AT THE CUTTING EDGE OF PRC AML PRIVATE LITIGATION

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I. INTRODUCTION

On August 1, 2008, China launched the Anti-Monopoly Law ("AML"), establishing a dual enforcement system comprising both public and civil enforcement measures. Article 50 of the AML provides the legal basis for private anti-monopoly enforcement and states that undertakings that violate the provisions of the AML and cause damage to others shall bear civil liability.

In contrast to the activity surrounding public enforcement cases, China's private antitrust enforcement regime remained relatively quiet during its first four years. From 2008 to 2012, a total of 143 cases concerning monopolistic conducts were accepted by the courts. Since then, however, an increasing level of private antitrust enforcement action in China, accompanied by some high-profile cases, has prompted an increased level of attention and scrutiny. Over the last four years to date, more than 300 antitrust cases have been brought before the courts.[2] Considering that China as a jurisdiction has not traditionally hosted a competition or pro-litigation culture, these statistics are surprising to everyone, even within Chinese competition circles.

Generally speaking, Chinese courts are still at an early stage in implementing the AML.

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[2] The number was announced by judges of the Supreme People's Court during an antitrust conference.

Nevertheless, they have garnered a great deal of experience in the intervening eight years since implementation began, and are now stepping up the pace. This is evidenced by the advent of several landmark cases addressing increasingly more complicated facets of competition law, such as two-sided markets, Standard Essential Patents ("SEPs"), resale price maintenance, refusal to deal and essential facilities.

According to our observations, China's private antitrust enforcement regime has displayed the following tendencies.

First, most of the cases brought before the courts have alleged abuse of dominance. However, there are also a developing number of complaints alleging horizontal agreements, vertical restrictions and abuse of Intellectual Property Rights ("IPRs"), among others.

Second, the parties to such actions are gradually diversifying, to include a greater range of state-owned enterprises, transnational enterprises and private companies. The subjects of private antitrust litigation in China now include renowned enterprises such as Sinopec, Johnson & Johnson, InterDigital, Hitachi, Tencent and so forth.

Third, the diversity of sectors involved in private antitrust litigation has increased to include both high-tech sectors such as telecommunications and information networks, and more traditional sectors such as pharmaceuticals, energy, food and home appliances.

Finally, in most antitrust cases, courts with higher jurisdiction have exercised first instance jurisdiction. According to the Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts ("Antitrust Litigation Rules") published by the Supreme People's Court in 2012, the Intermediate People's Courts of provincial capital cities, capital cities of autonomous regions, municipalities directly under the Central Government, municipalities with independent planning status and the Intermediate People's Courts designated by the Supreme People's Court, all have jurisdiction to hear an antitrust case. And it is only with the Supreme People's Court's approval, that an antitrust case can be heard before a Basic Level People's Court. The majority of the antitrust cases have been heard in the Intermediate People's Courts. Furthermore, the dispute between Qihoo 360 and Tencent was the first antitrust case to be heard before the Supreme People's Court.

In China, a private antitrust action follows the general rules governing civil liability. Whether in relation to tortious or contractual liability, plaintiffs must apply both the provisions of the general rules of civil laws such as PRC Contract Law and Tort Liability Law, and the relevant provisions under the AML. Applicable procedural rules can be found in the Civil Procedural Law and the Antitrust Litigation Rules.

II. INTERPLAY BETWEEN PRIVATE LITIGATIONS AND ADMINISTRATIVE INVESTIGATIONS

A. Parallel Procedures

Public antitrust enforcement actions are not preconditions for, but rather run parallel with, private antitrust proceedings in China. Any party who suffers damage from specific monopolistic behavior is entitled to initiate a lawsuit before the court, regardless of whether

the antitrust enforcement authority has already launched an investigation against the potential defendant. As a matter of fact, an overwhelming majority of antitrust litigation in China is currently lodged independently rather than as follow-up litigation. But the number of the latter is forecast to grow gradually along with the plaintiff's increased awareness of the right to take self-protective measures by utilizing antitrust law in China.

In 2015, an insured party sued Ping An Insurance Company for damages in Hangzhou after the National Development and Reform Commission ("NDRC") investigated 23 non-life insurers about an auto insurance premium cartel in 2014. The first follow-up litigation eventually reached settlement.

In the meantime, some Chinese law firms are acting as watchdogs to closely scrutinize disclosed cases in other jurisdictions, with a view to solicit the damaged party to kick-off a corresponding civil action in China. The emergence of multi-national follow-up litigation within China can be expected to follow.

B. Evidence in Private Antitrust Litigation

During antitrust investigation proceedings, one of the biggest concerns is whether or not documents, materials and information submitted to the enforcement authority may subsequently be available as evidence that could potentially be used to support a follow-up antitrust litigation against its provider. In this regard, three questions in particular are frequently asked.

First, whether statements and documents submitted to the enforcement authority in support of leniency and suspension applications in particular, could be used as evidence in potential follow-up litigation. It should be noted that currently there are no clear rules or precedents in this regard. However, the Draft Guidelines on Leniency Application[3] (the "Draft Guidelines") issued by the NDRC in February 2016, may be of some reference value as far as they reflect the attitude of the Anti-Monopoly Commission under the State Council. According to the Draft Guidelines, leniency application documents shall not be used as evidence in relevant civil proceedings, unless otherwise stipulated by law.[4] Nevertheless, there is still some uncertainty regarding the influence this provision shall have on the court. For one, the Draft Guidelines are still just a draft version; for another, they stand relatively lower than a statute in the legislative hierarchy; hence, there is some doubt as to whether the court would adhere to this provision in practice. In addition, there is room for interpretation on whether a defendant, requested by the court to submit the leniency statements, would enjoy the specific protection granted under the draft guidelines. Given that there are not as yet any existing precedents for private follow-up antitrust litigation by the Chinese courts resulting in a judgment, the attitude of the courts toward this issue should be kept under close watch.

[3] The Draft Guidelines on Leniency Application are available at: http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201602/t20160203_774288.html.

[4] See Article 16 of the Draft Guidelines on Leniency Application,"Confidentiality Obligations of the Enforcement Agency. All documents and reports submitted by business operators for leniency application hereunder and documents generated therefor shall be kept in special archives by the Enforcement Agency and shall not be disclosed to any third party without the consent of the business operators concerned; no other agencies, organizations or individuals may access such information. In the meanwhile, the aforesaid documents shall not be used as evidences in relevant civil proceedings, unless otherwise stipulated by the laws.…"

Second, whether or not discovery rules for evidence exist in China. While U.S. or UK-type discovery rules do not exist in China, the court may, of its own motion or upon request from the party or parties to the proceeding, order an institution or an individual to produce a certain document. According to the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (the "Interpretation of Civil Procedure Law"),[5] where documentary evidence is under control of the other party, the party bearing the burden of proof may, prior to expiration of the time period for producing evidence, apply to the court in writing to request the latter to order the other party to submit the evidence. Where the reasons for the application are established, the court shall make such an order. Where the other party thereafter refuses to submit the documentary evidence without justification, the court may determine that content of concerning documentary evidence alleged by the applicant is true.[6] In light of this, relevant undertakings should pay close attention to the content of public releases or publicized penalty decisions by the NDRC, SAIC and MOFCOM, in case potential plaintiffs may rely on clues therein to apply to the court for an evidence order.

Third, whether or not legal privilege applies within China's judicial practice. As of yet, there are no clear rules for legal privilege between attorney and client in China, and a court order to produce a document could theoretically also cover correspondence between the defendant and its counsel. In practice however, it is unlikely to do so, in part due to the difficulty of providing the court's required level of specificity when identifying such correspondence, such as when it occurred, what it refers to and by whom it was communicated. Even if assumed that the court would accept such an application by the plaintiff, justifiable reasons for not being able to produce it can be raised by the defendant, such as self-deletion. While a court considering such reasons to be sufficiently justified would normally then refuse the application, it does not entirely dispel the risk that the court maintains its insistence on the order to produce the evidence, given its large discretion in practice. Notwithstanding, a defendant replying to the court that it does not have the evidence being requested, would be placed in an adverse position if the plaintiff actually holds a copy of the evidence it is requesting.

C. Tactical Application of the AML

In practice, the Anti-Monopoly Law of PRC is subject to tactical application by undertakings that choose to pursue such a strategy.

First, companies often strategically lodge a complaint to the antitrust enforcement authority and initiate an antitrust private litigation before the court at the same time. Where China's antitrust enforcement authority and the Chinese courts implicitly reach a consensus

[5] The Supreme People's Court on the Application of the Civil Procedure Law is available on: http://www.court.gov.cn/fabu-xiangqing-13241

[6] See Article 112 of the Interpretation of Civil Procedure Law: "Where a piece of documentary evidence is under the control of the other party, the party bearing the burden of proof may, prior to the expiration of the time period for producing evidence, apply to the competent people's court in writing to request the latter to order the other party to submit the said evidence. Where the reasons for the application are established, the people's court shall order the other party to submit the piece of documentary evidence, and the expenses so incurred shall be borne by the applicant. Where the other party refuses to submit such evidence without justification, the people's court may find that the facts contained in the documentary evidence as claimed by the applicant are true."

that one side has accepted the case first, the other side will normally hold off making a decision, so as to avoid inconsistencies in law enforcement.

Second, in practice antitrust enforcement authorities enjoy the discretion to make decisions on accepting cases or not based on their enforcement priorities, whereas in theory the court cannot refuse to accept a case that meets the qualifying standard for acceptance. In this regard, parties can be seen to be increasingly selecting litigation as their preferred route for seeking damages or challenging competitors rather than by triggering an investigation.

Third, the option remains for companies to lodge a complaint to the antitrust enforcement authority after receiving a favorable judgment in a private antitrust litigation, such as in the *Huawei v. InterDigital* case. Following this case, the NDRC decided to suspend the investigation to avoid inconsistencies in law enforcement with the courts.

Fourth, where one party applies for arbitration outside China according to the arbitration clause concluded by the parties, the other party still has the option to file for a private antitrust litigation in China, to assert that the AML violation is against the compulsory law of the PRC, and that the Chinese court therefore has jurisdiction to handle the dispute.

To sum up, in addition to the topics discussed above, and given the relatively young history of China's public and private enforcement regime, a number of significant issues regarding the interrelation between public antitrust enforcements and private litigation still remain open, and could be addressed further through developing and clarifying the rules and establishing more valuable precedents. For China's antitrust enforcement agencies and the Chinese courts, coordinating the relations between public and private enforcement in the most efficient and legitimate way is a learning-by-doing process. Meanwhile, this developmental period also leaves open a lot of opportunity for Chinese antitrust lawyers to wield their influence, since antitrust enforcement authorities and Chinese courts remain open to many issues.

D. Expert Witnesses

Given the essence of antitrust laws, it comes as no surprise that economists have so far been the most frequently drawn upon group of expert witnesses in antitrust litigation in China.

In China, the concept of the expert witness was initially introduced by the Provisions on Evidence in Civil Proceedings[7] promulgated by the Supreme People's Court in 2002, which grants the parties to the action the right to apply for one or two expert witnesses to appear in court to provide expert testimony on specific issues involved in the lawsuit, subject to approval by the courts. Ten years later, in 2012, the Supreme People's Court restated the concept of the expert witness for use in antitrust litigation, namely under the Antitrust Litigation Rules.[8] In particular, this restatement made clear that the court might allow for the involvement of economists using economic analysis reports to help address some of the

[7] Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings, Chinese original is available at http://www.china.com.cn/chinese/PI-c/92700.htm, Article. 61.

[8] Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts, Chinese original is available at http://www.law-lib.com/law/law_view.asp?id=383641, Article 12,13 and 14.

specialized issues involved in antitrust litigations.

As a result, antitrust litigation in China now deploys the use of expert witnesses more frequently than in any other type of litigation, to the extent that even American economists are now active in PRC AML litigation, especially those with Chinese language skills.

E. Qualification as an Expert Witness

An expert witness is one that the court recognizes as having special knowledge of a subject through qualifications, training and/or experience, so that they are allowed to state opinion on specialized matters, as well as to introduce or explain a specialized subject matter to the court. However, Chinese laws have not explicitly set down criteria for qualifying someone as an expert witness. Rather, in practice, the Chinese court enjoys a high level of discretion in recognizing a witness' qualifications to act as an expert.

In the notable *Qihoo 360 v. Tencent*[9] case, the qualifications of an economist being relied upon as an expert witness by one party became an issue during the course of proceedings. During the court hearing, the economist in question, who was supposed to be assisting Qihoo in defining the relevant market based on his economic analysis report, was challenged by his counterpart on the court trial. The challenge was aimed at denouncing the qualification of the economist as an expert witness, alleging the economist's description of job title to be inconsistent with that presented in the first instance trial and in the appeal. However the court declined to support such a challenge, instead concluding that it is the sufficiency of the facts and data, the accountability of the market survey, the appropriateness of the methods used in the econometric analysis report and other facts pertinent to its results, that should be the focus of the court, rather than the expert's educational background, previous working experience or research achievements.

Furthermore, in order to ascertain the credentials of the economic institution with which the economist worked, the court simply referred to an appropriate piece of evidence contained in the institution's official website page. Since the evidence was found to be authentic and publicly available, these were considered acceptable grounds for proof.

F. Appointment of the Expert Witness

The economist, as an expert witness, is usually appointed by the parties themselves. Under special circumstances, where either of the parties concerned fails to make such an appointment, the court shall designate one for the party(s) concerned if necessary.

The fee for the appointment of an economist as an expert witness is initially payable by the party making the appointment, but as proceedings advance, the court may decide to apportion the expenses incurred by the plaintiff in this regard to the damages being sought.

G. Admissibility of the Evidence

Under the rules on evidence, and Chinese court rules, the economic analysis report shall be submitted to the court prior to the trial, with the economist as an expert witness participating in the trial, and whose opinions as stated in court sessions are deemed to be statements

[9] The full judgment in Chinese is available at http://wenshu.court.gov.cn/content/content?DocID=4fe3cab6-8698-4f8f-9131-3ec8b921b96c&KeyWord=奇虎公司|垄断纠纷|上诉.

made by the party concerned themselves, subject to possible further inquiry by the court, or cross-examination by the other party concerned, before being accepted by the court.

In the *Qihoo 360 v. Tencent* case, it is notable that Qihoo appointed two economists. In particular, the first economist who submitted the economic analysis report did not participant in the court trial, while a second economist appointed by Qihoo did. Consequently, the court decided that they would not accept the report, due to the first economist's absence, and an economic analysis report that inappropriately addressed more of the legal, rather than economic issues. The court continued to explain that, based on the second economist's continued participation and testimony in the trial concerning the economic related issues at stake, her testimony would be admissible to the court. The *Qihoo 360 v. Tencent* case can be regarded as the best illustration to date of the admissibility of evidence in connection with the role of economists as expert witnesses.

III. IPR RELATED ANTITRUST LITIGATION

The intersection between intellectual property rights ("IPR") and antitrust law has been an ongoing focal point for discussion worldwide, including within China. Even though AML in China is still in its infancy, IPR-related private antitrust litigation has appeared, and has exerted significant impact on the development of IPR-related antitrust issues.

One of the most significant of these cases is *Huawei v. InterDigital*, which is a landmark case in this regard. In December 2011, two complaints were filed by Huawei before the Shenzhen Intermediate People's Court. The first complaint alleged that InterDigital had abused its dominance, and the second, that InterDigital had failed to negotiate on fair, reasonable and non-discriminatory terms ("FRAND") regarding licensing of its SEPs. In February 2013, the Shenzhen Court made the first-instance ruling and in October 2013, the Guangdong Supreme Court made the appellate ruling.

In this case, some important issues at the intersection between antitrust law and IPR were decided by the Guangdong Court. First, that the relevant markets should be regarded as separate technology licensing markets in respect of each single SEP; in other words, that each SEP constitutes a separate market and therefore each SEP holder naturally possesses a market share of 100 percent, indicating market dominance. In reaching this conclusion, the Guangdong Court considered the uniqueness of each SEP, and reasoned from the perspective of supply substitutability and demand substitutability. Second, the case set an example for establishing a FRAND royalty rate, where in determining the applicable royalty fee, the court mainly gave consideration to the non-discriminatory element. By comparing the royalty rates and sales volumes between Huawei and Apple Inc., the court found that the royalty rates for Huawei were much higher than for Apple Inc. and thus Huawei was being treated discriminately. The court finally reduced the royalty rate of InterDigital's SEPs from 2 percent down to 0.019 percent of the actual selling price for each Huawei product.

Meanwhile, it is worth noting that after the appellate ruling was made, the antitrust investigation initiated by the NDRC was suspended and the NDRC announced that a settlement agreement between Huawei and InterDigital had been reached. From this response by the NDRC, we can observe that the ruling of the court is respected by the

antitrust enforcement agency and that it tends to avoid conflicts in decision making with the court.

The repercussions of the case have been far-reaching, particularly as only general legal provisions were previously available for reference in this area. Article 55 of the AML provides a general framework for IPR, stipulating that "this law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, this Law shall be applicable to the undertakings who eliminate or restrict market competition by abusing their intellectual property rights." Further to the case, this framework has since been augmented by a series of legislative activities. In April 2015, the State Administration for Industry and Commerce ("SAIC") enacted the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, thereby establishing the legal basis for antitrust enforcement agencies. The SAIC, NDRC, MOFCOM and State Patent Office separately drafted the Antitrust Guidelines on IPR, and have submitted their own versions to the Anti-Monopoly Commission under the State Council ("AMC"). AMC will take the four versions into considerations, and is expected to release the final version.

In addition to the forgoing legislation activities, the Supreme Court issued a judicial interpretation concerning the application of FRAND when determining royalty rates, thereby serving to further confirm the ruling in the *Huawei v. InterDigital* case. The judicial interpretation is named Interpretations of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II), Article 24 of which provides that:

> [t]he licensing terms of patents relevant to the standards shall be negotiated by the patentee and the accused patent infringer; where they fail to reach a consensus through negotiation, the parties may request the people's court to make a ruling. In the determination of the licensing terms, the people's court shall take account of the degree of innovation of the patent and the function of the patent in the standards, the technical fields of the standards, the nature of the standards, the application scope of the standards, relevant licensing terms and other factors in line with the principles of fair, reasonable and non-discrimination [....].

It can be seen therefore that the *Huawei v. InterDigital* case brought with it a more in depth discussion of the interrelation between IPR and antitrust in China that has carried through to the legislature. It has also revealed a willingness on the part of the courts to help domestic companies lower barriers to the development of their own indigenous technology.

IV. CONTRIBUTIONS OF THE COURTS

Due to the short time allocated to its implementation, China's AML does not give clear answers to many significant questions, for example, how to define the relevant market in SEP-related cases; how the Chinese courts should allocate the burden of proof and collect evidence; whether the rule of reason principle should apply to monopolistic agreement cases, particularly vertical cases; how to determine dominance in the relevant market, etc. In order

to seek guidance on such questions, it is necessary to seek further recourse in decisions by the Chinese courts. There are three particularly significant and high-profile cases, namely *Qihoo 360 v. Tencent*, *Huawei v. IDC*, and *Rainbow v. Johnson & Johnson*.

A. Qihoo 360 v. Tencent

This case was the first private antitrust lawsuit to be decided by the Supreme People's Court and provides a fundamental reference for determining dominance in the relevant market, and establishing the following guidelines.

1. Clear Definition of Relevant Market is not Necessary in Every Abuse of Dominance Case

Due to the complexity of the relevant products involved in the case, the Supreme People's Court did not provide a clear boundary of the relevant market, but instead offered a powerful new perspective instead, where it said:

> [i]n abuse cases, defining a clear relevant market is merely a tool, rather than an end, to evaluate market power and anti-competitive effects. Even though the relevant market has not been clearly defined, some direct evidence showing the anti-competitive effects could be enough to evaluate the alleged undertaking's market position and the anti-competitive impact of the alleged conduct.

2. Market Share Could be Rough and Misleading When Establishing Dominance

In the decision, the Supreme People's Court acknowledged the fact that Tencent's market shares exceeded 80 percent in both of the product markets involved. Notably however, the court continued to make another significant point; namely, that the position and function of market share when assessing a position of market dominance is to be decided based on the specific circumstances. A high market share does not necessarily mean market dominance, especially in a market where the competition has dynamic characteristics.

B. Huawei v. InterDigital

The court's decision in this case set the scene for a number of regulatory and judicial actions in China against allegedly abusive conduct by SEP holders. In addition, the Guangdong Court confirmed that every licensing market for each SEP constitutes an independent relevant product market, and each country of the relevant product market constitutes an independent relevant geographical market. The Guangdong Court came to these conclusions based on the theory that every single SEP is unique and non-substitutable, and could not be replaced by other technologies.

C. Rainbow v. Johnson & Johnson

This is the first private antitrust litigation concerning vertical agreements under the minimum resale price maintenance ("RPM") clause of the AML. In this case, the courts contributed guidelines on the following issues.

1. "*Per Se* Rule" or "Rule of Reason"

Rainbow alleged that J&J had engaged in RPM in violation of Article 14 of the AML and that it

was not necessary to prove its anti-competitive effects. The Shanghai High Court held that in order to establish a claim under Article 14, it should be proven that the RPM clause has the effect of eliminating or restricting competition; in other words, that the existence of an RPM clause is not a *per se* violation of the AML, but rather, that the legality of the RPM clause is to be judged in accordance with the "rule of reason."

2. How to Allocate the Burden of Proof

Rainbow claimed that according to the Antitrust Litigation Rules, the defendant should bear the burden of proof in proving that the horizontal agreements do not have the effect of eliminating or restricting competition, and that this should apply to vertical agreements as well. The Shanghai High Court held the view that the plaintiff should bear the burden of proof in proving the antitrust effects of vertical agreements.

3. Whether RPM Clauses Constitute a Monopoly Agreement

In the appellate trial, the Shanghai High People's Court determined the following considerations to be the most important in analyzing the nature of minimum RPM, and that they can be treated as a fundamental approach to assessing such conduct: (1) Whether competition in the relevant market is adequate; (2) Whether the defendant has a strong market position; (3) What the motivation of the defendant is for fixing the minimum resale prices; and (4) What the competitive effect is of fixing minimum resale prices. Among these considerations, the first one is the most fundamental inquiry, and only when the answer is no, is any further analysis required. After a relevant and comprehensive analysis from multiple angles (including market share, pricing power, brand influence and control over distributors), and comparison of its competitive and anti-competitive effects, the Shanghai High Court concluded that the RPM clause involved in this case constituted a monopoly agreement.

V. CONCLUSION

Without any assistance from tri-damage and class actions systems, Chinese private antitrust litigation has been developing at breakneck speed over the last four years, having garnered attention from the courts, various undertakings, anti-trust lawyers and scholars alike. For differing purposes, competitors, upstream and downstream partners, consumers, antitrust lawyers and consumer rights associations continue to flock to PRC courts, and file antitrust litigation under various claim. No matter what their underlying motivations; competition, revenge, compensation, reputation or influence, such litigation will continue to benefit from the increasing engagement of Chinese judges with cases arising under the AML, benefit from Chinese undertakings and individuals becoming more aware of their rights under antitrust law and benefit from the efforts of China's society as a whole to incubate its fledgling competition culture. Through these prevailing efforts, we can ensure that the shift from a centrally planned economy to one guided by the market continues to develop in the healthiest possible way.