Counterclaim-  
Plaintiffs

**DECLARATION OF JAMES MCGILL AITKEN IN SUPPORT OF  
PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS APPLE INC. AND  
NEXT SOFTWARE, INC.'S REPLY IN SUPPORT OF THEIR MOTION FOR  
A STAY PURSUANT TO FED. R. CIV. P. 19**

I **JAMES McGILL AITKEN** of Freshfields Bruckhaus Deringer LLP, 65 Fleet Street, London, EC4Y 1HS hereby declare:

1. I am a partner in the law firm of Freshfields Bruckhaus Deringer LLP. I received my law degree from the University of Glasgow in 1996, an LLM from Edinburgh University in 1997, and qualified as a solicitor of England and Wales in 2000. I practice EU and UK competition law and advise Apple in that capacity. The matters referenced in this declaration are based on personal knowledge and, if called as a witness, I could, and would, testify competently to these matters.

2. I set out below the basic process and timetable for clearance of a merger within the EU, pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EU Merger Regulation").

3. Attached at **Exhibit 1** is a true and correct copy of the EU Merger Regulation. References below to "Article" are to the relevant sections of the EU Merger Regulation.

4. Pursuant to Article 4(1) of the EU Merger Regulation, mergers which have a "Community dimension" (i.e. they trigger certain thresholds in the EU, as defined in Article 1), must be notified to the European Commission. Pursuant to Article 7, such mergers cannot be implemented without the approval of the European Commission.

5. I understand that the thresholds in Article 1 of the EU Merger Regulation appear to be triggered by the proposed acquisition of Motorola Mobility, Inc. ("MMI") by Google, Inc. (the "Merger") because MMI has confirmed publicly that a merger notification to the European Commission is required as a result of the Merger. Attached at **Exhibit 2** is a copy of the "Proxy Statement" pursuant to section 14(a) of the United States Securities Exchange Act of 1934, published by MMI on 27 September 2011, in which MMI confirms that pre-closing antitrust clearances are required in a number of jurisdictions, including the European Union (see page 19, **Exhibit 2**).

#### *Phase I review*

6. Once a merger is formally notified pursuant to Article 4(1) of the EU Merger Regulation (see also paragraph 15 *et seq.* below regarding the pre-notification phase), the Commission is required to examine the notification as soon as it is received (Article 6(1)). This initial review of the merger is also known as a "Phase I" review. At the end of this review, the Commission must make a decision, either that:

- (a) the merger does not qualify for review under the EU Merger Regulation (Article 6(1)(a)); or
- (b) the merger does not "raise serious doubts as to its compatibility with the common market" ((Article 6(1)(b)); or
- (c) the merger "raises serious doubts as to its compatibility with the common market" ((Article 6(1)(c)); or

- (d) following modification by the parties (i.e. if remedies are offered) the merger no longer raises serious doubts as to its compatibility with the common market (Article 6(2)).

7. Article 10(1) provides that the Commission must make a decision under Article 6(1) within 25 working days of the receipt of a complete notification. Where parties offer remedies with a view to seeking a decision under Article 6(2), the time period within which the Commission must make a decision may be increased to 35 working days.

8. Accordingly, a Phase I review in the EU without remedies lasts 25 working days (or approximately 5 weeks) and a Phase I review with remedies lasts 35 working days (or approximately 7 weeks). Working days do not include public holidays. Accordingly, these periods may be slightly longer depending on the timing of the merger review and whether public holidays fall within the relevant period.

#### *Phase II review*

9. If the Commission decides that the merger “raises serious doubts as to its compatibility with the common market” (i.e. takes a decision under Article 6(1)(c)), it will initiate Phase II proceedings. This is known as a “Phase II” review. At the end of this review, the Commission must make a decision, either that:

- (a) the merger will not significantly impede effective competition in the common market (Article 8(1)); or
- (b) the merger will not significantly impede effective competition in the common market if it is modified by the parties (i.e. if remedies are offered) (Article 8(2)); or
- (c) the merger will significantly impede effective competition in the common market and should therefore not be implemented (i.e. the merger is blocked) (Article 8(3)).

10. Article 10(3) provides that a decision under Article 8(1), 8(2) or 8(3) shall be taken within 90 working days of the date on which Phase II proceedings were initiated. Where parties offer remedies, with a view to seeking a decision under Article 8(2), the time period within which the Commission must make a decision may be increased to 105 working days.

11. Article 10(3) also provides that the above periods may be increased by 20 working days, either at the request of the parties, or by the Commission (with the consent of the parties).

12. Accordingly, a Phase II review in the EU without remedies can take up to 110 working days (approximately 22 weeks) and a Phase II review in the EU with remedies can take up to 125 working days (approximately 25 weeks). As noted above, these periods may be slightly extended due to public holidays. Additionally, in exceptional circumstances, these periods may be suspended for the purposes of further information gathering by the Commission (Article 10(4)).

### *Phase I and Phase II*

13. A merger which is referred to Phase II may therefore take a total of 160 working days from the date that the Commission receives a complete notification, which is equal to approximately 32 weeks, or approximately 8 months. As noted above, this period may be slightly extended due to public holidays or, in exceptional circumstances, for the purposes of further information gathering, as provided in Article 10(4).

### *Incomplete notification*

14. Article 10(1) provides that the Phase I review period shall start on the day following the receipt of a complete notification. If parties submit a notification which the Commission considers to be incomplete, the Commission will reject it and require the parties to submit the necessary information before the "Phase I" period starts to run.

### *Pre-notification Phase*

15. Attached at **Exhibit 3** is a copy of a document entitled "Best Practices on the conduct of EC merger control proceedings" (the "Best Practice Guidelines"), published by the Directorate General for Competition, the section of the European Commission which is responsible for reviewing merger filings. These guidelines explain, at paragraphs 5 *et seq.*, that the Commission strongly encourages parties to engage in pre-notification contacts, even in cases which are non-problematic.

16. The purpose of these discussions is to allow the Commission and the parties to discuss issues raised by the merger (see paragraph 6 of the Best Practice Guidelines) and for the parties to satisfy the Commission that their notification is complete before they make a formal notification, avoiding the risk of a merger notification being rejected due to incompleteness (see paragraph 7 of the Best Practice Guidelines; see also paragraph 14 above). According to paragraph 10 of the Best Practice Guidelines, pre-notification discussions can take at least two weeks, or longer in more complex cases. As indicated in paragraphs 11 *et seq.* of the Best Practice Guidelines, pre-notification discussions may involve the submission of briefing memoranda and draft filings to the Commission, as well as one or more pre-notification meetings with the Commission.

### *Formal notification of the Merger*

17. In accordance with Article 4(3) of the EU Merger Regulation, the fact that a merger has been formally notified to the European Commission is published. To the best of my knowledge, as at the date of this declaration, the Commission has not yet published the fact of the notification of the Merger pursuant to Article 4(3). Accordingly, I believe that the above mentioned time periods have not yet begun to run.

*EU and other jurisdictions*

18. As noted at paragraph 4 above, a merger which is subject to the EU Merger Regulation cannot be implemented without the approval of the European Commission (Article 7(1)). The European Commission is not bound by the findings of other competition regulators outside the European Union. The European Commission may come to a decision which differs from that of other non-EU regulators who also have jurisdiction to review the relevant transaction and it has done so on several occasions previously. For example:

- (a) On 3 September 2009, the European Commission initiated Phase II proceedings in a merger between Oracle Corporation and Sun Microsystems, Inc., finally clearing the merger on 21 January 2010. The United States Justice Department decision to close its investigation of this transaction was announced by Oracle on 20 August 2009. See attached at (i) **Exhibit 4** a copy of Oracle's press release confirming that the transaction had been approved by the United States Department of Justice, in the form of a Form 8-K filed at the United States Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934; (ii) **Exhibit 5** a press release from the United States Department of Justice dated 9 November 2009 ("Department of Justice Antitrust Division Issues Statement on the European Commission's Decision Regarding the Proposed Transaction Between Oracle and Sun"); and (iii) **Exhibit 6** a copy of the European Commission decision dated 21 January 2010 to clear the merger pursuant to Article 8(1) of the EU Merger Regulation, which contains, at paragraphs 7 *et seq.*, an overview of the EU procedure and timing in this case.
- (b) On 28 November 2007, the European Commission initiated Phase II proceedings in a merger between Tom Tom N.V. and TeleAtlas N.V., finally clearing the merger on 14 May 2008. On 15 October 2007, the parties were granted early termination of the initial 30 day waiting period under the Hart-Scott-Rodino Act in the United States. The initial 30 day waiting period under the Hart Scott Rodino Act is the equivalent of the European Commission's "Phase I" review. See attached at (i) **Exhibit 7** a copy of an extract from the United States Federal Trade Commission Federal Register reporting that Early Termination was granted on 15 October 2007 (Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules, 72 Fed. Reg. 65,024" (Fed. Trade Comm'n Nov. 19, 2007)); and (ii) **Exhibit 8**, a copy of the European Commission decision dated 14 May 2008 to clear the merger pursuant to Article 8(1) of the EU Merger Regulation, which contains, at paragraphs 7 *et seq.*, an overview of the EU procedure and timing in this case.
- (c) On 28 March 2008, the European Commission initiated "Phase II" proceedings in a merger between Nokia Corporation and Navteq Corporation, finally clearing the merger on 2 July 2008. On 5 December 2007, the parties were granted early termination of the initial 30 day waiting period under the Hart-Scott-Rodino Act in the United States. See attached at (i) **Exhibit 9** a copy of an extract from the United States Federal Trade Commission Federal

Register reporting that Early Termination was granted on 5 December 2007 (Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules, 72 Fed. Reg. 74,289 (Fed. Trade Comm'n Dec. 31, 2007)); and (ii) **Exhibit 10** a copy of the European Commission decision dated 2 July 2008 to clear the merger pursuant to Article 8(1) of the EU Merger Regulation, which contains, at paragraphs 1 *et seq.*, an overview of the EU procedure and timing in this case.

- (d) On 3 July 2001, the European Commission blocked a merger between General Electric Company and Honeywell International Inc. On May 2, 2001, the United States Justice Department had announced that it had reached an agreement in principle with the parties (involving certain remedies) that resolved its antitrust concerns. See attached at (i) **Exhibit 11**, a copy of a press release from the United States Department of Justice dated 2 May 2011 ("Justice Department Requires Divestitures in Merger Between General Electric and Honeywell; and (ii) **Exhibit 12**, a copy of the European Commission decision dated 3 July 2001 to prohibit the merger pursuant to Article 8(3) of the EU Merger Regulation.

#### **Statement of Truth**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 28 day of September 2011 at London, United Kingdom.

Signed.....

  
JAMES MCGILL AITKEN