Are Patent Settlements Anti-Competitive?

Introduction to the conference

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Issue at the Interface

- Intellectual property (IP) and competition law
  - What is the scope of patent? When is it extended? When should competition law interfere IP rights?
- Law and policy
  - Beyond legal issues: what is the rationale of IP and competition law? How to reconcile those justifications?
- Law and economics
  - Settlements safe costly litigation (including time and efforts of courts) but consumer welfare might be better if litigation continues?
- IP/competition law and (pharmaceutical) regulation
  - Should “pay-for-delay” settlements be addressed similarly when the regulatory framework differs (ex. no Hatch-Waxman Act in Europe)?

Legal Developments in the U.S., the EU and South Korea

- U.S.:
  - Sherman Act § 1 & § 2: >< agreements that restrain trade + >< monopolies
  - Federal Trade Commission (FTC) Act § 5: prohibits "unfair methods of competition" (broader?)
  - Split between several Courts of appeal
  - June 17, 2013: Supreme Court decision in *Actavis*
    - Not per se anti-competitive but rule of reason
  - Regulatory context: Hatch-Waxman Act grants a 180-day extra-exclusivity for first generic

Legal Developments in the U.S., the EU and South Korea

- EU:
  - Art. 101 TFEU: >< agreements “which have as their object or effect” the restriction of competition
  - 2009 Pharmaceutical Inquiry and subsequent monitoring of patent settlements by DG Competition
  - Statements of objections
  - June 19, 2013: Lundbeck decision (fines: € 145 m)
    - Is it a patent settlement case? or a cartel? Then anti-competitive “by object”?
    - Appeal before the General Court
  - Regulatory context: no additional incentive for the first generic company to settle

Legal Developments in the U.S., the EU and South Korea

- Korea:
  - Art. 19 Monopoly Regulation and Fair Trade Act (comp. with Art. 101 TFEU)
  - Oct. 2011: decision of the Korean Fair Trade Commission (KFTC) with fines for GlaxoSmithKline and Dong-A
  - Oct. 11, 2012: confirmation of the GSK fine by Seoul High Court
  - Appeal before the Supreme Court

Bridging the Gap Between IP and Competition

- Competition law: to increase consumer welfare
  - Lower prices of drugs, reduction of health expenditures and benefit for the tax-paying public
  - Risk: short-termism
- Patent law: to increase the investments in developing new products
  - New drugs benefit mankind (longer life expectancy…)
  - Risk: over-protection and “increasing propertization”
- Institutional issues:
  - Assessing patent strength: for Competition Authorities?
  - Assessing all economic factors: for the judiciary?

To Discuss Today: Three Panels of Three Speakers

- The “Professors” panel: set the scene, discuss the most recent legal developments in three regions
- The “Stakeholders” panel: define the specific interests of originators, generics and consumers
- The “Discussion” panel: further discuss the economic aspects, the patent arguments/policy and the competition approach
- All are experts, all will discuss… together with the audience (not only at the end)

Setting the Scene

- Keynote introduction:
  - S. Tsakova, Case handler, DG Competition, Pharma and Health Services
- The recent legal developments in the U.S., EU and Korea
  - Prof. J. Kallaugher , Visiting Prof. University College, London; partner, Latham and Watkins
  - Prof. J. Drexl, Max-Planck Institute, Munich
  - Prof. H. Lee, Korea University School of Law, Seoul

Thanks to all the speakers!

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