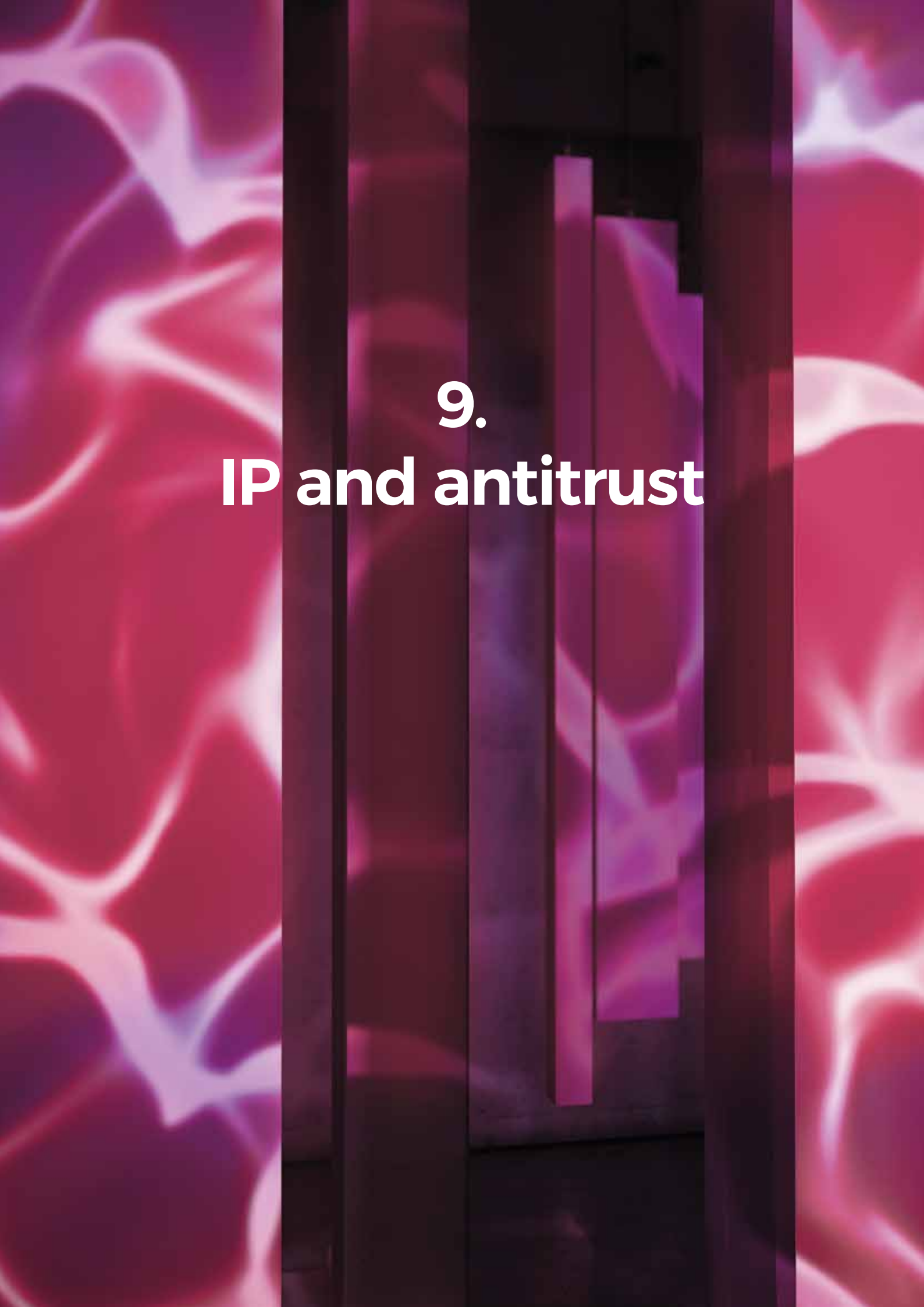

9.
IP and antitrust

Implications of recent cases and likely policy developments in 2017

Rewards for innovation through the existence and protection of intellectual property (IP) rights are crucial in today's technology-based economy, which is highly dependent on R&D. Exclusive rights conferred by patent law can, however, create tensions with goals pursued by competition laws. Indeed, competition agencies across the globe are acutely interested in matters arising at the interface of IP and competition law.

Recent enforcement in the sphere of standard essential patents (SEPs) and pharmaceuticals, in particular, is significantly affecting the legal landscape for patent owners; it is clear that patentees must now, more routinely, consider how competition law may impact on the exercise of their patent rights. Developments in 2017 will test how far the law permits competition authorities to go in this respect.

Standard essential patents

Standards are critical to innovation in many industries, especially where compatibility and interoperability between manufacturers' products or components within a system are required. The last few years have seen antitrust agencies worldwide focus on standardisation, especially 3G/4G mobile communications standards, amid concerns that SEP owners may have been exploiting market power, and holding up innovation, through unreasonable or discriminatory licensing demands.

Considerable attention has been concentrated on the impact of a 'FRAND' obligation: a commitment given by patent owners in the standardisation process to license their SEPs to all third parties on fair, reasonable and non-discriminatory terms. The European Court of Justice's landmark ruling in 2015 confirmed that, in the EU, a dominant SEP holder, which has given a FRAND commitment, would infringe competition law if it sought an injunction in patent litigation against the user of standardised technology if the user acted in a way that was consistent with being a 'willing licensee'.

This ruling has been influential globally and many jurisdictions, including China and India, are exploring how to deal with issues as SEP owners seek injunctions and other ways to monetise the value of their patent portfolios. Disputes and private litigation between private parties are also occurring. Important further questions raised include: What does each party need to do to establish it has been engaged in good faith licensing negotiations? How should FRAND rates be determined? How does FRAND relate to the requirements of competition law in some antitrust systems that dominant firms may not charge excessive or exploitative prices for their products or discriminate in prices between their customers? Can patent portfolios be split and, if so, what impact does such a split have on FRAND licensing obligations? Can SEP holders sue not only manufacturers for infringement but also retailers? Do the same principles apply where the patent owner has not given a FRAND commitment?

Resolution of these issues will be critical to the relationship between patent owners and innovators/implementers of standards (implementers) as future standards, such as 5G, are developed and implemented.

'The Court of Justice's ruling that FRAND-encumbered SEP holders may violate antitrust law if they seek injunctions against willing licensees has determined some issues but unleashed a host of other complex matters for resolution. Many of these, including the scope of the obligations for the patentee/implementer and the question of whether acts necessary to assert/avert injunctive relief can be rectified at a subsequent point in time, such as during infringement proceedings, are working their way through the German courts. Solutions to these issues are crucial if disputes are not going to break out between SEP holders and potential licensees as 5G technology is developed.'

Wolrad Prinz zu Waldeck und Pyrmont, Partner, Rhineland

Pharmaceutical products

In the field of pharmaceuticals, there has been, for some time, antitrust concern about practices of pharmaceutical companies that might be delaying entry of new, innovative and cheaper generic medicines onto the market — particularly product hopping, in which a pharmaceutical company makes non-therapeutic changes in drug formulation to prevent generic substitution rather than to improve the quality of the product, and settlement agreements.

Settlement agreements may be designed to resolve, without recourse to costly litigation, disputes concerning the validity or scope of IP and are common in patent-intensive industries. They can be an entirely legitimate and economically rational means to settle genuine disputes in relation to rights that are uncertain. Nonetheless, competition agencies, including the US FTC and the European Commission, have made clear that such arrangements, especially where they involve payments from patentees to generics in return for not entering the market, may go beyond the legitimate exercise of patent rights to prevent alleged infringements. Although the US Supreme Court and the General Court in the EU have recognised that such 'pay-for-delay' or 'reverse payment' settlement arrangements may infringe antitrust laws, they take a different approach to the question of how a violation is to be established.

The US courts have held that, given the complexity and variability of the practices, a claimant needs to demonstrate likely anti-competitive effects. The European General Court, in contrast, affirmed the Commission's finding in *Lundbeck* that a restriction of competition could be assumed without need to demonstrate restrictive effects. Consequently, in the absence of the parties demonstrating a valid efficiency defence, the conduct was prohibited.

'In the US private litigants have been targeting the conduct of pharmaceutical companies, including patent settlements and product hopping, which is alleged to prevent consumers from benefiting from generic drug competition. The FTC is also taking a close interest in conduct in the pharmaceutical sector and is keen to ensure that firms do not obstruct the entry of generics into the market.'

Thomas Ensign, Partner, Washington DC

Another emerging issue of controversy is whether pharmaceutical companies are seeking to extract 'too high' prices from their proprietary medicines. Competition agencies have generally been reluctant to bring excessive pricing cases in the past — such allegations are difficult to establish, cut across parties' rights to price their products as they see fit and may create disincentives to innovation. Although the US and EU agencies have not so far been willing to intervene in this sphere, the Italian antitrust authority imposed €5m in fines for such behaviour and, in December 2016, the UK's CMA issued its highest ever individual fines on Pfizer and Flynn Pharma (nearly £90m) for charging excessive prices to the National Health Service for an anti-epilepsy drug.

'Although the EU and US antitrust agencies have, to date, been unwilling to intervene in relation to complaints about excessive pricing of blockbuster pharmaceutical products some national competition law agencies in the EU have been taking an interest in the matter. The question of whether competition law should curtail pricing of patent holders is coming to the forefront both in relation to pharmaceutical products and SEPs.'

Thomas Lübbig, Partner, Berlin and Vienna

Looking ahead in 2017

Developments internationally demonstrate the importance for patent owners to take account of competition law when devising their pricing, end-of-life and patent enforcement strategies. The actions of competition authorities, and the outcome of litigation, are creating a fast-moving and challenging landscape for patentees and their customers and licensees — particularly in the areas of mobile communications and pharmaceuticals. Key developments expected during 2017 include:

Outstanding issues relating to the availability of injunctions

- **What constitutes good faith negotiating?** Can a SEP holder comply by offering a licence of all its SEPs on a global basis and/or can a licensee insist on only taking licences of certain SEPs in a jurisdiction in which they have been proved to be valid and infringed? Can a licensee require the licensing of SEPs held by affiliated companies?
- **When do SEP holders/implementers have to fulfil their obligations** to be able to assert/avert injunctive relief and is it possible to rectify missing requirements and actions in the course of proceedings? This key question is still working its way through the courts, with the courts in Europe's biggest market, Germany, likely to be a key battleground on this critical issue.

Clarifying FRAND terms

- **What should a FRAND licence look like?** Should licensing rates be calculated by reference to the value of the patent before or after standardisation and/or before or after the validity of the patent is ascertained? Should licensing rates relate to a percentage of net sales of the final product or a 'smallest saleable unit' or some other measure? To date, few courts outside of the US and have tackled these questions.
- **EU Commissioner Vestager has recently indicated** that she will be willing to act against exploitative behaviour of SEP holders, balancing the rewards of innovation with the interests of consumers. Other antitrust agencies are also engaging with these matters and many are likely to pay close attention to the behaviour of SEP holders as 5G technology develops, together with the Internet of Things.

Splitting SEP portfolios

- **Given that courts are generally only prepared to consider** a small number of patents, an important issue is whether dividing a SEP portfolio constitutes an infringement of competition law. Although an English court has suggested, in litigation between Unwired Planet and Samsung and Huawei, that it might, a German court has held that targeting a fair remuneration for a patent portfolio is a legitimate and legal objective.
- **One vexed question, likely to arise in further litigation,** is whether the principle of non-discrimination requires a purchaser of a patent portfolio – especially where the purchaser does not itself produce standardised equipment (ie it is a non-practising entity) – to adopt the same approach to licensing as the vendor or whether that principle only obliges a patent owner to treat its own licensees in a non-discriminatory manner.

Patent enforcement and pricing strategies in the pharmaceutical sector

- **A particularly important issue is** whether, and if so when, it is legitimate for a competition agency (or other claimant) to rely on an assumption that a patent settlement agreement restricts competition. Lundbeck has confirmed it will appeal the General Court's controversial judgment to the Court of Justice. A similar appeal is pending before the UK courts.

- **Parties entering into a settlement agreement** should ensure that they take antitrust advice prior to entering into it in order to minimise the risk of an antitrust infringement. Factors to consider are likely to include whether the agreement is aligned with the scope of the patent in dispute; the agreement permanently settles the dispute; and any payments made reflect the strength of the patent and likely cost of litigation.

Pricing of pharmaceutical products

- **Competition agencies seem likely to continue** to take a close interest in the pricing of drugs on which people's health, or lives, is dependent. Commissioner Vestager has indicated that competition agencies should act when drug prices increase above a level that cannot be 'justified'. Further, the CMA has indicated, following its decision in Pfizer and Flynn Pharma, that it has a number of other pharma cases in the pipeline.

'It is clear that patentees need to pay close regard to antitrust law, particularly when devising their pricing and enforcement strategies for pharmaceutical products and SEPs. Implementers will continue to look to antitrust law to protect them in patent litigation and recent history shows that it is the parties that pay closest attention to the competition – as well as patent – law aspects of their strategies that are the most effective in securing their commercial objectives.'

James Aitken, Partner, London

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