dentons.com

DENTONS

SEVEN GLOBAL REGULATORY TRENDS TO WATCH IN 2014

February 2014

Contributors

Sandy Walker (Editor; Competition and Foreign Investment: Canada), Robert Joseph (Antitrust: US), Timothy Banks (Privacy and Security: Canada), Todd Liao (China), Agnieszka Stefanowicz-Barańska and Michal Bernat (Competition: EU/Poland), Michelle Shapiro, Randy Bregman and Peter Feldman (Anticorruption: US), and Michael Zolandz (National Security: US)

Dentons team of regulatory experts from key jurisdictions around the world weigh in on regulatory trends to watch in 2014 – from antitrust to foreign investment to anticorruption in the EU, the US, Canada and China.

Aggressive anti-cartel enforcement

Competition authorities around the world are vigorously pursuing domestic and international conspiracies and other anticompetitive activities.

Focus on the US

Criminal antitrust enforcement remains a top priority of the U.S. Department of Justice (DOJ) Antitrust Division. The US is targeting domestic and international cartels, prosecuting both corporations and individuals, whether foreign or domestic. The Antitrust Division is placing particular emphasis on combating international cartels. Through the end of Fiscal Year (FY) 2012, approximately 67 percent of conspiracy cases were associated with subjects or targets located in foreign countries. Of the approximate $7.8 billion in criminal antitrust fines imposed by the Division between FY 1997 and the end of FY 2012, approximately 97 percent were imposed in connection with the prosecution of international cartel activity. In addition, approximately 65 foreigners have served, or have been sentenced to serve, prison sentences in the US.

During FY 2013 the Antitrust Division filed 50 criminal cases and obtained $1.02 billion in criminal fines. The most notable example was the DOJ's ongoing investigation of cartel activity in the automotive parts industry. *On a single day in September*, nine Japanese manufacturers agreed to plead guilty to criminal price-fixing charges and were assessed more than $740 million in criminal fines.

The Antitrust Division's Corporate Leniency Program continues to be a particularly effective investigative tool for detecting large-scale international price-fixing cartels.

Within the cartel area, so-called "reverse payment" settlement cases will be an area to watch in 2014. In *Federal Trade Commission v. Actavis* (the Activis case), a "reverse payment" settlement occurred after a brand-name pharmaceutical manufacturer sued a generic manufacturer for patent infringement, with the generic firm allegedly accepting a payment to stay out of the marketplace for a certain period of time. The court rejected the argument that, when the anticompetitive effects of reverse payments "fall within the scope of the exclusionary potential of the patent," they do not violate the antitrust laws. At the same time, the court rejected a "quick look" standard of presumptive illegality of such payments and concluded that a rule-or-reason standard applies and will take into account the size of the payment, its relation to expected litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The *Actavis* case is likely to lead to a period of intense rethinking of the extent to which it is possible to structure reverse payment settlements that will pass muster under the rule of reason.

Focus on the European Union

In 2013 the European Commission (the Commission) reached four new cartel decisions, imposing total fines of approximately EUR 1.9 billion, which made it an average year in the Commission's recent cartel enforcement history. The cases concerned covered sectors as diverse as financial markets, North Sea shrimp, and wire harnesses. The bulk of these fines were levied in cases involving financial institutions (in particular, fines totaling EUR1.043 billion were imposed in the Euro interest rate derivatives case, whereas the Yen interest rate derivatives case yielded fines of ca. EUR 669.7 million). This reflects the Commission's closer scrutiny of financial markets since the 2008 financial crisis.

EU scrutiny in the cartel area in 2014 is expected in the car parts sector (following the wire harness producers cartel decision of 2013) and in oil and biofuels, white sugar and cargo train transport services (following dawn raids conducted by the Commission in 2013).

More generally, the financial services sector can expect to enjoy the continued interest of the European Commission. There may be a resolution of pending cases such as a ruling by the European Court of Justice on the MasterCard appeal against a decision of the European Commission of 2007 that the member bank delegates of MasterCard had collectively set cross border fall back multilateral interchange fees. In addition, there may be progress this year on a regulation on interchange fees for card-based payment transactions which would impose a cap on the level of interchange fees charged in four-party payment (credit and debit) card schemes.

The Commission is also pushing forward with further cases involving agreements to delay market entry by generic drugs ("pay for delay" cases). For example, the Commission's June 2013 decision against Lundbeck is being appealed as the company challenges the Commission's contention that patent settlement agreements restrict competition by object, (i.e., there is no requirement to demonstrate that such agreements have an adverse impact on competition).

In addition to cartels, vertical competition restrictions are also very much within the Commission's sights. The three main areas to look out for in this regard in 2014 are: restrictions on online sales, resale price maintenance (RPM), and most favored nation clauses.

E-commerce is considered instrumental to achieving the goal of a single internal market in Europe and as a result, EU competition rules specifically target restrictions of online sales in distribution agreements. In the first major enforcement action in this area, in December 2013, the Commission conducted dawn raids at companies active in the manufacture, distribution and retail of consumer electronics products and small domestic appliances, which it suspects of restricting online sales of their products. Resale price maintenance cases are also on the rise, both before the European Commission and before national competition authorities in the EU Member States. At the EU level, the General Court may rule in 2014 on the *Ordre national des pharmaciens* (ONP) appeal against the Commission's 2011 decision fining ONP for imposing minimum prices.

Finally, most favored nation (MFN) clauses have been the subject of attention in EU jurisprudence over the past two years. In 2013 MFN clauses were again prominent with the Commission accepting binding commitments in the e-books case from Penguin to refrain from including MFN clauses in agreements with retailers. In parallel, MFN cases flourished at the national level (notably in the UK and Germany) and are expected to be on the rise in 2014.

In this environment, it is critical for companies to have an effective antitrust compliance program. This includes focused training sessions with those senior executives who are responsible for major strategic planning, as well as those officers or employees whose conduct potentially carries the most antitrust risk to the company from charges of price fixing, market allocation or bid-rigging. Periodic reviews with key managers of their pricing and other business practices, sources of market information, and potential risk areas such as trade association activities and other competitor contacts will lower the risk of non-compliance.

Focus on China

Chinese government agencies are actively pursuing price-fixing and other anti-competitive behaviour.

The National Development and Reform Commission (NDRC) has used the anti-cartel law as a means of keeping prices, especially in key mass consumption sectors, under control. Major cartel cases in the past have involved rice noodles, garlic, beans, and infant milk formula industries. NDRC has announced that its anti-cartel efforts will continue to focus on products and services that are directly purchased by end consumers, such as food, groceries, drugs and internet products. In August 2013, international news outlets reported that NDRC had been working with the China Automobile Dealers Association to collect data on pricing behaviour of foreign auto manufacturers. It is believed that this data will be used by the NDRC to determine whether the automakers have required their distributors and retailers to resell products at a minimum price.

It is noteworthy that compared to fines imposed elsewhere, fines are much lower in China. For example, despite reaching all time highs in 2013, the total amount of fines was still much lower than fines imposed by the European Commission. In 2013, NDRC fined two liquor manufacturers and nine baby formula manufacturers for price fixing arrangements. The fines imposed on those companies ranged from 1% to 6% of sales revenue in the prior year.

The State Administration of Industry and Commerce (SAIC), which oversees non-price monopoly activities in China, announced in January 2014 that it would focus its efforts on regulating infrastructure industries such as telecom, public transportation, water, power and gas supply.

Close scrutiny of M&A under merger control rules

Antitrust authorities in major jurisdictions can be expected to continue their close scrutiny of M&A deals raising competition concerns, whether or not such deals are reportable. In addition, some jurisdictions are moving to streamline their merger control regimes.

Focus on the US

In the US, premerger filings under the Hart-Scott-Rodino (HSR) Act have recovered from recessionary levels—indeed, both FY 2012 and FY 2013 saw about twice as many filings as FY 2009. It is also notable that over a dozen consummated, non-reportable deals have been challenged during the Obama Administration.

The US agencies continue to pursue aggressive merger litigation strategy. In addition to various quantitative economic analyses, internal business documents prepared by the parties are increasingly relied upon by the agencies as evidence on key issues, such as relevant markets and potential anticompetitive effects. In this context, everyone involved in such deals (including investment bankers and other outside advisors) should be cautioned from the beginning to exercise care, to be measured, clear and precise in writing about the transaction and to avoid over-blown rhetoric or speculation about the potential impact on markets, prices or other competitive matters.

Mergers, joint ventures or other cooperative arrangements should be reviewed from an antitrust standpoint *early in the planning stages,* so that antitrust risks can be appropriately identified, and addressed or managed. In addition, the merging parties' coordination of filings and strategy on a worldwide basis is necessary given cooperation of authorities around the globe.

Focus on Canada

Canada's highest court will be addressing lower courts' application of the substantial prevention of competition test for requiring a merger remedy in *Tervita Corporation et. al. v. Commissioner of Competition* (Tervita). Tervita is notable as the Canadian Commissioner of Competition's first court challenge of a merger since 2005 and the first case involving a non-notifiable merger.

Focus on the European Union

On January 1, 2014, a package of measures to simplify the procedures for notifying mergers under the EU Merger Regulation came into effect. Specifically, the European Commission revised the simplified merger procedure notice to expand the categories of cases to which it will apply. It also reduced the amount of information that needs to be provided in merger notifications and published revised versions of its model texts for commitments and trustee mandates and accompanying Best Practice Guidelines.

Following a Commission consultation on a major revision of EU merger control rules in 2013, the Commission is, among other things, considering modifying the mechanisms for pre- and post-notification referrals of merger cases from national competition authorities to the Commission. The most controversial proposal would extend the scope of the EU Merger Regulation to acquisitions of non-controlling minority shareholdings.

In this regard, the Commission has looked to the US, UK and Germany for examples of regimes which already subject non-controlling minority stake acquisitions to a merger control regime. In the most likely scenario, the Commission would propose a system under which it would have discretion to select cases to investigate. In other words, the notification of a non-controlling minority stake meeting certain thresholds would be mandatory, but not all cases would be pursued by the Commission.

One of the EU Member States which is also in the process of revising its merger control rules is Poland. The planned amendment to Polish competition law which is likely to be in force in 2014 foresees several measures aimed at relaxing the merger control procedure and making it more transparent, although it remains to be seen how it will be implemented.

The repercussions of the 2007-2008 financial crisis are still being felt in some merger control cases and in particular, the increase in the number of merger cases in which the failing firm defence is raised. For example, the Commission accepted a failing firm argument in the Olympic Air/Aegean and Nynas/Harburg mergers in 2013. The postal sector is also facing upheavals on several fronts: legislative measures forcing its liberalization, the restructuring of the sector following changes in market trends, and the Commission's close scrutiny, including a decision in January 2013 to prohibit the UPS/ TNT Express merger (which decision has been appealed by the parties).

Focus on China

China's merger review authority, the Ministry of Commerce (MOFCOM), has continued to impose conditional approval on global mergers, including the mergers of Glencore-Xstrata, Marubeni-Gavilon, Baxter-Gambro and MediaTek-MStar. Notification of the recent merger of Thermo Fisher-LIFE was submitted in July 2013 and granted conditional approval on January 14, 2014. In the past 5 years since China's Anti-Monopoly Law came into effect, MOFCOM has granted conditional approvals in less than 3% of the total cases submitted and reviewed. However, there is a clear trend towards more conditional approvals based on the 11 conditional clearances in 2012 and 2013. In addition, the review period can be very long and can involve re-filing for cases with significant competition issues. For example, the MediaTek-MStar took 14 months to obtain final clearance. To date, this was the longest review period undertaken by MOFCOM. Multinational companies are advised to budget an appropriate amount of time for China's merger review when planning for their deals.

Despite this, MOFCOM has taken steps to streamline its review process for mergers that raise no competition issues. In 2013, MOFCOM released a draft regulation setting forth six different scenarios that qualify a case for a simplified review process. Three of the scenarios are based on market share criteria, two on the economic effect of the proposed transaction within China and one on the control between the parties of the proposed transaction. The draft regulation does not specify the procedures of the simplified review. It is expected that MOFCOM will issues new rules relating to the simplified review process.

Foreign investment and national security review in M&A

A significant regulatory trend to watch in 2014 is how governments treat foreign, and particularly state-owned, investors, as well as investments in strategic sectors.

Focus on Canada

Over the past year, the Canadian government has established new rules restricting and monitoring investments by foreign state-owned enterprises (SOEs) in Canada, indicating concerns about the prospects of foreign nationalization (following decades of privatization of Canadian state ownership in key sectors of the economy). The acquisition by Chinese SOE, CNOOC, of Canadian oil and gas company, Nexen, in early 2013 was approved by the government but triggered a public debate about the role of SOEs and ultimately resulted in a Canadian government policy that, going forward, prohibits SOEs from acquiring control of oil sands projects save in exceptional circumstances. The government also served notice that it would be monitoring SOE investments in other areas of the economy, and in particular would closely scrutinize SOE acquisitions in sectors where SOE investment was becoming significant. The new and tougher approach to SOEs was bolstered by amendments to the Investment Canada Act which broaden the definition of an SOE beyond foreign state ownership to include an entity “influenced” by a foreign government and expand the circumstances in which an SOE investment can be reviewed.

Apart from articulating a policy that could limit SOE investment in the Canadian economy, the government has demonstrated its willingness to block private foreign capital in key sectors such as telecommunications for national security reasons. The rejection of Egyptian-controlled Accelero Capital Holding’s purchase of Allstream— the wireline enterprise services division of Manitoba Telecom Services Inc. (MTS) in October 2013 under the little-used and relatively new (2009) national security review law signalled the government’s sensitivity to investments in critical and strategic areas of the economy such as telecommunications infrastructure.

Focus on US

Notifications and reviews of inbound foreign investment transactions by the Committee on Foreign Investment in the US (CFIUS) to determine whether they impair “national security” have dramatically increased in the last two years, and 2014 promises to be no different. In the most recent statistics reported by CFIUS (for 2012), 114 deals were reviewed by the Committee, with more than 40 percent of those deals being fully investigated by the Committee. CFIUS has the authority to review transactions involving a wide range of foreign investment into the United States, particularly those that involve foreign government investment (such as State-Owned Enterprises) and any investment in critical infrastructure. CFIUS is comprised of representatives from nine different departments and agencies within the Executive Branch of the U.S. government (including Commerce, Defence, Homeland Security and Justice) and is overseen by the US Treasury Department. “National security” is purposefully left undefined in the law creating CFIUS and in the implementing regulations published by CFIUS, so that “national security” can be interpreted in accordance with political exigencies.

While notifications to CFIUS of foreign investment transactions are not mandatory, once there is a required notification to one US government agency (i.e., an HSR filing) for a proposed transaction, a voluntary filing with the CFIUS agencies may well be advantageous. The benefit of notifying CFIUS of a proposed transaction is that, after CFIUS has cleared the transaction, the acquiring company has assurance that the transaction will not be investigated and possibly challenged after closing. A notification to CFIUS is essentially an insurance policy against post-closing U.S. regulatory review on “national security” grounds. The CFIUS process may require 30 days, or 75 days if CFIUS initiates a 45-day investigation (in addition to the initial 30 day review).

The CFIUS review process has again been the subject of high profile political and legal maneuvering. In 2012, for the first time in more than 20 years, the President blocked a proposed transaction -- the construction and operation of a wind energy facility by a consortium of investors from China -- on grounds of national security. Our experience over the past year suggests that the CFIUS agencies continue to apply a strict standard to investments in the energy sector, as well as those that involve proximity to US Defense installations, and presage an increase in the number of reviews that go through the full 75-day process and require mitigation measures before approvals are issued.

Focus on China

The Chinese central government has decided to simplify approval procedures and delegate approval authority for foreign investments. The principle is that unless there is a concern about national security, ecological security, production of material industries, development of strategic resources and material public interests, investments will be exempted from governmental approvals. In the past year, the Chinese government has increasingly relaxed its control over foreign investments. In addition, capital controls are likely to be further eased in the future.

A key development regarding foreign investment is the unveiling of China's first free trade zone, which opened in Shanghai in October 2013. The plan, which will take three years to fully implement, is the latest step in China's national strategy to further open up markets and promote Shanghai as an international trade and financial hub. China released a negative list of the restricted and prohibited sectors for foreign investment, which covers 18 sectors ranging from agriculture to manufacturing to finance to public services. For sectors beyond the negative list, foreign enterprises registered in the free trade zone may invest as freely as their domestic peers. The negative list will be updated every year and will be shortened as negotiation of bilateral investment treaties with the U.S. and European Union make progress.

China has also announced that it will be amending its three major laws to relax the rules on foreign-investment enterprises. In addition, China's State Administration of Foreign Exchange (SAFE) has simplified the process of settling international service-related payments. The new rules apply to service-related payments, such as service fees, advances and expense reimbursements, with a general principle of looser regulatory restrictions on service-related payments that are based upon genuine and lawful transactions. SAFE's statistics show that the new rules apply to around 80% of the service related payment and has enhanced the efficiency of a substantial amount of foreign exchange payments in the service sector.

Heightened anticorruption enforcement

The increasing focus on enforcement of the US Foreign Corrupt Practices Act (FCPA), Canadian Corruption of Foreign Public Officials Act, and UK Bribery Act, as well as similar anti-corruption laws around the globe, has made anti-corruption compliance more essential than ever.

In particular, conducting pre-acquisition anti-corruption due diligence is a critical element of any cross-border merger or acquisition. The failure to conduct pre-acquisition anti-corruption due diligence can result in severe legal and financial consequences, as well as reputational damage, for both buyers and sellers. For buyers, anti-corruption diligence can be especially critical because, under US principles of successor liability, a buyer may be held liable for pre-closing FCPA violations by the target. And if illegal conduct by the acquired company continues post-closing, the buyer can be held directly liable, even if it had no knowledge of or participation in the violation.

For sellers, apart from individual liability (which would survive a transfer of ownership or control), concerns about potential pre-closing violations can strongly influence a deal's value, if not threaten the entire transaction. Moreover, sellers may be asked to provide specific representations -- or even fundamental representations -- and warranties as to anti-corruption compliance that are backed by broad indemnification provisions and hefty escrow amounts.

The two US government agencies responsible for enforcing the FCPA, the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC), have endorsed a risk-based approach to conducting pre-acquisition anti-corruption due diligence. Such an approach requires an initial evaluation of the target's risk profile, followed by the creation and subsequent implementation of a work plan that incorporates review procedures specifically tailored to and commensurate with the risks identified. Even if pre-acquisition anti-corruption diligence does not reveal evidence of bribery, conducting such a review can help to identify "red flag" indicators of corruption and potential control weaknesses. The prospective buyer can then address the issues with the seller (including through remediation) and the results of the review can be factored into the deal terms and pricing. If you do not devote sufficient time and resources to try to detect corrupt practices pre-closing, arguments that you were an "innocent purchaser" may fall on deaf ears.

Focus on China

The Chinese government is vigorously pursuing endemic and widespread corruption. In 2013, this trend was especially evident in the healthcare industry. In June 2013, a Chinese subsidiary of GlaxoSmithKline (GSK) was accused of paying almost $500 million in bribes to Chinese doctors and hospitals in exchange for purchasing or prescribing GSK’s products. In response, China has issued a series of new measures. The National Health and Family Planning Commission (NHFPC) and its provincial branches will maintain and publish on their websites a blacklist of medical manufacturers and distributors with a history of bribing hospitals or health care professionals. Such companies will be prohibited from participating in or will be downgraded in public hospitals' procurement of medicine and medical devices. NHFPC also issued new rules reiterating the prohibition on hospitals and healthcare professionals from receiving kickbacks and other forms of bribery. In particular, hospitals and healthcare professionals are not permitted to receive improper sponsorship and donations from outside parties. Sponsorships and donations must not be conditional upon any terms that will "impact fair competition" or be related to the procurement of products or service. In 2014, the medical industry will continue to be closely monitored by the Chinese government. Given rampant commercial bribery in China's medical system, medical companies will face serious challenges in the future as they balance the realities of business and the crackdown by authorities.

Apart from the healthcare sector, multiple anti-corruption measures have been passed by government agencies at the central and local levels in 2013. These regulations ban the use of luxury cars, eliminate lavish gifts for government officials, and place limits on galas, official dinners, and special privileges that party cadres have long enjoyed. The Chinese government also launched a series of high profile enforcement actions against senior-ranking government officials at both the central government and local levels. As an example, the former Railways Minister Liu Zhijun was convicted of accepting bribes and given a suspended death sentence.

Accelerated privacy and data protection reform and enforcement

Whether in the European Union, the United States or Canada, the pace of privacy and data protection reform and enforcement action is expected to accelerate, particularly during the second half of the year.

Focus on Europe

The proposal to adopt a Data Protection Regulation (DPR) to replace the current Data Protection Directive and patchwork of national laws will continue to be studied and negotiated. Currently, the draft DPR would provide data protection authorities (DPAs) with the power to levy fines of 2% to 5% of annual worldwide turnover for breaches, expand the scope to govern third party processors outside of the EU who process EU data, and establish a lead authority framework in which an organization would be subject to a primary national data protection authority. Although it is unlikely that the DPR will be finalized in 2014, it is expected that the pace of negotiations will increase following the May 2014 EU Parliamentary elections.

Focus on the US

California's Do-Not-Track legislation is in force requiring companies to indicate in their privacy policies how they respond to Do Not Track signals from web browsers. In addition, the new Children's Online Privacy Protection Act Rules provide new guidelines for obtaining verifiable parental consent to the collection of personal information. Organizations may see significant enforcement action with respect to both of these developments in 2014.

Beyond enforcement, it is expected that there may be a continued push to address national and international concerns regarding oversight of the collection and use of personal information by US intelligence. The appointment of a Chief Privacy Officer for the National Security Agency is one step in that direction, but it is unlikely to satisfy the EU, which continues to negotiate a framework agreement with the US that, if the EU is successful, could include redress provisions for EU citizens.

Focus on Canada

The Supreme Court of Canada struck down the Alberta Personal Information Protection Act late in 2013 but stayed its own decision to give the Alberta Legislature twelve months to revise it. The issue in the Alberta case was a conflict between privacy rights and freedom of expression for unions engaged in a strike. The union had collected photos of individuals crossing a picket line. The British Columbia Personal Information Protection Act is structured the same way as the Alberta legislation and so the decision has implications for that province as well. Legislative revisions may be proposed later this year to recalibrate the balance between data privacy and freedom of expression.

Federally, a new Privacy Commissioner is expected to be appointed. In addition, the Office of the Privacy Commissioner is expected to continue to explore opportunities for joint enforcement action with other oversight bodies, following its joint investigation of WhatsApp, Inc. in 2013 with the Dutch DPA. And, with the Federal Court recently awarding an individual damages of CAD $20,000 (inclusive of $10,000 in exemplary damages) in a case where Bell TV was found to have failed to obtain valid consent for a credit bureau check, we expect to see the pace of individual actions for damages from privacy breaches to increase.

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 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.

Private enforcement of antitrust/competition law

Class actions based on antitrust/competition claims face new challenges in some jurisdictions and are bolstered in others.

Focus on the US

The US Supreme Court addressed standards for class certification in private antitrust actions, underlining the difficulty of demonstrating damages on a class-wide basis in some circumstances. In Comcast Corp. v. Behrend, the Supreme Court held that plaintiffs failed to demonstrate at the class certification stage that damages could be established on a class-wide basis at trial. Absent a method for establishing damages on a class-wide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." The Supreme Court found that the class was improperly certified because the finding that common questions predominated rested on a damages model that did not fit the substantive legal theories remaining in the case. The inability of the damages model "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding" precluded a finding that common questions predominated.

Focus on Canada

The Supreme Court of Canada held in a trilogy of cases in 2013 that indirect purchasers are able to sue for damages in class actions for contraventions of the conspiracy provisions of the Competition Act. While plaintiffs will still have to address the evidentiary burden of proving their damage claims, this decision could embolden plaintiffs and their counsel to pursue more competition class actions in the coming year.

Focus on the EU

Under EU law, any person who has suffered harm caused by an antitrust infringement can claim compensation based on national law. Most cases are brought in very few Member States - primarily the United Kingdom, Germany, and the Netherlands.

In June 2013, the European Commission adopted a series of documents aimed at facilitating the development of private antitrust enforcement in the EU Member States, including: a proposal for a directive on certain rules governing actions for damages under national law for infringements of national and EU competition law; a Commission communication on quantifying harm in actions for damages; a communication regarding a series of common, non-binding principles for collective redress mechanisms in Member States; and a recommendation that Member States establish collective redress mechanisms for breaches of EU law (including competition law) within two years. On January 27, 2014, the European Parliament voted on changes to the draft directive and agreed to enter into three-way talks with EU governments and the European Commission (which may start as early as February 2014) to work out the final version of the legislation. This means the bill may be passed by May 2014.

The Parliament rejected a proposal to incorporate in the draft Directive a reference which would prompt EU governments to encourage class litigation in the antitrust area, out of fear it would open the door to US-style litigation. There was no clear consensus on other sensitive issues, which are now bound to lead to heavy discussions during tripartite negotiations. This includes the question of disclosure of evidence from the cartel investigation, protecting leniency applicants from larger damages payouts, and how indirect purchasers are treated.

A major issue that has emerged in the EU is the extent to which potential plaintiffs in antitrust damages actions should have access to documents gathered by the Commission (or national competition authorities) in the course of antitrust investigations. Access to such information highlights a tension between the Commission's drive to develop private antitrust enforcement and the concern that public antitrust enforcement could be jeopardized. This tension may be addressed in 2014 through cases such as: Netherlands v Commission; Commission v EnBW Energie Baden-Wurttemberg; Henkel v Commission; and Pilkington Group v Commission.

Focus on China

On August 2, 2013, the Shanghai High Court released the final decision on Beijing Ruibang Yonghe Technology & Trade Co v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd., the first civil action on vertical monopoly agreement in China. The court's decision provides a framework for several previously unclear legal issues in the AML, including the establishment of the "rule of reason" principle in deciding the legality of a vertical monopoly agreement, the key factors in deciding the impact of the restraint on trade and the economy, and the standard for calculating damages caused by such agreement.

As vertical arrangements such as resale price maintenance between manufacturers and distributors are not uncommon in China, this case may serve as a precedent for more civil actions brought by distributors against manufacturers/licensors. We also note that both the plaintiff and defendant in this case presented data on sales and change of prices of the product, market analysis conducted by professional market research firms and expert witnesses. This case may represent the beginning of a new level of complexity in AML cases.

Companies that engage in vertical price maintenance agreements are advised to seek legal counsel to review local distribution contracts, business policies and internal rules to better understand and make informed decisions regarding potential civil liability.

If you have any questions regarding the above, please do not hesitate to contact one of the contributors.

Dentons Canada LLP
F +1 416 863 4592
dentons.com