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Content and Methods of Balancing the Interests of Antitrust Law in Regulating the Abuse of Standard-Essential Patents

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Abstract: Safeguarding the public interest of society is the value goal of antitrust law, and in the process of realizing this goal, there is a need to balance the interests of the public interest of society and the interests of individuals, as well as the conflicts between different public interests of society. How to balance the interests of antitrust law in regulating the abuse of standard-essential patents is a problem that must face. Specifically, the content and methodology can summarise as follows: clarifying the conflict of interests involved in or arising from the abuse of standard-essential patents, analyzing the influencing factors of the conflict of interests, and applying the specific rules of antitrust law under the idea of balancing interests.

1. Introduction

In recent years, regulations on the abuse of standard essential patents has been an issue of close attention in the theoretical and practical circles. Standard-essential patents themselves naturally have a particular "monopoly" attribute.The market also circulates "technology patenting, patent standardization, standard monopoly" market competition strategy, through the antitrust law on the regulation of this issue has become more common academic.The practice of regulating this issue through antitrust law has become a more common practice in the academic circle.However, most of the existing research is limited to dealing with the application of general rules of antitrust law to specific behaviors, which is the underlying logic of antitrust law, in order to solve this problem fundamentally.

Social relations, as the object of legal adjustment, are essentially a relationship of interests, and law is fundamentally a means of achieving a balance of interests. [1]In a sense, the balance of interests is the pursuit of the value of law. Monopoly involves complex interests, antitrust law intend to achieve the prevention and suppression of monopoly, the protection of market competition as the direct goal and improve economic efficiency, safeguard the legitimate rights and interests of consumers and safeguard the public interest of the community's ultimate goal, we must adhere to the balance of interests as the basic criterion. Because of the value of standard essential patents, the

government, enterprises and other types of subjects tend to compete fiercely, and the abuse of standard essential patents by right holders often involves complex interests, so the principle of balancing interests is reasonably applied in the practice of antitrust law to regulate the abuse of standard essential patents, which is a critical way to promote the solution of the problem. The specific contents and methods of balancing interests in the antitrust law in regulating the abuse of standard-essential patents can summarise as follows: clarifying the conflict of interests involved in or triggered by the abuse of standard-essential patents, analyzing the influencing factors of the conflict of interests, and applying the specific rules of the antitrust law under the idea of balancing interests.

2. Clarifying the Conflicts of Interest Involved in or Arising from Abuse of Standard-Essential Patents

The interests involved in the use of standard-essential patents, such as licensing, and the conflicts of interest arising from that place are the main targets of antitrust interest balancing in regulating the abuse of standard-essential patents. Identifying kinds of interests involved and clarifying the types of conflicts of interest is the first step in balancing the interests of antitrust law. When analyzing the interests associated with standard-essential patents, it is appropriate to take a rough look first and include as many relevant interests as possible. On this basis, it is then necessary to identify the more critical interests, especially those that may be significantly affected by the use of standard-essential patents. The interests involved in the use of standard-essential patents can be classified into two main types according to their subject matter, namely, private interests and public interests. Private interests in standard patent licensing mainly embody in three categories: material economic interests, technological interests and developmental advantages, but due to the various positions of the licensor and the licensee of the standard-essential patents, the above three kinds of interests also have different manifestations, such as the licensor of the standard-essential patents intends to obtain more material and economic rewards through the patent licensing, and therefore will raise the licensing fees and further seize more economic interests through tying, etc., whereas the licensee may obtain more economic benefits through the licensing, while the licensee may obtain more economic benefits through the licensing. While the licensee hopes to lower the patent fee, and at the same time to improve the quality of its products with the help of the standard-essential patents, so as to increase the sales volume and expand the profit. Public interest in the process of standard essential patent licensing is mainly embodied in the order of free competition, national economic security, overall technological development, overall positive efficiency, and the protection of the interests of vulnerable groups, etc. It should note that the analysis of public interest in standard essential patent licensing is fundamental. It should be noted that the analysis of public interest should not only focus on economic public interest but also non-economic interest.

In the process of standard necessary patent application, based on the different interests of the subject will inevitably produce conflict of interest, which is mainly manifested in the conflict between private interests, private interests and public interests of the conflict between the public interests and the conflict between different public interests of the three forms. Among them, the conflict between private interests can also be called direct conflict of interest, primarily manifested in the conflict between the licensor and the licensee, its nature belongs to the contract dispute. Conflicts between private interests and public interests and conflicts between different public interests can be called deep conflicts of interest, and the former mainly refers to private interests and free competition order, national economic security, overall technological progress, overall economic efficiency, consumer interests or the development of small and medium-sized enterprises. The latter can take various forms, such as the conflict between free competition and many other

public interests, the conflict between overall technological progress and industrial development, the conflict between overall technological progress and national economic security, and the conflict between consumer interests and overall technological progress.

3. Analyzing the factors influencing conflicts of interest

Analyzing the factors affecting the conflict of interest of standard-essential patents is the basis for balancing the interests of antitrust law. The primary method to resolve the conflict of interest is to make the best use of the situation, and clarifying the influencing factors of the conflict of interest is the prerequisite for making the best use of the situation. The interests related to the operation of standard-essential patents will be affected by a variety of factors, which can summarise as follows. Firstly, the impact of standard-essential patents on conflicts of interest. Different types of technical standards will directly affect the content of the conflict of interest, for example, compared with international standards and domestic standards, international standards are more likely to lead to conflicts between the private interests of the patentee and the public interest of national economic security, and compared with mandatory standards and recommended standards, they are more likely to lead to conflicts between the private interests and the public interests of the consumers and the overall economic development,etc.;in the technical standards, the number of standard-essential patents, their distribution, quality, the ability of the patentee and other factors will have an impact on the conflict of interest. In technical standards, the number, distribution and quality of standard-essential patents, and the ability of the patentee all have an impact on the conflict of interests. For example, a powerful standard-essential patentee is more likely to infringe on the interests of small and medium-sized enterprises (SMEs) during the process of licensing standard-essential patents, and the interests of the development of SMEs, a disadvantaged group, and the conflict of interests are more likely to be revealed.

Secondly, the impact of competition between standards on conflicts of interest. Competition between different standard systems will have a profound impact on the conflict of interest and this impact is mostly manifested as a positive promotion, for example, the competition between different standard systems will prompt standard organizations to optimize their standard setting and regulatory actions, and prompt standard essential patentees to restrain their self-interested behaviors, etc.; Competition within the same standard system is mainly carried out among the members of the same standard organization, and is primarily a competition between different enterprises to improve the status of their technology in the standard. Competition within the same standard system mostly occurs among members of the same standard organization, mainly due to the competition among different enterprises to improve the status of their own technology in the standard, and the standard essential patentee has to take actions that harm other individuals' interests or the public interest in order to maximise its own interests, and thus needs to consider more the demand for protection of the public interest in the balancing of interests. The development of technical standards will also affect the conflict of interests, because if the owner of a standard-essential patent of an existing technical standard does not consider the reasonable needs of other subjects of interest when licensing the patent, it will lead to more operators deviating from the existing technical standard on which the patentee relies to obtain competitive advantages in the relevant market, and accelerate the process of new technical standards eliminating the existing technical standards, so as to counter the right holder who abuses the standard patent.

Thirdly, the impact of the constraining ability of the subject of standard-essential patents on conflicts of interest. For patent licensing, standardization organizations can give full play to regulatory control. For example, the exclusion of patents with high risk of interest and the prevention of conflict of interest in patent licensing. These solution will effectively weaken the

conflict between private interests and public interests; To a large extent, the licensee's own strong confrontation and restriction ability will also affect the conflict of interest. For example, the licensor have large market shares, strong innovation ability, strong business ability, good conditions to switch to other standards and strong ability to respond to lawsuits. This may cause the right holder to exercise its patent licensing right with greater consideration of the other party's interests and the relevant public interest, thus weakening and reducing the conflict of interest.

4. Application of specific rules of antitrust law under the balance-of-interests approach.

The process of balancing interests is essentially the process of antitrust enforcement officers applying the antitrust rules by taking the balance of interests as an important criterion. The balance of interests, in order to produce the desired effect, requires that the officers dealing with a specific case have a clear idea of the balance of interests as well as scientifically reasonable paths and methods, which can summarise in the following points.

Firstly, Different interests need to be treated differently. Conflicts between private interests, as mentioned above, are contractual disputes and therefore do not fall within the scope of the antitrust law. For conflicts between private and public interests, the antitrust law should favour the protection of public interests and give due consideration to the protection of private interests. In the case of a conflict between public interests, the attitude of maximizing overall interests should be upheld, with unrestricted competition as the core interest while taking other interests into account.

Secondly, Effective application of the general rules of the antitrust law. The general rules of the antitrust law are the essential basis for regulating monopolistic behaviour, and the balancing of interests can only be effective if it is combined with the general rules of the antitrust law.

Scientific design and flexible application of the substantive norms of the antitrust law is the basic path for the antitrust law to coordinate the conflict of interests related to the licensing of standard-essential patents. Firstly, balancing interests when applying the rules of determining dominant market position in the antitrust law and analysing whether an actor has a dominant market position is the first step in applying the antitrust law to regulate the abusive behaviour of standard-essential patents. However, in practice, there is still a considerable controversy on how to determine whether a dominant market position exists, which largely stems from the ambiguity of the provisions of the Antimonopoly Law on the determination of dominant market position. However, it is also the ambiguity of the provisions of the law that makes the balancing of interests have sufficient space to be exercised. The determination of dominant market position can be generally divided into two steps: the determination of relevant market and the determination of dominant position. For the determination of the relevant market of standard essential patents, the current controversy mainly exists in the determination of the relevant technology market, one viewpoint is that each standard essential patent technology should be regarded as an independent technology market when defining the technology market of standard essential patents. Another viewpoint is that, when defining the scope of the relevant technology market for standard essential patents, the scope should not be absolutist, but should be based on the general rules of the antitrust law in determining the relevant market, and be analysed from the perspectives of cross-elasticity of demand and substitutability. From the standpoint of balance of interests, although the former viewpoint is easy to apply in practice and is conducive to the protection of the interests of subjects other than the owner of standard essential patents, it is easy to artificially expand the scope of operators with dominant position in the market because of its over-emphasis on the unique nature of standard essential patents, resulting in an imbalance in the interests of different subjects, and the latter viewpoint is obviously more reasonable. But at the same time, the latter point of view is also due to the abstract nature of its norms and greater flexibility makes it face particular difficulties in

the specific application, the solution to this problem can be guided by the introduction of the principle of balance of interests, the relevant departments in the examination of the demand for cross-elasticity and reasonable substitutability should be in focus on the protection of the public interest and take into account the protection of the private interests of the interests of the coordination of ideas under the guidance of the concept. Specifically, on the one hand, in general, each standard-essential patent technology can be regarded as an independent technology market, especially for those technology standards which are unique for an extended period due to the mandatory requirements of the law or strong influence in fact, which can make the public interests promoted by the smooth implementation of the technology standards to be manifested and realised; on the other hand, if the standard-essential patentee can provide the exact information, the relevant departments should be guided by the principle of balancing the interests. On the other hand, if the patentee of an essential standard is able to provide precise evidence to show that it is not the only source of the technology needed by the other party, and the technical needs of the other party can be satisfied through other channels, then the technology that may be obtained from other channels should be included in the scope of the relevant technical market, so that some reasonable requirements put forward by the patentee of an essential standard to the other party will not be disregarded or rejected by the other party due to the narrowing of the scope of the technology. [2]With regard to the determination of dominant position, the view that all holders of standard-essential patents should be regarded as having a dominant position in the market should be discarded, and the flexibility of the general provisions should be flexibly utilised in order to maximise the comprehensive benefits. Generally speaking, a presumption of market dominance can be made on the basis of market share, and then the accused monopolist can be required to provide counter-evidence to determine whether it really has a dominant market position. [3]Then, according to the need for balancing interests, some tendentious interpretations can be made, for example, in order to protect individual local enterprises with strong technological innovation ability to further enhance their competitiveness and stimulate their enthusiasm for innovation, the antitrust authorities should take a lenient attitude towards the examination of their technological conditions when determining their dominant market position, and downplay the influence of their technological conditions on their market position. On the contrary, if a multinational company with standard essential patents has apparent advantages in the relevant technology market in China, and it is difficult for local enterprises to challenge its technological status, the antimonopoly authorities should pay attention to its technological conditions when determining its dominant market position, and take its technological conditions as an essential basis for whether it is able to maintain or even enhance its market position obtained by its standard essential patents. Secondly, when determining the specific abusive behaviors of the patentee, a balance of interests should be made, for example, to determine whether the licensing fee of the standard-essential patent is reasonable or not. All along, there has not been a generally convincing standard for the method of calculating the license fee of standard essential patents, but from the viewpoint of existing practice and theoretical research, all the calculation methods should be based on the FRAND principle, but what kind of standard can be regarded as fair, reasonable and non-discriminatory? From the perspective of balancing interests, the antitrust authorities should focus on the protection of public interests, especially the core antitrust interest of free competition, when determining the reasonableness of the licensing fees for standard essential patents. Specifically, the antitrust authorities should first consider whether the competition in the relevant technology market and downstream market has been substantially harmed, and take the promotion of free competition as the basic consideration of whether the standard essential patent licence fee should be increased or reduced. On the premise that it does not conflict with the requirements of free competition in the relevant market, or at least does not significantly harm competition in the relevant market, the judgment and treatment of the antitrust

case-handling authority should be conducive to the promotion of one or more of the public interests pertinent to the case. Generally speaking, consumer interests cannot be avoided in standard essential patent abuse cases. A rise in the licensing fee for standard essential patents will inevitably lead to an increase in the price of the relevant goods, and at this time, if there are no alternative goods available in the market, consumers will be forced to accept the price that is unfavorable to them; therefore, the antitrust authorities should take a negative stance on the calculation of patent licensing fees that are unfavorable to the interests of consumers. [4]Similarly, the protection of the interests of small and medium-sized enterprises (SMEs) is also a factor to be considered when dealing with this issue. When the implementers or potential demanders of standard-essential patents include a large number of SMEs, the antitrust authorities should be inclined to consider whether the method of calculating the fee will pose a more significant obstacle to the development of SMEs of the relevant industries in evaluating the reasonableness of the licensing fee of the standard-essential patents. Generally speaking, it is unacceptable for a patentee to charge SMEs a license fee that is higher than the ordinary licence fee under the same conditions. All in all, the criteria or method of calculating the licence fee that can protect or promote more public interests is what the antitrust authorities need to try to identify and decide in the course of dealing with cases of monopolistic overcharging of standard-essential patents. If none of the calculation methods can promote two or more public interests in addition to free competition, but rather, each of them is favored separately, the antitrust authorities should give priority to the public interests that are more compatible with free competition or those that need to be protected more urgently in a particular period. Thirdly, when pursuing the responsibility of abusive behaviors of standard essential patentees, it is not appropriate to set up criminal liability, for example, in terms of the type of liability, because such liability is too severe and may lead to the protection of the extreme of an interest, which makes the difficulty of balancing and coordinating the interests drastically increase. In the case of administrative liability, the determination of specific amounts within the range of fines should be an essential tool for balancing interests. In the case of civil liability, consideration could be given to introducing a system of immunity to better balance interests.

Thirdly, it is necessary to organically combine the substantive norms of the antitrust law with procedural innovations, and to give full play to the procedural value is an important path for the antitrust law to coordinate the conflicts of interest related to standard essential patent licensing. Firstly, the establishment of a procedural mechanism for the joint involvement of all interested parties. This is conducive to the full expression of the interests of all parties, in order to help the antitrust authorities to better understand the interests involved in the standard essential patent licensing and its influencing factors, so as to better promote the balance of interests in the light of the situation, the specific form mainly includes hearing procedures, seminars and so on. Secondly, explore the mechanism of participation of technical standard-setting organizations. The participation of standard-setting organizations in balancing interests is a manifestation of industry autonomy and the requirement of modernization of governance, which can help clarify the important interests involved in the licensing of standard-essential patents, and provide information on the competition situation related to technical standards as well as the management of standard-essential patents by standard-setting organizations, so as to better resolve the conflict of interests. Once again, the respondent's commitment mechanism under the Antimonopoly Act should be flexibly applied. This system is actually a typical reconciliation system, which can speed up the process of conflict of interest resolution, improve the effectiveness and stability of the coordination results of the balance of interests, reduce the cost of coordination of the balance of interests, and timely eliminate the damage that the abusive behaviour of standard-essential patents may cause to competition. Finally, the introduction of a procedural mechanism for independent assessment of interests by relevant experts. The positive significance of this mechanism lies in solving complex

and specialized problems more effectively, but it requires strict regulations on the selection of experts and further improvement of the design of specific procedures for their participation.

Fourth, attention should be paid to the special characteristics of standard-essential patents. When applying the general rules of the antitrust law, the attention to the unique circumstances of standard-essential patents should not be neglected. Such as standard essential patent licensing in the acquisition of market dominance in the particularity of the combination of public and private interests in the particularity of the intersection of intellectual property law and competition law, at the same time should also pay attention to some of the standard essential patent licensing for the special regulation of the special characteristics of the rules arising from the act.

5. Conclusions

Technology patenting and patent standardization are important paths for market players to protect and promote their innovations, as well as a field for fierce competition among market players. Technical standards and necessary patents have played an important role in promoting technological innovation and economic and social development, but at the same time, there are also problems of improper use by operators, which can harm the interests of other operators and the public interest. The misuse of standard-essential patents has received much attention in recent years, and the antitrust law should take the balance of interests as the basic criterion for the regulation of this behaviour, not only because of the important mission of the antitrust law, but also because the licensing of standard-essential patents involves complex and diverse interests. This is not only due to the important mission of the antitrust law, but also because the licensing of standard-essential patents involves complex and diverse interests. Reasonable application of the rule of balancing interests is the basic idea of the antitrust law to regulate the abuse of standard-essential patents, which must be paid attention to and flexibly applied.

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