Focus on IP issues by antitrust/competition agencies

Competition authorities in key jurisdictions will continue to focus attention on antitrust issues arising from the exercise of intellectual property rights.

Patent Hold-up

Focus on the US

In the US, agency interest in "patent hold-up" is keen in relation to the determination of royalties on patents (standard-essential patents or SEPs) tied to standards developed by standard-setting organizations (SSOs). In particular, there is concern that a firm with an SEP can demand royalty payments, and other favorable licensing terms, based not only on the market value of the patented invention before it was included in the standard, but also on the costs and delays of switching away from the standardized technology.

Standard-setting organizations (SSOs) commonly seek to mitigate the threat of patent hold-up by seeking commitments from participants to license SEPs on "fair, reasonable, and non-discriminatory" (FRAND) terms, often as a *quid pro quo* for the inclusion of the patent(s) in the standard. But the potential for hold-up remains if the FRAND commitment is later disregarded, because the royalty rate often is negotiated after the standard is adopted.

In January 2013, the Antitrust Division and the U.S. Patent & Trademark Office (PTO) issued a policy statement recommending that the U.S. International Trade Commission (ITC), when considering whether an order excluding non-licensed patented products from the U.S. is in the "public interest," should take into account whether the infringer is acting within the scope of the patent holder's FRAND commitment and is able, and has not refused, to license the patent on FRAND terms.

Focus on the European Union

The European Commission is likely to make progress in 2014 in cases relating to the alleged misuse of mobile phone standard essential patents. Joaquin Almunia, the Commissioner responsible for competition, has in the past spoken of the Commission's intention to prevent the abusive use of necessary patents from hindering competition in new, innovative technology markets. As a result, further cases in this area are anticipated.

Patent assertion entity (PAE) activity

Focus on the US

PAEs are a type of nonpractising entity (NPE) that owns patents but does not practise them. PAEs acquire patents from existing owners and make money by licensing them to—and litigating against—manufacturers that use the patents. PAEs are playing a larger role in patent litigation. While supporters claim that PAEs are efficient middlemen that increase the return to invention, especially for small inventors, critics argue that PAEs exploit flaws in the patent system and add to a growing tax on innovation.

In 2012 the FTC and Antitrust Division held a workshop to explore the impact of PAE activities on innovation and competition and the implications for antitrust enforcement and policy. More recently, the FTC is aiming to use its statutory authority to collect nonpublic information for the purpose of conducting industry studies to expand the empirical evidence on PAE activity, including examining the PAE business model generally as well as PAE activity in the wireless sector. The FTC hopes to develop a fuller and more accurate picture of PAE activity, which it can then share with Congress, other government agencies, academics, and industry.

Focus on IP issues by antitrust/competition agencies

DENTONS

Focus on China

In 2013, the State Administration of Industry and Commerce (SAIC), the authority that regulates market activities in violation of the Anti-Monopoly Law (AML), formulated guidelines and rules relating to the prevention of abuse of IP rights to eliminate or restrict competition. While the AML prohibits such abuse, it does not specify what activities are considered abusive. SAIC is developing guidelines and rules that aim to define abusive conduct and the concept of the "relevant market" as well as safe harbours for certain justifiable activities. SAIC announced in 2013 that it will issue a fifth draft of the guidelines and rules, but it is uncertain when they will be formally released.