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EU manufacturers suffer from malfunctioning of the US certification market: potential abuse of dominant position

1. INTRODUCTION

Orgalime would like to report to the European Commission a situation that might be considered as potentially constituting abuse of dominant position in the US market. European component manufacturers have been suffering for years the consequences arising from the practices of Underwriters Laboratories (UL) in the US certification market. Taking advantage of the non-competitive character of the US certification market, UL is effectively in a position to exploit its position and reinforce it, thereby leading to an increasing hold over the certification market for certain categories of goods. The competitiveness of EU manufacturers is thus undermined by excessive pricing and unnecessary bureaucracy. The situation moreover in our view leads to an effective barrier to trade.

2. LEGAL FRAMEWORK

In the USA, there is a legal obligation for third party product certification for finished products ready for end use, such as a complete machine, in a professional environment. As is often the case, safety relevant components like control devices, circuit boards, cables, electrical connectors, switching devices etc. are supplied by separate component manufacturers. The approval of these components is required *for the certification of the complete product* which will be used in a professional environment. Consequently, manufacturers of such components need a certification for their products that is recognised *by the product testing and certification organisation/company of the complete product*. Otherwise, the components would not be marketable in the USA.

OSHA (Occupational Safety and Health Administration) is the governmental body that accredits all the *National Recognized Test Laboratories* (NRTL). All the NRTLs have the same legal standing and are viewed as technically equivalent, if their scopes of accreditation include the same US national standard. Furthermore, according to the principle of separable certification domains, all organisations/companies that have a NRTL status are allowed to determine that specific products meet consensus-based standards of safety.

Orgalime, the European Engineering Industries Association, speaks for 34 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 22 European countries. The industry employs some 9.7 million people in the EU and in 2010 accounted for some €1,510 billion of annual output. The industry not only represents some 28% of the output of manufactured products but also a third of the manufactured exports of the European Union.

Therefore, each of their certificates is considered to provide the assurance, required by OSHA, that these products are safe for use in the US workplace. This way, there is interconnection among the NRTLs' certificates. Clients have "in principle" the freedom of choice between the different NRTLs, even when it comes to certifying components of the same product. What is more, the NRTL chosen by the component supplier shall not restrict the manufacturer of the end-product in terms of choosing another NRTL.

At the same time however, NRTLs are free to set an operating policy that includes barriers to data acceptance. If an NRTL refuses to accept another's data, it is rejecting OSHA's accreditation or deeming it insufficient. Consequently, the principle of separable certification is questioned by this certification body, which may not accept the certificates produced by other NRTLs. This behaviour of course restricts the choice of the customers, as they cannot submit for certification to this specific NRTL a machine that includes components approved by other NRTLs.

3. CURRENT PROBLEM

Most NRTLs accept certificates issued by other NRTLs with one notable exception: the market leader, UL, which due to historical reasons occupies much more than 50% of the market (the overall market share is estimated at over 70%). UL will issue a certificate for a complete product, in which electrical components are embedded, only if UL itself has certified the electrical components beforehand¹.

Despite their allegations, we consider that UL has no arguments –neither legal nor quality related– for this behaviour. Six of its competitors also hold the additional status of US National Certification Body (US NCB) within the International Electro-technical Commission's (IEC) Certification Body (CB) Scheme. Within this scheme, members agree to peer-review audits and mutual recognition of CB Certificates. In this case, UL is obliged to accept test results from all participating NCB's, but the price which manufacturers have to pay for permission to use the UL logo based on testing results by another CB-body is higher than the entire testing procedure by UL itself including the contract for the use of the logo.

Overall, UL removes any incentive to use other NRTLs either by not accepting competitors' certificates or by rendering their use too expensive. Component suppliers are consequently pushed by manufacturing companies to make use of the UL services. Therefore many engineering companies feel that the behaviour of UL constitutes an abuse of their dominant position.

4. COST TO THE INDUSTRY

This practice of denying recognition of component certificates delivered by other NRTL's causes de facto a quasi monopoly situation from the component manufacturers' viewpoint. In practical terms, all products need to be re-evaluated by UL or a UL-certified supply must be sourced and

¹ There is only one exception to this policy of UL, namely an agreement with between UL and the Canadian Standards Association CSA, signed in 90ies. This agreement in theory allows for certain products to accept each others test reports for a very limited area of products, however in practice this agreement has never been put in place.

incorporated. The result is that all products within the electrical component market must be certified by UL and UL's share of the component market is ever increasing.

This behaviour not only restricts the freedom of choice of manufacturers, but also proves to be expensive and causes delays in the development process of a machine.

Orgalime considers this situation as a classic case of market failure.

4. ORGALIME SUGGESTION FOR SOLVING THE PROBLEM

Orgalime suggests that the European Commission encourages the US authorities to study the facts and correct the malfunctioning of their certification market. Although OSHA's original intention was to set up a certification system in the form of a services market subject to competition, the current rules governing the market have one fundamental shortcoming, namely the lack of obligatory recognition among the NRTLs of component certificates. This element, as exploited currently by UL, allows them to abuse their dominant position in the market. Orgalime believes that competent US authorities (for example the Antitrust Division of the Department of Justice) should examine the case and take the appropriate measures that would bring a permanent solution to the problem. In this context we would like to stress that US and other component producers suffer from UL's behaviour as much as European producers.

Orgalime remains available for providing more information and suggesting ideas to resolve the issue.

The European Engineering Industries Association

ORGALIME aisbl | Diamant Building | Boulevard A Reyers 80 | B1030 | Brussels | Belgium

Tel: +32 2 706 82 35 | Fax: +32 2 706 82 50 | e-mail: secretariat@orgalime.org

Ass. Intern. A.R. 12.7.74 | VAT BE 414341438