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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Antitrust Group Comments On Draft IP Licensing Guidelines

By **Kelly Knaub**

Law360, New York (September 20, 2016, 7:21 PM EDT) -- The Global Antitrust Institute at George Mason University School of Law on Tuesday submitted a comment in response to the U.S. Department of Justice and the Federal Trade Commission's proposed update of the antitrust guidelines for intellectual property licensing, offering both praise and suggestions to improve the plan.

The GAI commended the antitrust agencies for preserving the principle that the antitrust framework suffices to address possible competition issues involving all intellectual property rights — both standard essential patents and non-standard-essential patents.

"In doing so, the agencies correctly reject the invitation to adopt a special brand of antitrust analysis for SEPs in which effects-based analysis is replaced with unique presumptions and burdens of proof," the institute said.

The school backed up its view by citing FTC Chairwoman Edith Ramirez, who said "the same key enforcement principles [found in the 1995 IP guidelines] also guide our analysis when standard essential patents are involved."

It further explained that SEP holders, like other IP holders, don't necessarily possess market power in the antitrust sense, adding that conduct by SEP holders, including breach of a voluntary assurance to license its SEP on terms that are fair, reasonable and nondiscriminatory doesn't necessarily harm consumers or the competitive system.

"[I]t is important to recognize that a contractual dispute over royalty terms, whether the rate or the base used, does not in itself raise antitrust concerns," the GAI added, again citing Ramirez.

The institute also expressed concern that the statements in regard to refusals to license in two provisions of the proposed draft somewhat depart from the general enforcement approach laid out in the antitrust agencies' 2007 IP report. In that document, GAI says the agencies state that "[a]ntitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."

As such, it recommended that the DOJ and FTC incorporate that approach into the updated proposal.

It also suggested that another provision be revised to replace the phrase "unreasonable conduct" with a clear statement that the agencies only condemn licensing restraints when pro-competitive

benefits are outweighed by anti-competitive effects.

In addition, the institute urged the agencies to reconsider — or at the very least, it said, to substantially limit — the inclusion of research and development markets for several reasons.

First, it said that the innovation process is often highly speculative and decentralized, which GAI said makes it impossible to identify all market participants. Second, it said the optimal relationship between R & D and innovation is unknown. Third, it argued that the structure of the market most conducive to innovation is unknown. It also said the capacity to innovate is hard to monopolize since the components of modern R & D, such as scientists, engineers and software developers, are continuously available on the market. It added that anti-competitive conduct can be challenged under the so-called actual potential competition theory — **which the FTC relied on** in its attempt to challenge Steris Corp.' \$1.9 billion acquisition of Synergy Health PLC — or at a later time.

Under the actual potential competition theory, mergers between potential competitors substantially harm competition if the acquiring firm would enter the market in a more competitive manner had it not agreed to the merger.

Koren Wong-Ervin, Joshua Wright, Judge Douglas Ginsburg, and Bruce Kobayashi authored the document, the GAI said.

--Additional reporting by Melissa Lipman. Editing by Stephen Berg.

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