



EUROPEAN COMMISSION

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Polski Związek Przemysłu
Oświetleniowego (PZPO)
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02-697 Warszawa
Poland

Subject: Case AT.39913 – LED
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Sir,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided to reject your complaint against Koninklijke Philips N.V. ("Philips") and Osram AG ("Osram"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. THE COMPLAINT

1.1. The procedure

- (2) On 5 May 2015, the Polish Association of Lighting Industry ("PZPO") submitted a complaint ("Complaint") requesting the Commission to launch an investigation into alleged infringements of Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union ("TFEU") on markets in the European LED² lighting sector.
- (3) On 27 July 2015, the Commission sent Philips a non-confidential version of the Complaint and on 11 September 2015, Philips submitted its response to the Complaint ("Response to the Complaint"). On 25 July 2016 you submitted comments on the Response to the Complaint.

¹ 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, Official Journal L 123, 27.04.2004, pages 18-24.

² LED stands for Light Emitting Diode.

- (4) You made additional written submissions to the Commission on 10 September 2015, 30 June 2016 and 13 December 2016.
- (5) On 24 June 2016, the Commission received a letter of support from [REDACTED] (lighting industry associations in Italy). An additional letter from [REDACTED] (also a lighting industry association in Italy) was submitted on 28 June 2016.³
- (6) On 28 June 2016 and 1 December 2016, you provided further clarifications at meetings with the case-team at DG Competition in Brussels.
- (7) On 29 July 2016 and 22 December 2016, Philips submitted signed copies of the license agreements entered into with a number of Polish licensees.⁴ In reply to questions from the Commission, Philips submitted additional information on 29 September 2017.
- (8) By letter of 27 April 2018, the Commission informed you of its intention to reject your complaint. In response, you made additional observations in your letter of 24 May 2018.
- (9) You further sent a letter on 4 September 2018, in which you set out your view that the alleged anticompetitive behaviour is particularly harmful to small and medium-sized enterprises ("SMEs"), and urged DG Competition to ask an opinion from the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs. DG Competition complied with your request, but DG Internal Market, Industry, Entrepreneurship and SMEs declined to comment.
- (10) On 5 October 2018, you discussed the case with the case-team during a phone call.
- (11) Finally, you sent letters on 28 November 2018 and 20 February 2019 with additional information.

1.2. Summary of the allegations

- (12) The Complaint concerns alleged infringements of EU competition law on the markets for LED light fixtures (light fixtures in general can also be referred to as luminaires or lighting products) and LED components, and more particularly, Philips' Patent Licensing Program under which Philips licenses a portfolio of its patents on LED technology.
- (13) Philips and Osram are active, among other things, in the manufacture and distribution of LED light fixtures⁵ as well as the components for LED light fixtures. As PZPO represents manufacturers of LED light fixtures, Philips and Osram are therefore both (potential) suppliers and competitors to PZPO's members.

³ In the letters of support, these parties express their agreement with the arguments you brought forward in the Complaint. However, the substantive content of these letters does not add to the information in the Complaint itself. For the purpose of the legal assessment in Section 7 below, these letters therefore need not be taken into account.

⁴ In particular those of the Polish licensees named by yourself during the mentioned meetings with the case-team as being the target of the alleged anticompetitive behaviour: [REDACTED]

⁵ An LED light fixture (or LED luminaire) is an electrical device used to create artificial light which typically contains three components: the LED module (the light supply, consisting of a light emitting diode – LED – mounted on a board), the LED driver (the power supply) and the controller (for adjusting light intensity, hue, etc.), all encased in some kind of housing.

- (14) In your complaint and subsequent submissions, you allege that a number of practices of Philips and Osram infringe Articles 101 and 102 TFEU. Your concerns are primarily related to the terms of Philips' Patent Licensing Program ("PLP"), which was launched in 2008 and offers access to a portfolio of Philips' patents on LED technology.⁶ Under the PLP, licensees have to pay royalties whenever their products or the components included in them use Philips' patented technology.
- (15) You allege that Philips holds a dominant position, conferred to it (at least in part) by its LED patent portfolio⁷, and that it abuses this dominant position through a number of practices.
- (16) Specifically, you claim that Philips unlawfully intimidates and threatens lighting products manufacturers to force them to join the PLP. This would be done, *inter alia*, through an "aggressive market policy"; claiming the infringement of patents which are not valid in Poland; creating a misconception that manufacturers of lighting products infringe Philips' IPR; threatening expensive legal action or creating problems with public procurement procedures.⁸ These manufacturers, being relatively small, would enter into a disadvantageous agreement rather than risk being exposed to significant litigation costs.⁹
- (17) You also claim that Philips imposes exploitative terms on the license agreements entered into with the manufacturers of lighting products and does not allow for the possibility of negotiating these terms.¹⁰ In particular:
 - (a) Philips allegedly requests that licensees under the PLP disclose any innovation or improvement on existing products to it, in order to identify whether they are covered by its patents. According to you, this prevents the licensees from seeking patent protection for their inventions;¹¹
 - (b) The licensing agreement allegedly envisages not only future royalties, but also retroactive payments due to alleged past patent infringements that have not been established by a competent authority or court;¹²
 - (c) Philips allegedly imposes royalties that depend on the value of the entire lighting product while the patent only covers a part or component of that product.¹³ Moreover, such royalties are charged irrespectively of the territory where the licensed goods are sold¹⁴;

⁶ The PLP has been operated by Philips Lighting since February 2016. Philips Lighting was divested by Philips in 2016 and changed its name to Signify in May 2018: <https://www.signify.com/global/about/news/press-releases/2018/20180516-philips-lighting-is-now-signify>. While the complaint is not limited to a particular time period, references to Philips's corporate structure should be understood to refer to the situation as it was at the time the Complaint and the responses from Philips were received.

⁷ Complaint, Section 3.II.A, para 2 and Section 5.II.

⁸ Complaint, Section 3.II.A, para 4-9 and Minutes of the meeting of 1 December 2016.

⁹ Complaint, Section 3.II.A, para 9.

¹⁰ Complaint, Section 3.II.A, para 19-20.

¹¹ Complaint, Section 3.II.A, para 21.

¹² Complaint, Section 3.II.A, para 23.

¹³ Complaint, Section 3.II.A, para 24.

¹⁴ Comments of 25 July 2016 on the Response to the Complaint.

- (d) Philips allegedly may decide unilaterally whether a product infringes one of its patents and it is unclear which products are covered by the licence agreement;¹⁵
 - (e) Philips allegedly imposes excessive reporting obligations on the licensees, such as information on customers and sales data. Additionally, independent inspections of the licensees' businesses may be carried out up to five years after the termination of the contract;¹⁶
 - (f) The terms of the agreement are allegedly vague and may not guarantee the licensee against court proceedings for patent infringements;¹⁷
 - (g) The termination of the agreement is allegedly almost impossible for the licensee while termination provisions can easily be used by Philips.¹⁸
- (18) You also allege that the terms of the license agreements would have the effect of limiting production and innovation from Philips' competitors, thereby resulting in the elimination of competition.¹⁹
- (19) Additionally, you claim that Philips entered into unlawful restrictive agreements with Osram, in breach of Article 101 TFEU. You claim that these cross-license agreements aim at exchanging patents and sensitive information, thus reducing the effective level of competition between the two undertakings. Moreover, the agreements discriminate other potentially interested operators by excluding them from the agreements.²⁰
- (20) In your additional observations in your letter of 24 May 2018 on the Commission's letter of 27 April 2018, you challenge the Commission's analysis and provisional conclusion but do not provide any new information.
- (21) In your letter of 28 November 2018, you reiterate your view that Philips is dominant on any possible market for LED technology, based primarily on the number of LED-related patents it filed in the period between 2008 and 2012.

1.3. Observations of the implicated parties

- (22) On 27 July 2015, the Commission sent Philips a non-confidential version of the Complaint and on 11 September 2015, Philips submitted its response to the Complaint ("Response to the Complaint"). Philips also submitted additional information on 29 July 2016, 22 December 2016 and 29 September 2017.
- (23) Philips describes the value chain of LED lighting products in terms of various levels²¹. According to Philips, the worldwide LED lighting industry is highly fragmented, and the total number of companies that are active at Levels L0 to L5/6 are in the tens of

¹⁵ Complaint, Section 3.II.A, para 26.

¹⁶ Complaint, Section 3.II.A, para 27-29.

¹⁷ Complaint, Section 3.II.A, para 30.

¹⁸ Complaint, Section 3.II.A, para 31.

¹⁹ Complaint Section 3.I (1).

²⁰ Complaint Section 3.II.B.

²¹ Philips response to RFI of 13 July 2017, para 7. The levels identified are as follows: L0 (LED chips), L1 (packaged LEDs), L2 (LED modules and drivers), L3 (light sources), L4 (LED luminaires) and L5/6 (LED systems and solutions).

thousands. Several players in this industry are vertically integrated and active at all levels (L0 to L5/6) in the value chain.²²

- (24) According to Philips, when deciding on its IPR strategy, Philips determined that it would be most practicable to license the patents covered by the PLP at a single level of the value chain. Philips considered that if it were to license the Program Patents at different levels of the LED lighting value chain, this might create uncertainty for market participants regarding the license status of the different components and luminaires that they use.²³ Philips therefore decided to license the Program Patents at the luminaire level.²⁴
- (25) In the framework of the PLP therefore, Philips enters into licensing agreements with branded luminaire manufacturers. If Philips believes that a luminaire manufacturer may be selling branded LED luminaires incorporating Philips' technology in countries in which Philips has patents under the PLP, Philips will seek to enter into a discussion with that company on the potential use of its patents in the company's products. Philips' IP specialists will work together with the company (and its technical experts) to analyse the manufacturer's product portfolio in order to determine which of its products read on Philips' patents.²⁵
- (26) Regarding the alleged infringements of Article 102 TFEU, Philips claims that:
- (a) Neither its shares of sales on the European market for luminaires nor its patent portfolio for LED-related technology convey dominance. The LED luminaire sector is and will remain highly competitive²⁶, and Philips' shares of both sales and patent filings are well below a level that would indicate dominance²⁷. In addition, Philips asserts that the PLP does not cover any actual or future essential patent since alternative technologies exist for all patents.²⁸
 - (b) The PLP consists of valid patents that are clearly identified on a dedicated website and can be easily verified in public registers. The fact that some patents are granted in countries other than Poland does not mean they cannot be asserted against luminaire suppliers based in Poland, as these may be selling branded LED luminaires in other countries in which Philips has valid patents.²⁹
 - (c) Participation in the PLP is based on open, good faith discussions and involves no "unlawful intimidation".³⁰
 - (d) The terms of the PLP are reasonable and ensure equal treatment among licensees. A standard template agreement is proposed to all partners regardless of their size, so that there is no discrimination between smaller and larger companies and both

²² Philips response to RFI of 13 July 2017, para 12.

²³ Philips response to RFI of 13 July 2017, para 9.

²⁴ Philips response to RFI of 13 July 2017, para 10.

²⁵ Philips response to RFI of 13 July 2017, paras 46-47.

²⁶ Response to the Complaint, para 8-14.

²⁷ Response to the Complaint, paras 10 and 13.

²⁸ Response to the Complaint, para 13.

²⁹ Response to the Complaint, para 17-22.

³⁰ Response to the Complaint, para 23-29.

royalty calculation methods (both charging royalties over LED luminaires - not LED components) are offered to all licensees.³¹ Under the “line-by-line assessment”, Philips and the licensee jointly carry out a detailed analysis of each luminaire that the licensee sells to determine which read on a Philips patent and whether these are sold in countries in which Philips’ relevant technology is protected. Philips then charges a percentage royalty for each luminaire that uses at least one Philips patent included under the PLP (and which is manufactured or sold in countries where there is patent coverage).³² Under the “flat rate assessment” (according to Philips requested by various prospective licensees wishing to avoid the administration associated with the “line-by-line assessment”), a flat rate is calculated based on the luminaire categories sold by the licensee and the patent coverage in the countries in which the licensee assembles and/or sells the respective luminaire. This flat rate is designed so that a licensee will pay approximately the same overall royalty rate as it would under the “line-by-line assessment”.³³

- (e) Instead of foreclosing rivals, the PLP has actively stimulated competition in a fast-growing sector. Philips deliberately chose to license key parts of its IPR instead of keeping it for captive use in order to increase competition in the LED sector. Moreover, alternative technologies exist for all patents under the PLP.³⁴
 - (f) The information transmitted to Philips by its licensees is the minimum that is reasonably necessary for the purpose of verifying compliance with the conditions of the PLP and for calculating the royalties due, and is provided subject to confidentiality obligations on the part of Philips. In any case, there are internal firewalls between Philips Lighting’s IP Department (previously Philips IP&S) and Philips business units, preventing the latter from becoming aware of commercially sensitive information.³⁵
- (27) Philips also strongly contests any infringement of Article 101 TFEU, as it submits that the PLP is unilaterally set up and operated by Philips, and solely covers Philips’ technology.³⁶ Philips has concluded a cross-licensing agreement concerning IPR on LED technology with Osram to overcome potential disputes over lighting technologies.³⁷

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (28) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.³⁸

³¹ Response to the Complaint, para 30-32.

³² Philips has confirmed that in the case of an agreement under the line-by-line assessment, if it turned out “*that the specific product no longer used Philips’ technology, the product would be removed from the list of products that are subject to royalty payments*” (Philips response to RFI of 13 July 2017, para 61).

³³ Philips response to RFI of 13 July 2017, paras 33-35.

³⁴ Response to the Complaint, para 33-37.

³⁵ Response to the Complaint, para 38-41 and Philips response to RFI of 13 July 2017, para 38.

³⁶ Response to the Complaint, para 2.

³⁷ Philips response to RFI of 13 July 2017, para 54.

³⁸ OJ C 101, 27.04.2004, p. 65. See also the Commission’s Report on Competition Policy 2005, p. 25-27.

- (29) Contrary to the assertions in your written observations³⁹, the Commission is not required to carry out an investigation for every complaint that comes before it. Rather, the case-law of the EU courts allows the Commission to reject complaints without taking any investigative measure.⁴⁰ Moreover, Article 7 of Regulation No 1/2003 does not give a complainant the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement.⁴¹
- (30) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. In addition, the Commission may consider the scope of the investigation required.⁴² If it emerges that an in-depth investigation would be complex and time-consuming and the likelihood of establishing an infringement seems limited, this will weigh against taking further action.⁴³
- (31) Moreover, according to the case-law of the EU courts, the burden of showing the likelihood of an infringement is on the complainant.⁴⁴ Additionally, the case-law allows the Commission to take a strict view of the quality of the evidence that the complainant provided. Finally, it is entirely permissible for the Commission to assess the probative value of evidence independently.⁴⁵
- (32) In your written observations you claim that the purpose of the Complaint was "*to investigate the infringement of competition law by a global player and defend the rights of [SMEs]*."⁴⁶ However, the mere fact that the alleged victims of the alleged anticompetitive behaviour are competitors of a small size does not mean that the conduct is likely to have an impact on the market that warrants the application of the competition rules. The General Court of the EU has held that Article 101 TFEU aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.⁴⁷

³⁹ Points 3, 11, and 16 of your letter of 24 May 2018.

⁴⁰ Cases T-432/05 *EMC Development*, ECLI:EU:T:2010:189, paras. 57-59; T-320/07 *Jones*, ECLI:EU:T:2011:686, paras. 112-116; T-319/99 *FENIN*, ECLI:EU:T:2003:50, para. 43; T-204/03 *Haladjian Frères*, ECLI:EU:T:2006:273, para. 28; and the Notice on Complaints, para. 47.

⁴¹ See, to that effect, Case C-373/17 P, *Agria Polska e.a. v. Commission*, EU:C:2018:756, paragraph 97 and the case-law cited therein.

⁴² Case T-24/90 *Automec v Commission*, EU:T:1992:97, paragraph 86.

⁴³ Case T-104/07 *BVGD v Commission*, EU:T:2013:366, para 218.

⁴⁴ Cases C-56/12 P *EFIM*, ECLI:EU:C:2013:575, paras. 71-72; T-198/98 *Micro Leader*, ECLI:EU:T:1999:341, para. 32-39 and 57; T-712/14 *CEAHR*, ECLI:EU:T:2017:748, para. 39. In *EFIM*, the Court of Justice held that "*une plainte doit contenir des informations précises sur les faits dont on peut inférer qu'il y a infraction*". In *CEAHR*, the General Court held that "*the burden of proving the allegation rests on the complainant*".

⁴⁵ Case T-699/14, *Topps Europe Ltd v. Commission*, ECLI:EU:T:2017:2, para 52.

⁴⁶ Your letter of 24 May 2018, points 26 and 30.

⁴⁷ Joined cases C- 501/06 P, C-513/06 P, C-515/06 P and C- 519/06 P, *GlaxoSmithKline Services Unlimited v. Commission*, ECLI:EU:C:2009:610, para 63.

3. ASSESSMENT OF YOUR COMPLAINT

- (33) After a preliminary assessment of your complaint, the Commission does not intend to conduct an in-depth investigation into your claims for the reasons set out below.

3.1. The likelihood of establishing the existence of an infringement

- (34) First, the likelihood of establishing the existence of an infringement of Articles 101 and/or 102 TFEU in this case appears limited.

3.1.1. Assessment of the alleged infringement of Article 102 TFEU

3.1.1.1. Market Definition

Relevant product market

- (35) In the Complaint you considered two possible definitions of the relevant market:
- (a) You claim that the relevant market could be a market for the manufacturing and marketing of all lighting products, irrespective of the manufacturing technology. According to you, this market should include both home and industrial lighting products.⁴⁸
 - (b) You also suggest that the relevant market could be defined as "*the global market for licensing for the use of patents covering lighting products*" and that Philips' patents could run in the thousands, likely giving it a qualified market position on such a market.⁴⁹ The Commission understands this to mean that you consider that the technology covered by the patents for lighting products could be a relevant market in this case.
- (36) As regards the first market, in previous merger decisions⁵⁰ the Commission held that the market for light fixtures in general comprises two separate product markets: consumer/residential and professional/industrial light fixtures. The Commission has so far left open the question of whether the professional light fixture market could be further segmented into separate markets for indoor and outdoor light fixtures. The Commission has also considered the possibility of a separate market for LED light fixtures but has left this question open.⁵¹
- (37) For the purpose of assessing your complaint, the Commission considers that the definition of the relevant market for goods can be left open, since the assessment of the alleged infringements will remain the same under any of the mentioned potential market definitions.

⁴⁸ Complaint, Section 5.I, para 1 and 4.

⁴⁹ Complaint, Section 5.I, para 5.

⁵⁰ Case IV/M.258 – CCIE/GTE, decision of 25 September 1992, para 16; Case COMP/M.1876 – KKR/WASSAL/Zumtobel, decision of 13 April 2000, para 11; Case COMP/M.2917 – Wendel-KKR/Legrand, decision of 14 October 2002, para 18; Case COMP/M.4509 – Philips/PLI, decision of 29 January 2007, paras 7-8; and Case COMP/M.6194 – Osram/Siteco Lighting, decision of 22 June 2011, paras 12-14.

⁵¹ Case COMP/M.6357 – Koninklijke Philips/Indal Group, decision of 23 November 2011 and Case COMP/M.6194 – Osram/Siteco Lighting, decision of 22 June 2011.

- (38) As regards the technology market, the Commission notes that a relevant technology market includes a certain licensed technology and its substitutes. Substitutes of the licensed technology are those technologies that are regarded by the licensee as interchangeable or substitutable, by reason of their characteristics, their intended use and the royalties payable in respect of those rights.⁵² Theoretically, if no suitable alternative technologies exist to manufacture a certain final product, a single patent may constitute a relevant technology market in itself. However, the interrelatedness of different technologies in the LED sector may lead to the inclusion of one or more patent-protected technologies in the same relevant technology market.
- (39) In its assessment of the complaint, the Commission considers that the relevant technology market definition can be left open, as the conclusion on the alleged infringements would not change under any of the mentioned potential market definitions.

Relevant geographic market

- (40) You allege that the relevant geographic market for lighting products should have at least a European scope, although you do not rule out that this market could be national.⁵³ In merger proceedings the Commission has considered and left the question open as to whether this market is national or EEA-wide.⁵⁴ For the purpose of assessing your complaint, the Commission considers that the relevant geographic market definition for lighting products can be left open, since the assessment of the alleged infringements will remain the same under any of the mentioned potential market definitions.
- (41) As for the technology market, the Commission equally considers that the relevant geographic market definition can be left open, since the assessment of the alleged infringements will remain the same under any potential market definition.

3.1.1.2. Alleged dominant position held by Philips

- (42) The Union Courts have defined "dominance" as a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers.⁵⁵
- (43) While market shares on their own are not determinative of dominance, they can provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market. The Union Courts have established a rebuttable presumption for dominance if an undertaking holds a market share of 50% or more in the relevant market.⁵⁶

⁵² Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements ("TTBER"), Article 1(k).

⁵³ In the case of national markets, it appears from the Complaint that the relevant market would be the territory of Poland, where PZPO's members are based. Complaint, Section 5.I, paras 1-3.

⁵⁴ Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011 and Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011.

⁵⁵ Case 27/76 *United Brands and United Brands Centraal v Commission*, ECLI:EU:C:1978:22, para 65; Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 38

⁵⁶ Case C-62/86 *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, para 60.

- (44) In the Complaint you claim that Philips is the undisputable leader of the lighting industry in Poland.⁵⁷ In support of this statement, you attach press articles and reports that refer to Philips' position in the Polish market, as regards revenue and net profits. As for the European market, you claim to have no data on the value of the market or Philips' position.
- (45) You also claim that Philips is a leader in the development of lighting technologies (in particular LED technologies)⁵⁸, and that Philips' patents could run in the thousands⁵⁹, which would also contribute to its dominant position. You reiterate this position in your letter of 28 November 2018, referring to an article and a research paper which provide estimates of the number of LED-related patents filed and owned by Philips.⁶⁰
- (46) The Commission has previously examined the markets for light fixtures (and sub-segments of these markets) and the market shares of the market participants in the context of merger proceedings. The *Philips/Indal*⁶¹ decision suggests that in the EEA, Philips' market share for professional light fixtures in 2010 did not exceed 20% (and the combined market share of the merging parties would not exceed 20%). The decision also suggests that in Poland, Philips' market share for professional light fixtures in 2010 did not exceed 30% (and the combined market share of the merging parties would not exceed 30%).⁶² This is in line with the Commission's findings in a previous merger decision.⁶³ As for consumer (non-professional) light fixtures, Philips only entered this market with the acquisition in 2007 of PLI⁶⁴ which had a small market share in the EEA. In your written observations, you claim that this information is not up-to-date.⁶⁵ As the market situation could indeed have changed, the Commission requested Philips to provide more recent figures.
- (47) The more recent figures provided by Philips⁶⁶ do not suggest that its market position has changed significantly in the past years. In particular, Philips has provided an estimate of its 2015 and 2016 EEA-wide market share (as well as its market share in Poland) for professional (indoor and outdoor) and consumer luminaires. According to its estimates, Philips' share on the overall European market for luminaires is below 20%. In Poland, Philips' market share does not appear to have changed significantly since 2010. In your written observations, you claim that this contradicts previous Commission decisions⁶⁷ but it is unclear which decisions you refer to, as the decisions referred to in point (46) above

⁵⁷ Complaint, Section 5.II.

⁵⁸ *Ibid.*, para 2.

⁵⁹ Complaint, Section 5.I, para 5.

⁶⁰ Letter of 28 November 2018 and annexes.

⁶¹ Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011, para 81.

⁶² *Ibid.*, para 82.

⁶³ Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011, para 67.

⁶⁴ Case COMP/M.4509 – *Philips/PLI*, decision of 29 January 2007.

⁶⁵ The Commission notes, nevertheless, that some of the evidence you submitted to support your claims also dates back to 2011 (see in particular, attachment 8 to the Complaint).

⁶⁶ Philips submission of 28 September 2017.

⁶⁷ Your letter of 24 May 2018, point 23.

do not point to different figures. Moreover, some of the evidence you provided corroborates Philips' low market share, at least as regards the professional segment.⁶⁸

- (48) In your written observations, you also refer to LED components, arguing that Philips is a market leader with regard to these and that these should also be taken into account in the assessment of dominance.⁶⁹ You refer in this regard to the findings of the *Philips/Indal* decision. However, this decision suggests that Philips does not have a high market share with regard to these products.⁷⁰
- (49) As regards technology markets, the existence of a dominant position depends not on the number of patents, but on the presence of the patented technology in the downstream relevant product market. The licensor's market share in a technology market will be the combined market share, on the downstream relevant product market, of the products manufactured by the licensor and by the licensees using the licensed technology⁷¹. Following this approach, all the sales on the downstream relevant product market are taken into account, irrespective of whether the product incorporates a technology being licensed.
- (50) Philips submits that the share of products incorporating technology licensed under the PLP is unlikely to exceed 40% on any meaningful downstream product market segmentation.⁷² In your written observations, you claim this is an unverified supposition.⁷³ However, Philips' estimate is supported by the level of the average flat rate agreed with the licensees opting for this method of royalty calculation,
- (51) The flat rate is a weighted average royalty, calculated to reflect the average rate over all LED luminaires sold by a licensee. As the flat rate applies to all of a licensee's LED luminaire sales, its value and how it compares to the highest possible rate, are a reflection of how many LED luminaires sold by a licensee actually read on Philips' patents.
- (52) Philips has provided figures on the average flat rate applying to all flat rate agreements concluded until 2017. According to Philips, the level of this average flat rate suggests that Philips' licensees use Philips' program patents in only a limited percentage of their products, which Philips deems unlikely to exceed 40%.⁷⁴
- (53) Moreover, information gathered by the Commission during its preliminary investigation suggests that Philips does not hold any essential patents that might confer upon it a position of market power and that there are viable alternatives to its IPR.⁷⁵ This is first supported by information that Philips has provided on its relative position in patent

⁶⁸ See attachment 10 to the Complaint, which indicates that Philips' share in the Polish market for professional luminaires is 18.2% (presumably in 2013, as the report is dated May 2014).

⁶⁹ Your letter of 24 May 2018, point 24.

⁷⁰ Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011, para 207.

⁷¹ See Article 8(d) of the TTBER (see footnote 52 above) and para 86 of the Commission's Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3). The Guidelines also illustrate an alternative methodology based on calculating, for each technology, the share of total licensing income from royalties, representing the technology's share of the market where competing technologies are licensed.

⁷² Philips response to RFI of 13 July 2017, paras 18-19.

⁷³ Your letter of 24 May 2018, point 15.

⁷⁴ Philips response to RFI of 13 July 2017, paras 25-28.

⁷⁵ Response to the Complaint, para 13, and Philips response to RFI of 13 July 2017, paras 29-32.

filings in the lighting sector (including LED-related patent filings). This information does not suggest that Philips holds a particularly large number of LED-related patents⁷⁶, and is not contradicted by the information in your letter of 28 November 2018.

- (54) Second, Philips has also provided a detailed description of six patents⁷⁷ that the Commission identified early in its investigation as particularly relevant to luminaire manufacturers, and has explained the different options available to those manufacturers who wish to design around these patents. Philips has also provided examples of products that make use of alternative technologies, which suggests that these workarounds are not merely theoretical, but commercially viable and used in practice.⁷⁸
- (55) In view of the information at the Commission's disposal, its assessment is that, while it cannot be excluded, it appears unlikely that Philips holds a dominant position on any of the proposed relevant markets. However, even if Philips were found to be dominant on one or more relevant markets, the Commission considers that its behaviour is unlikely to amount to an abuse of a dominant position as explained below.⁷⁹

3.1.1.3. The alleged abuses

- (56) You claim that Philips unlawfully intimidates and threatens lighting products manufacturers to force them to join the PLP. This would be done through several means (see para (14) above). In support of your claim, you submit a number of e-mails (of similar content) sent by Philips to Polish manufacturers of lighting products as well as a document from the Polish Patent Office on the issue of whether a number of European patents are protected in Poland.
- (57) The Commission first notes that the letters you submitted as evidence do not suggest an aggressive policy on Philips' part nor do they include any threats. In these letters, Philips informs the manufacturers that it believes they are using its patents (some of which are listed as an example) and of the possibility of obtaining a license under the PLP; it provides a link where the manufacturers can obtain more information on the PLP and invites the manufacturers to discuss the PLP with it. In particular, these letters do not threaten litigation or mention any possible retaliation for failing to join the PLP (e.g., in the context of procurement procedures).
- (58) As for the claim that some of the patents included in the PLP are not valid in Poland, the Commission finds this is without relevance as it is possible for a Polish manufacturer of lighting products to infringe non-Polish patents if it manufactures and/or sells its products in countries in which Philips has valid patents.⁸⁰ In your written observations you argue that the issue is that Philips charges royalties for markets to which the licensees do not sell. This argument is dealt with in para (68).

⁷⁶ Response to the Complaint, para 13, and Philips response to RFI of 13 July 2017, paras 20-24.

⁷⁷ EP 0890059; EP 0929992; EP 1415517; EP 1415518; EP 2089656; EP 1576858.

⁷⁸ Philips response to RFI of 13 July 2017, paras 29-32.

⁷⁹ For this reason, it is irrelevant whether or not the Commission has, at this stage, conducted an "in-depth investigation of the patent market", as you insisted the Commission should have, during the telephone conference with the case-team on 5 October 2018.

⁸⁰ Response to the Complaint, paras 19-22.

- (59) The evidence and explanations submitted by Philips also do not suggest that manufacturers of lighting products cannot identify the patents covered by the license agreement. On the contrary, these patents are listed on the PLP's dedicated website⁸¹ as well as in an Annex to the license agreement.
- (60) The Commission therefore concludes that the available evidence does not seem to support the claim that Philips unlawfully intimidates or threatens lighting products manufacturers to force them to join the PLP.
- (61) In your written observations, you claim that the main point of the Complaint was Philips' alleged "pre-contractual practice" (i.e., that Philips proposes draft agreements to potential licensees, accompanied by threats of litigation, in order to persuade them to sign the agreements)⁸² and you claim that the Commission did not address these arguments. However, these claims are addressed in paragraphs (56)-(59).
- (62) As regards your claim that Philips does not allow for the possibility of negotiating the terms of license agreements it enters into with manufacturers of lighting products, the Commission first notes that this claim is not substantiated and there are no elements in the file that would corroborate this. Philips argues that it offers prospective licensees a standard template agreement, in order to ensure equal treatment among licensees and that it engages in good faith discussions on the terms of the agreement.⁸³ Moreover, it is not clear what potential effects on competition could derive from the terms of the license agreements being uniform between the licensees, especially as it does not appear that licensees are forced to enter into these agreements against their will.⁸⁴
- (63) You further claim that the terms of the license agreements entered into with the manufacturers of lighting products are exploitative and would have the effect of limiting production and innovation from Philips' competitors, thereby resulting in the elimination of competition.
- (64) In particular you argue that Philips requests that licensees under the PLP disclose any innovation or improvement on existing products to it, in order to identify whether they are covered by its patents. In your view, this reporting obligation would be anticompetitive as it could allow Philips to apply for patents over the licensees' inventions and consequently discourage the licensees from pursuing further innovation.
- (65) In the framework of the PLP, a licensee is contractually obligated to provide Philips with information regarding sales. In particular, Philips requires country-by-country sales data expressed in value and volume, because an analysis of the licensee's sales is necessary for Philips to calculate the applicable royalty.⁸⁵ Philips claims that there are two ways to get this data: performing periodic *ad hoc* audits with independent third party auditors or imposing reporting obligations. The latter would be the most cost-efficient means to get this data.

⁸¹ Response to the Complaint, para 18.

⁸² Your letter of 24 May 2018, points 10, 19, and 28.

⁸³ Response to the Complaint, paras 5 and 29.

⁸⁴ See paragraph (53) above.

⁸⁵ Philips response to RFI of 13 July 2017, paras 33-35.

- (66) Philips also explains that the reporting obligations vary depending on the royalty calculation method: the "line-by-line" method requires detailed information about sales values and volumes because royalties need to be calculated on an item-by-item basis. Data is required on a "country-by-country" basis in order to determine whether products are sold in countries in which Philips' relevant technology is protected.
- (67) The reporting obligations are lighter under the "flat rate" method where Philips calculates a "weighted average royalty". In this case the calculation of the flat rate is based on a company's overall LED luminaire revenues, and therefore requires the provision of less detail with respect to the licensee's products and sales activities at each reporting (i.e., no country-by-country sales data).
- (68) The Commission first notes that in view of the terms of the template licensing agreements (as well as the terms of the signed agreements with Polish licensees) submitted by Philips⁸⁶, it appears that the reporting obligations under the PLP have the sole purpose of allowing Philips to assess which of the licensees' products require a license and to establish the level of royalties due. Philips submits that it requires licensees to provide only the information needed to assess the royalties payable by the licensee and to enable Philips to prevent the unlawful use of its IPR. According to Philips, it requires detailed information about the licensees' sales values and volume for the product-by-product option⁸⁷, as this involves the calculation of percentage royalties on an item-by-item basis. Country-by-country sales data is required because Philips only charges a royalty for products manufactured or sold in countries in which its relevant technology is patented. Under the flat rate option even less detail is required.⁸⁸ On balance, it does not appear that Philips requires any information that would be unnecessary or excessive for the stated purpose. Moreover, as regards the requirement to report new products, Philips has confirmed that it is willing, in all agreements, to allow the licensees to only report new products 30 days after their commercial release⁸⁹, which would allow more time for the licensees to protect their inventions.
- (69) Furthermore, Philips argues that reporting obligations such as those in the PLP are common and not materially different from other licensing programs in the industry.⁹⁰ It substantiates this statement by referring to Philips' CD Disc Standard Patent License Agreement, on which the PLP license agreements are based and which was reviewed by

⁸⁶ Philips response to RFI of 13 July 2017, para 37, and e-mails from Philips of 29 July 2016 and 22 December 2016.

⁸⁷ Under the product-by-product (or line-by-line) option, Philips and the licensee jointly carry out a detailed analysis of each luminaire that the licensee sells to determine which read on a Philips patent. Philips then charges a percentage royalty for each luminaire sold that uses at least one Philips patent included under the PLP. Under the flat-rate option, the royalty is calculated based on the luminaire categories sold by the licensee and the patent coverage in the countries in which the licensee assembles and/or sells the respective luminaire. The flat rate is established following a joint assessment of the licensee's LED luminaire portfolio by Philips and the licensee, and is designed so that a licensee will pay approximately the same overall royalty rate as he would under the "line-by-line" assessment. See Philips response to RFI of 13 July 2017, paras 33-35.

⁸⁸ Philips response to RFI of 13 July 2017, paras 33-37.

⁸⁹ Philips response to RFI of 13 July 2017, paras 39 and 66-68.

⁹⁰ Philips response to RFI of 13 July 2017, paras 41-44.

the Commission in 2003⁹¹, as well as by referring to the licensing agreements of other undertakings.

- (70) In addition to the particular context of these reporting obligations, as well as their purpose, the Commission notes that it appears unlikely that Philips uses the information reported to alter the parameters of competition in the market for light fixtures, where it competes with the licensees.
- (71) The template licensing agreements (as well as the signed agreements with Polish licensees) submitted by Philips to the Commission include unambiguous confidentiality clauses ensuring that the information received from the licensees will not be shared with any third parties or Philips' employees outside the division responsible for the PLP (Philips Lighting's IP Department or previously Philips IP&S). Philips has also explained the (structural and contractual) measures it has taken to ensure that sensitive information disclosed by licensees remains confined within Philips Lighting's IP Department (previously Philips IP&S) and cannot be accessed by other business units of Philips that compete with licensees on the market for light fixtures.⁹²
- (72) Furthermore, discussions with potential licensees prior to joining the PLP are governed by a separate confidentiality and non-disclosure agreement which prevents Philips from using confidential information for any purpose other than the possible conclusion of a license agreement. The corporate structure of Philips also appears to prevent the exchange of confidential information between Philips' IP Department and other Philips business units. Philips IP&S (which operated the PLP until February 2016) was set up as an individual and independent organisation within Philips, with its own management. Similarly, the structure of Philips Lighting prevents such exchange between Philips Lighting's IP Department and Philips Lighting's business units.⁹³
- (73) Moreover, you have not provided any evidence that would suggest that Philips is using information reported to it under the PLP, for example, to claim the licensees' inventions as its own. In the absence of evidence or indicia suggesting that Philips does not in practice respect the confidentiality clauses or internal "firewalls" that would prevent the spread of the confidential information, or that these reporting obligations deter light fixture manufacturers from investing in R&D, the Commission's assessment is that it is unlikely that the reporting obligations could have restrictive effects on competition.
- (74) In your written observations, you add that the confidentiality obligations imposed by Philips in particular with regard to the template agreement suggest that Philips is aware of the exploitative terms of the agreements and are meant to hide this.⁹⁴ However, this is mere speculation. Moreover, confidentiality clauses and non-disclosure agreements are a commonplace practice when companies negotiate agreements, as these discussions often involve confidential business information from both parties. They are therefore not sufficient to suggest that the agreements contain anticompetitive terms.

⁹¹ Case No. COMP/C-3/37.228 *Ingman Disc+VDC/Philips+Sony*, Case No. COMP/C-3/37.561 *Pollydisc/Philips+Sony*, and Case No. COMP/C-3/37.707 *Broadcrest & Others/Philips+Sony*.

⁹² Response to the Complaint, paras 39-40, and Philips response to RFI of 13 July 2017, paras 38-40.

⁹³ Philips response to RFI of 13 July 2017, para 38.

⁹⁴ Point 20 of your letter of 24 May 2018.

- (75) You also claim that it is exploitative for Philips to impose royalties that depend on the value of the entire lighting product while the patent only covers a part or component of that product, as it would result in competitors having to use inferior materials and components to remain competitive. In this regard, the Commission notes that the practice of calculating royalties on the basis of the price of the final product where the licensed technology relates to an input which is incorporated into a final product is generally not considered restrictive of competition.⁹⁵
- (76) As for your claim that royalties are charged irrespectively of the territory where the licensed goods are sold (and whether Philips' patents are valid in those territories), Philips has explained that the manner in which its royalty calculation methods are applied ensures that it only charges royalties for products manufactured or sold in countries where the patents are valid.⁹⁶ In the absence of evidence suggesting the contrary, it appears that Philips only charges a royalty for products manufactured or sold in countries where it has patent protection.
- (77) With regard to the other allegedly exploitative terms of the licensing agreements you mention in the Complaint, it is not clear how these would result in the anticompetitive effects you allege (i.e., limiting production and innovation from Philips' competitors), especially as it does not appear that licensees are forced to enter into the licensing agreements against their will. Furthermore, you do not provide any evidence or indicia to substantiate your assertions that these terms would have an anticompetitive effect. Philips asserts in this regard that, on the contrary, the PLP has stimulated competition in the industry.⁹⁷ There is no indication from lighting manufacturers that they have held back on innovation due to the PLP.
- (78) The Commission notes that the LED market is a growing and innovative market, which is, above all, technological. It does not appear likely, therefore, that market participants would stop investing in innovation unless they were significantly restrained. The terms of the licensing agreements do not appear to be capable of leading to such an effect and, given the lack of evidence for such effects, the Commission concludes that it is unlikely that the terms of Philips' licensing agreements will lead to a limitation of production or technological innovation.
- (79) As a general comment with regard to the alleged anticompetitive terms of the agreements, you assert in your written observations that the Commission should not have regard to template agreements or signed agreements, but to the draft agreements allegedly proposed by Philips to potential licensees. You claim not to know which agreements Philips submitted to the Commission⁹⁸ but that those agreements did not contain prohibited terms and the Commission did not receive the documents that do not comply with competition law.⁹⁹ You claim as well to have presented evidence of these prohibited terms during one of the meetings with the case-team.¹⁰⁰

⁹⁵ Para 184 of the Guidelines (see footnote 71).

⁹⁶ See paragraph (26)(d) above and Philips' response to RFI of 13 July 2017, paras 33-35.

⁹⁷ Response to the Complaint, para 37.

⁹⁸ Even though the companies that had already signed agreements, and for which Philips submitted the agreement signed by both parties, were clearly identified by you.

⁹⁹ Your letter of 24 May 2018, point 6.

¹⁰⁰ Your letter of 24 May 2018, point 27.

- (80) However, no such evidence was presented. During the meeting of 1 December 2016 you provided an "anonymised" draft agreement, of unknown origin, allegedly containing the anticompetitive clauses which Philips proposed to potential licensees. This draft agreement, however, does not substantially differ from the template agreement submitted by Philips. The terms of the agreements signed by Polish licensees also do not appear capable of leading to the alleged anti-competitive effects. You were not able to name any potential licensee that had refused to sign the license agreement as proposed and had become the subject of patent litigation by Philips.
- (81) The Commission therefore concludes that there is low likelihood of finding that Philips has infringed Article 102 TFEU by abusing a dominant position on any relevant market.

3.1.2. Assessment of the alleged infringement of Article 101 TFEU

- (82) You claim that Philips entered into unlawful restrictive agreements with Osram relating to licensing, in breach of Article 101 TFEU. You state you are not familiar with the details of these agreements and have learned about these agreements through press statements and articles. It can be deduced from these articles that the agreements you refer to are a cross-licensing agreement signed in 2008, which is an extension of a previous agreement from 2006.
- (83) You claim that the cross-license agreement aims at exchanging patents and sensitive information about the undertakings' technological solutions, thus reducing the effective level of competition between the two undertakings. Moreover, the agreement discriminates other potentially interested operators by excluding them from it.
- (84) In response to questions by the Commission regarding its cross-license agreement with Osram, Philips has submitted that this agreement represents a legitimate way for it to achieve patent peace with Osram.¹⁰¹ This rationale is corroborated by Philips' internal documents. The examination of the cross-license agreement¹⁰² also suggests that the agreement essentially ensures the non-assertion of patents between the undertakings, in order to safeguard their freedom to operate on the market.
- (85) The examination of the cross-license agreement further suggests that its aim is to license the undertakings' patents to one another under terms which do not appear to be anticompetitive or otherwise discriminatory. It also does not appear that sensitive information is exchanged, such as to be capable of reducing the effective level of competition between the two undertakings. As to the allegation that the agreement discriminates other potentially interested operators by excluding them from it, it should be noted that undertakings are generally free to choose with whom they contract and the fact that Philips may choose to enter into cross-license agreements with only some selected undertakings may be due to a variety of commercial or business reasons.
- (86) In view of the information at its disposal, the Commission thus takes the view that there is low likelihood of finding that the cross-license agreement between Philips and Osram has an anticompetitive object or effect in breach of Article 101 TFEU.

¹⁰¹ Philips response to RFI of 13 July 2017, paras 4-6 and Philips response to RFI of 13 July 2017, para 54 and 57-59.

¹⁰² Philips response to RFI of 13 July 2017, Question 1.

3.2. The scope of the investigation required

- (87) Furthermore, an in-depth investigation would require considerable resources and would be disproportionate in view of the limited likelihood of establishing the existence of an infringement.
- (88) Such an investigation would, first of all, require the Commission to conduct a comprehensive analysis of the relevant product markets in order to conclude on their precise definition and segmentation. This would be particularly burdensome as regards the technology market, as it would require the Commission to examine a large number of Philips' patents. This exercise would involve a detailed technical analysis of Philips' technology as well as of potentially competitive technologies held by other undertakings, which would require requesting a great amount of information from the undertakings active in LED technology.
- (89) In addition, the Commission would have to establish whether Philips has a dominant position in any potential relevant market. This would require it to assess the market shares of Philips and its competitors on the different relevant markets, necessitating the acquisition of extensive sales data, as well as an assessment of any barriers to entry or countervailing buyer power, which would require requesting information from customers and other players in the market.
- (90) To fully assess the allegations that the reporting obligations under the PLP are anticompetitive, the Commission would have to establish whether the information required by Philips goes beyond what is reasonably necessary in order for its licensing agreements to be put in place. The Commission would furthermore have to examine whether Philips does not in fact contain this information in Philips Lighting's IP Department (previously Philips IP&S division), but shares it with its commercial lighting business, and whether the commercial lighting business uses the information to gain a competitive advantage on the market for light fixtures. This would likely require conducting inspections at the premises of Philips.
- (91) As for the alleged limitation of innovation, this may, *inter alia*, require the Commission to analyse the level of innovation that would have existed or would exist in the market in the absence of the PLP.

4. CONCLUSION

- (92) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (93) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (94) The Commission reserves the right to send a copy of this Decision to Philips Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.¹⁰³ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform [REDACTED] (e-mail: [REDACTED]). Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Philips.
- (95) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

*Margrethe VESTAGER
Member of the Commission*

¹⁰³ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.