Antitrust Chronicle

ANTITRUST DEVELOPMENTS IN CHINA

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CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Reader,

This month CPI would like to join the Chinese New Year celebrations in this, the year of the monkey, and bring to our readers a special issue on Antitrust Developments in China.

Last year, 2015, was a very active year for Chinese antitrust enforcement agencies as well as Chinese courts. Even though the number of investigations was not higher than previous years, the experience accumulated by those agencies since the promulgation in 2007 of the Chinese Anti-Monopoly Law ("AML") is now bringing outstanding results. Enforcement actions were taken not only in the area of horizontal agreements but also in the area of unilateral conducts. The clearest example of the sophistication in the investigations was the Qualcomm case. Qualcomm was investigated and ultimately fined for abusing its dominant market position in the licensing of SEPs concerning wireless telecommunications and baseband chip technologies. It is also worth mentioning that state-owned companies were also targeted by antitrust authorities, including national champions like China Telecom, China Unicom and China Mobile.

Besides enforcement, both agencies, SAIC and NDRC were active in 2015 and will continue being active in 2016, drafting different guidelines to provide legal certainty to undertakings operating in China. One of the most awaited guidelines were the SAIC IP Antitrust Rules, covering licensing arrangements, FRAND-encumbered IPRs, patent pools, etc.

The courts are also acquiring great expertise in antitrust cases, as was shown by the Supreme People's Court in the Tencent case, calling into question the use of traditional tools to analyze internet-related industries. In 2015, more than 140 antitrust cases were heard by Chinese courts, almost 50 percent more than the previous year. One interesting development is in the field of administrative monopolistic conducts, where public institutions are sued for allegedly abusing its administrative powers to eliminate or restrict competition. Given the clashes between a centralized economy and a market economy, this tool could eventually be of utmost importance to ensure competition in China. The contribution by professor Yanbei further explained the evolution of legislation and practice in this field.

After reading this issue our readers will have a better understanding of the antitrust regime in China and recent developments there. Michael Han & David Boyle review the non-merger antitrust activities by SAIC and NDRC. Similarly, John Yong Ren & Jason Liu focus on the investigations conducted in 2015. Two other contributions put more emphasis in IPRs. On the one hand, Susan Ning, Ting Gong & Yuanshan Li addressed the risks of grant-back provision in licensing agreements. On the other hand, Ren Qing & Wu Peng analyze the SAIC IP Antitrust rules from a compliance perspective.

As mentioned in our first AC issue, our magazine includes the CPI Talks section where every month a renowned antitrust expert is questioned by our staff on hot antitrust issues. This month we are delighted to have Judge Chuang Wang, Presiding Judge of the Intellectual Tribunal, Supreme People´s Court of P.R. China answering our questions.

We hope you enjoy reading this new issue of our AC magazine.

Thank you,
Sincerely,

CPI Team

CPI Talks...

Interview with Judge Chuang Wang

Presiding Judge of Intellectual Tribunal, Supreme People´s Court of P.R. China

In this issue CPI interviews Judge Chuang Wang about private enforcement of China's AML, the increasing number of antitrust cases ruled by the courts, the intersection between IPRs and antitrust, the challenges faced by judges and the role of witness experts among other things. Do not miss these insights from a Supreme People 's Court Justice.

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Antitrust Developments in China

This month CPI would like to join the Chinese New Year celebrations this year of the monkey, and bring to our readers a special issue on Antitrust Developments in China. Last year, 2015, was a very active year for Chinese antitrust authorities as well as Chinese courts. The experience accumulated by the administrative agencies and the courts since the promulgation in 2007 of the Chinese Anti-Monopoly Law ("AML") is now bringing remarkable results. Enforcement, merger control, advocacy and even international cooperation have shown improvements over the years, and 2016 seems to be a very promising year for the antitrust community in China. Read more to find out recent developments and prospect future of Antitrust in China.

A review of non-merger antitrust enforcement and litigation developments in the PRC in 2015

By Michael Han & David Boyle

It has been widely acknowledged that active antitrust enforcement is fast becoming the "new norm" in China's economic and social order. During the early years of the AML, the fines were relatively modest in most cases (less than $200,000). In 2015, we have seen fines of over $60 million imposed in the cargo ocean shipping carriers cartel case and the near $1 billion fine imposed on Qualcomm. With the Chinese antitrust authorities gaining expertise and confidence in initiating and conducting antitrust investigations, it looks like this trend is set to continue in 2016.

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Developments in Legislation and Practice of Prohibition of Administrative Monopolistic Conduct

By Meng Yanbei

Administrative monopolistic conduct is also considered conduct of abusing administrative power to eliminate or restrict competition. China's market economy has been reforming for over 30 years, but due to the nature of "path dependence" and the rigidity of ideology under a planned economic system, the government's function was not clarified completely vis-à-vis the said market economy. There may be some inaccurate orientation regarding what the government should do and how to do it. Therefore, administrative monopolistic conduct in China is a systemic problem.

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Chinese Antitrust Investigations in 2015

By John Yong Ren, Jason Liu

Compared with the previous years, the Chinese antitrust investigation authorities may be regarded by some observers to be relatively quiet in 2015, as fewer cases were reported by the media. However, this is just a myth. Beyond the previous investigation into high-profile cases, their approaches towards the law enforcement have become more and more comprehensive and sophisticated. Looking ahead, we expect that the authorities will actively keep pushing China's anti-monopoly law enforcement, and the industries closely related to common people's livelihood such as pharmaceuticals and medical devices will be the focus on the next steps.

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Risks of Grant-back Provisions in Licensing Agreements: A warning to Patent–heavy Companies

By Susan Ning, Ting Gong, Yuanshan Li

In recent years, the interplay between intellectual property rights ("IPRs") and antitrust issues has been on the radar of antitrust authorities in China. The article will focus on one of the highly controversial issues of IPRs, the grant-back provision, which is widely used by companies doing businesses in China. This provision has been regarded, by its very nature, as being likely injurious to the proper functioning of normal competition, the article also intends to shed some lights on patent-heavy companies when they do businesses in China.

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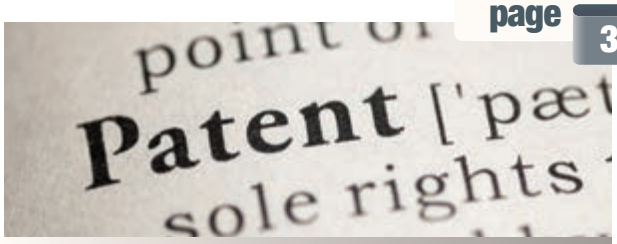

A Look into the SAIC New IPR Abuse Rules: From the Perspective of Compliance

By Ren Qing, Wu Peng

As the first legal document regulating IPRs related Anti-Monopoly Law issues, Rules on Prohibition of Abusing Intellectual Property Right to Eliminate or Restrict Competition (the "IPR Abuse Rules") promulgated by SAIC is of important significance. Due to various reasons, the application scope of the IPR Abuse Rules is relatively narrow and there is still some room to improve its practicability and predictability. Enterprises cannot interpret and apply the IPR Abuse Rules in an isolated manner, and shall instead ensure AML compliance by looking comprehensively at all other relevant laws and regulations in a comprehensive and systematic fashion.

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CPI Spotlight

At CPI we know your time is valuable and it is difficult to be constantly informed about the latest news and articles. This section is perfect for you, as CPI encapsulates for the three most read CPI products, from news to columns and briefing rooms.

EU CPI Column: Problems with the European Commission's Platform Survey and Lessons Learned from the Economics of Multi-Sided Platforms and Privacy

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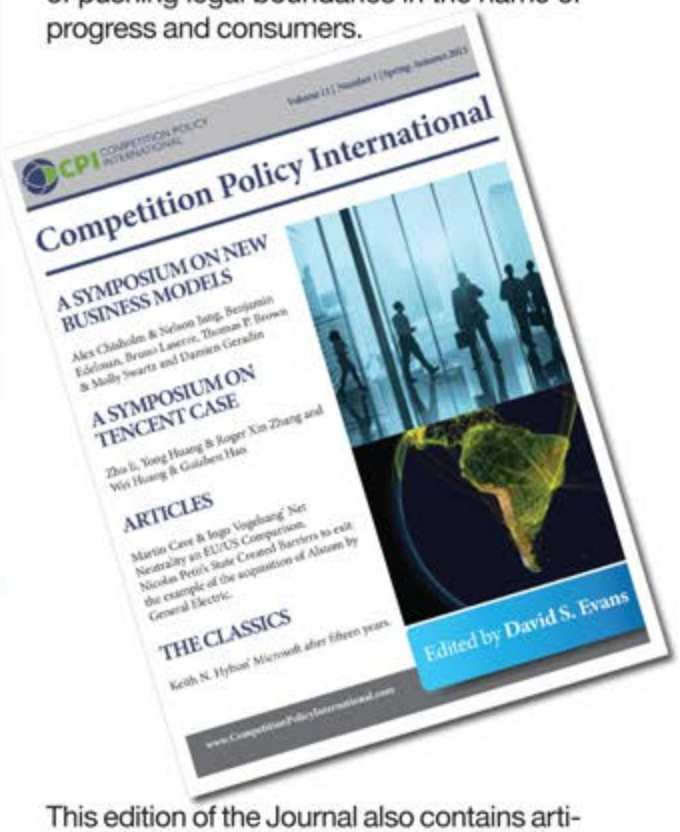
Announcements

Don't miss the upcoming release of our new CPI Journal at the end of this month. In this new Journal you will find two Symposia:

1) The First one about the famous Tencent case ruled by China Supreme People's Court, where the traditional tools and boundaries to determine market definition and market power are examined for the online industry.

2) The second one about new market economies. Companies such as Uber, Lyft or Blablacar are challenging and re-shaping the current status quo of antitrust and regulation. Different experts analyze the pros and cons of pushing legal boundaries in the name of progress and consumers.



This edition of the Journal also contains articles about Net Neutrality, Barriers to exit and the analysis of the classic case, Microsoft, in light of the new antitrust disputes in online markets.

Last but not least, follow us on Linkedin to have more interactive discussions with our personnel and with experts from the antitrust community.

Leave your comments, opinions or simply open a discussion group about your favorite topic. If something is of interest to you, share it with us! You may find your interest reciprocated.

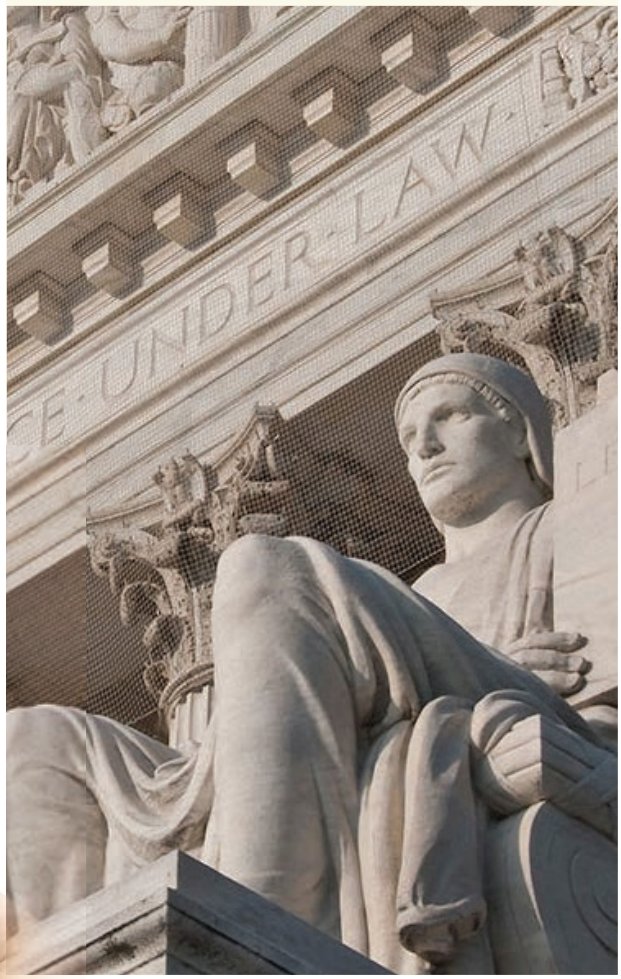
We also invite all our readers to visit our new website and get familiarized with the new features, content and applications. If you have not visited yet, go to: www.competitionpolicyinternational.com.

What is Next?

This section is dedicated to those who cannot wait to know what CPI is preparing for you for the next month. Spoiler alert! do not continue reading if you prefer to wait.

Our March issue of the AC magazine will address the recent developments on Unilateral conduct or Single Firm conduct. For this edition, we will have articles from regulators, practitioners and companies that will offer their views on rebates, licensing, due process, enforcement tools and more.

CPI Talks will interview a very prestigious judge from a United States Court of Appeals.



CPI Talks

INTERVIEW WITH JUDGE CHUANG WANG, PRESIDING JUDGE OF INTELLECTUAL TRIBUNAL, SUPREME PEOPLE'S COURT OF P.R. CHINA

BY **VANESSA YANHUA ZHANG** [1]

Since the Anti-Monopoly Law (hereinafter "AML") of China took effect in August 2008, private litigation has become one of the most important areas attracting scholars and practitioners' attention. This November 2015, we were honored to have an interview with Judge Chuang Wang, Deputy Presiding Judge of the Third Civil Tribunal (Intellectual Tribunal) at the Supreme People's Court of the People's Republic of China. The full interview is below.

Zhang: Thank you very much for sharing your insights with our readers. China's AML took effect on August 1, 2008. In the past eight years, legislation and enforcement of the AML have greatly matured. What is the current situation of private antitrust cases handled by China's court system since the AML was enforced?

Wang: Along with the growing awareness of private enforcement of the AML in society, the number of antitrust civil cases that were accepted and handled by the People's Court has increased dramatically in recent years. The People's Court processed 10 cases of First Instance and 6 adjudicated cases between August 1, 2008 and the end of 2009; 33 cases of first instance and 23 adjudicated cases in 2010; 18 cases of first instance and 24 adjudicated cases (including backlogged cases) in 2011; 55 cases of first instance and 49 adjudicated cases in 2012; 72 cases of first instance and 69 adjudicated cases (including backlogged cases) in 2013; 86 cases of first instance and 79 adjudicated cases (including the backlogged cases) in 2014; and, 141 cases of first instance and 98 adjudicated cases (including the backlogged cases) in 2015 (January through October).

The trend and characteristics of civil litigation cases accepted by the People's Court can be summarized as follows:

1. Increased Case Filings. The trend shows an acceleration in the filing number

1 Editor of CPI Asia Column and Director of Global Economics Group. We are grateful to Judge Yanfang Wang and Judge Li Zhu of the Third Civil Tribunal (Intellectual Tribunal) of the Supreme People's Court of China to coordinate and facilitate this interview.

after 2012 in particular, and the number of cases accepted by the Court increases yearly.

2. Decreasing Exploratory Cases and Increasing Rights Protection Litigation. From the perspective of plaintiff's body, business operators and consumers have filed more rights protection cases. In the early stage of civil anti-monopoly filings, most cases were brought by legal professionals to explore and examine the applicability of specific rules within the AML. In recent years, however, there were more rights protection cases brought to the Court by the victims of monopolistic conduct. It reveals that implementation of the AML has now become standard.

3. A Wide Range of Involved Industries. The case filings arose from both traditional and modern technology industries, showing a growing trend across such sectors as transportation, pharmaceutical, food, household appliances, and information networks.

4. Diversity in Filings. One manifestation of diversity is the mix of abuse of dominance cases and monopoly agreement cases, with more cases concerning from the former. Another fact is that cases involving foreign entities coexist with cases involving domestic entities, with the former having brought more abuse of dominance cases. This indicates the domestic parties' growing awareness of the possibility of taking legal action against foreign entities with market dominance.

5. Increasing Case Influence and Public Attention: Many cases have become headline news in social and industry circles, and have even attracted some international attention. The People's Court has accepted several cases that have had a large impact on domestic and international audiences, with abuse of dominance cases such as Tangshan *Renren v. Baidu*, *Qihoo 360 v. Tencent,* and *Huawei v. InterDigital*, etc. These cases have had notable impact in their respective industries.

6. Increasing Adjudications Favoring Plaintiff: Of those cases in which the plaintiffs lose, the reasons can be categorized into two. One is the difficulty of presenting evidence to support the plaintiff's filing. Almost all losing cases were due to insufficient evidence. This reveals the most crucial aspect to the private execution of the AML: that a major portion of the evidence needed to prove monopolistic behavior is held by the defendant; and as there is a lack of evidence discovery powers under the current legal framework, it is inevitable that the plaintiffs will suffer a higher loss rate. The other reason is the incompetence of plaintiffs themselves, who often have inadequate understanding of the AML and misinterpret the applicability of specific articles of the Law. Winning cases, on the other hand, tend to have plaintiffs and solicitors with a better understanding of the AML, compatible with that of the presiding judges.

Zhang: In the civil cases accepted by the Court, which industries matter the most? What are the issues and challenges faced by China's judges in dealing with antitrust cases in those industries?

Wang: As I mentioned before, the People's Court currently has civil antitrust cases scattered across many industries. It is hard to identify a particularly dominant industry. When dealing with private antitrust, judges face the problems and challenges of applying economic theories to specific cases, and in particular, to Internet-related cases. Obviously, due to its unique characteristics and differences from traditional industries, (generally featuring free services, platform effects, network effects, consumer stickiness, and rapid innovation etc.) internet cases require a certain degree of innovation, adjustment and development instead of just the application of traditional analytic methods and rules. Moreover, in the Internet-related cases, one should not overestimate the informative role of market shares when evaluating an operator's market power. It would be better to assess each situation case by case rather than using market share as a deterministic factor.

Zhang: How do Chinese judges deal with cases of Intellectual Property Rights (IPRs) and antitrust? Could you please provide an example of some representative case?

Wang: This is a complicated problem. Article 55 of the AML prescribes a principle-based provision, "[t]his Law shall not govern the conduct of business operators to exercise their intellectual property rights under the laws and relevant administrative regulations on intellectual property rights; however, the conduct of business operators to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law." At present, the People's Court has only accepted a few such cases, among which the most typical one was *Huawei v. InterDigital* (IDC), an antitrust dispute involving abuse of market dominance. In this case, IDC holds a large amount of standard essential patents (SEPs) and pending patents for 2G, 3G, and 4G technological standards of wireless communications, including patent rights and pending applications in both U.S. and China. The two parties held multiple negotiations on patent licensing fees. IDC's tentative licensing agreement to Huawei consists of licenses of IDC's global, non-exclusive, and royalty-bearing patents at issue, including the SEPs of 2G, 3G, and 4G standards, and Huawei's free grant-backs of all its patents to IDC. The licensing fees requested by IDC to Huawei were unfairly higher than those asked of Apple and Samsung. IDC filed lawsuits for SEPs infringement in a U.S. court and with the International Trade Commission (ITC) against Huawei, and asked the court for an injunction, Section *337* investigations and a complete ban on imports, as well as cease and desist orders. As a countermeasure, Huawei filed complaints against IDC for excessive pricing, discriminatory pricing, tying, and refusal to deal. After reviewing the case, the Shenzhen Intermediate People's Court determined that each of IDC's SEP license of 3G wireless communications technology standards in China and U.S. should be considered as an independent relevant market, and IDC having market power over each 3G SEP licensing market. Excessive and discriminatory pricing practices and the tying of SEPs with non-SEPs were considered an abuse of its market power. The Court ordered IDC to stop such monopolistic behavior of excessive pricing and tying, with damages of RMB 20 million payable to Huawei for its economic loss. The case was later submitted to the Guangdong Higher Court that upheld the decision of the first instance. The case is China's first antitrust litigation involving SEPs. Its ruling explored the market definition issue of SEP licensing market and considered each SEP licensing as an independent relevant market.

After the decision of the second instance, the defendant brought the case to the Supreme People's Court for a retrial, and it is still under examination. It is anticipated that the decision of the Supreme People's Court will provide more clarifications into the ruling criteria of similar cases.

Zhang: What is the role of expert witnesses during the court's proceedings in civil antitrust cases?

Wang: The determination of monopolistic behavior often requires sophisticated economic analysis beyond the expertise of a judge. Therefore, the participation of experts with profound knowledge of economics in antitrust proceedings is essential. This is explicitly stipulated in *"Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Monopolistic Conducts"* to encourage the parties to request the presence of one or two experts in economics to explain to the court the nature of the economic issue, so as to give guidance to the involved parties and advise them on technical issues. This will assist the People's Court in clearly discovering the facts and to accurately determine the alleged monopolistic conduct. During court proceedings, the adjudicatory personnel may proceed with questions to the expert advisors to further comprehension and investigate the technical details, and allow them to raise questions to the adversary party, to cross-examine the expert advisors, and request clarifications from the professionals who elaborated the market survey or economic analysis for better understanding and clarification of technical issues.

Zhang: What are your views on the prospect of civil antitrust litigation cases? What should we pay attention to in the future of antitrust litigation in China?

Wang: After recent years of judicial practice, the idea of private enforcement of the AML is well accepted in China. Private and public enforcement have become important mechanisms for the implementation of the AML, giving the judicial system a significant opportunity to expand and improve its functionality. Through trial proceedings, Chinese courts have accumulated preliminary experiences in dealing with civil antitrust cases and boosted their trial capacity by broadening their influence. At the same time, judges are still unfamiliar with basic principles of economic analysis in handling antitrust cases. With more and more monopoly cases arising from the emerging technologies and financial sectors, the traditional analytical framework and methodology for antitrust proceedings begins to face challenges. The task now faced by the People's Court becomes even more formidable. More effort should be focused on the following points in handling civil antitrust cases:

First, improve judicial proceedings and evidence rules to reduce the plaintiff's burden of proof. From the practice of civil antitrust cases, we have learned that the bottleneck in civil antitrust cases is the plaintiff's difficulty in collecting evidence and proving monopolistic behavior. The People's Court must be observant of the general provisions of the Civil Procedural Law and the special needs of antitrust trials as they try to accomplish this goal. The simple application of the principle — "the burden of proof shall be upon the claimant" — to divide responsibility must be moderated to relieve the plaintiff's burden.

Second, improve the use, procurement and examination of experts' opinions, economic analysis, and market survey reports to fully take advantage of the experts' function in evaluating professional and technical facts. Experts' opinions, economic analysis and market survey reports collectively play a crucial role in adjudicating antitrust cases. Judges, although often not economists themselves, are able to learn the technical facts of a case through expert witnesses during the proceedings. Pursuant to the requirements of the new Civil Procedure Law, they can also enforce the presence at court hearings of expert witnesses and the makers of the economic analyses and market survey reports under examination by the opposite party and the judge. It is encouraged to conduct cross-examination and to debate the expert witnesses of both parties to clear doubts, identify problems, and find the truth. The judges should also possess sufficient basic knowledge of economics to have a good understanding and allow for the examination and assessment of the competence of experts' opinions, economic analyses and market survey reports.

Third, provide guidance to the parties to ascertain their economic analysis on market definition, market power, and damages calculation, and improve the scientific nature of economic analysis. When identifying market power, the parties must fully understand that market share is just one of the many aspects used determine market dominance, not the only one. Other methods should be given equal weight to avoid unjustifiable reliance on market share. When performing damage calculations, parties should be guided to make the pertinent causality analysis of the facts, whether it resulted from monopolistic behavior, and evaluate reasonable amounts for compensations.

Fourth, encourage the applicability of the articles prescribed in the AML, and standardize the ruling criteria at an appropriate time. For example, by improving the methods for analyzing vertical monopoly agreements, antitrust enforcement against the abuse of IPRs, and studies on the analytical framework of two-sided market, etc.

A REVIEW OF NON-MERGER ANTITRUST ENFORCEMENT AND LITIGATION DEVELOPMENTS IN THE PRC IN 2015

BY **MICHAEL HAN** & **DAVID BOYLE** [1]

I. INTRODUCTION

Over the past number of years China's antitrust regime has been gaining prominence on the international stage. China's merger control law is now well established and has become a real consideration for dealmakers and their lawyers around the world. However, in 2015, China's antitrust enforcement in the non-mergers area came to the fore with some notable decisions and investigations. The National Development and Reform Commission's (the "NDRC") record breaking fines imposed on Qualcomm for abusing its dominant market position in the licensing of Standard Essential Patents ("SEPs") and the recent fines imposed on a number of international cargo shipping carriers for cartel activity show that competition law compliance is now a real consideration for international companies doing business in China.

1 Michael Han is an antitrust partner at Fangda Partners. David Boyle is an antitrust associate in the Hong Kong office of Fangda Partners.

In 2015, China's antitrust agencies also made strides in introducing more specific antitrust rules and guidelines to provide clarity on how the agencies will enforce China's Anti-Monopoly law (the "AML"). For example, the State Administration for Industry and Commerce (the "SAIC") promulgated the *SAIC IP Antitrust Rules,*[2] with important implications for licensing arrangements, FRAND-encumbered IPRs, patent pools and the like. In addition, further guidelines are expected in the automobile sector, as well as guidelines on the calculation of fines and new leniency rules.

This article provides a summary of the key legislative, enforcement and litigation developments in 2015 in the non-merger antitrust enforcement area and the likely consequences these changes will have for companies doing business in China.

II. CHINA'S ANTITRUST AGENCIES AND THEIR ENFORCEMENT RECORD IN 2015

Before exploring further the Chinese antitrust authorities' enforcement activities in 2015, it is useful to provide a brief introduction to the various authorities and their competences. Unlike other jurisdictions, China does not have an independent and unified antitrust enforcement agency. There are three regulatory authorities that enforce the AML at the national level.[3] The NDRC, the SAIC, and the Ministry of Commerce ("MOFCOM").[4] This article will primarily focus on non-merger enforcement in 2015, i.e., the enforcement activities of the NDRC and SAIC.

The NDRC is mainly in charge of investigations involving price-related antitrust infringements (including both anti-competitive cartels or vertical agreements and abusive conduct). In 2015, the NDRC imposed total fines of RMB 7 billion ($1.1 billion) in major price related antitrust cases (i.e., cartels, abuse of dominance, resale price maintenance and abuse of administrative power).[5] The main industries targeted included wireless technology, telecommunications, transportation, shipping and the auto sector.

The SAIC is responsible for the enforcement against non-price related antitrust infringements. In 2015, the SAIC concluded eight cases and initiated twelve new antitrust cases nationwide. Among the twelve new cases, four are related to cartels (e.g. allocation of markets and customers or price fixing), while eight are abuse of dominance investigations.[6] The industries targeted included construction materials, pharmaceuticals, telecommunications and public utilities.

III. ABUSE OF DOMINANCE

A. *Record Fines Imposed On Qualcomm*

One of the most high-profile unilateral conduct cases in the NDRC's record of antitrust enforcement is the *Qualcomm* case. On February 9, 2015, after an investigation that took more than one year and several rounds of discussions with Qualcomm, the NDRC found that Qualcomm abused its dominant market position in the licensing of SEPs concerning wireless telecommunication and baseband chip technologies, and issued a penalty in the amount of RMB 6.088 billion ($924.8 million).[7]

2 The Rules on Prohibition of Abuses of Intellectual Property Rights Eliminating or Restricting Competition (promulgated by the State Administration for Industry and Commerce, April 7, 2015, effective August 1, 2015), available in Chinese at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201504/t20150413_155103.html.

3 Above these three agencies is a higher authority, the Anti-Monopoly Commission of the State Council. The Commission's role is mainly competition policy making and high level coordination, rather than daily regulatory work or specific enforcement activities. The Office of the Anti-Monopoly Commission, or its "secretariat," however, is established within the Anti-Monopoly Bureau of MOFCOM.

4 The Anti-Monopoly Bureau of MOFCOM is the agency responsible for merger review.

5 It should be noted the fines imposed on Qualcomm accounted for $925.8 million/RMB 6.088 billion of the total $1.1 billion/RMB 7 billion fines.

6 The SAIC and its local counterparts i.e., local AICs have in total launched 58 antitrust investigations nationwide to date, of which 24 have been concluded and four suspended or terminated as of December 2015, *available in Chinese* at http://news.xinhuanet.com/politics/2015-03/09/c_127560575.html.

7 National Development and Reform Commission, Administrative Penalty Decision (February 9, 2015), available in Chinese at http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html.

The fine is the highest penalty the NDRC has imposed to date and amounts to eight percent of Qualcomm's 2013 revenue in China.

In reaching its decision, the NDRC affirmed the position of China's courts in earlier private damages cases that under the AML, each SEP may constitute a distinct relevant market. The NDRC found specifically that Qualcomm violated the AML, by charging unfairly high patent licensing fees, charging licensing fees for already expired or invalid SEPs, requiring free cross-licenses, bundling non-essential patents with SEPs, and setting unreasonable conditions in the sale of baseband chips by imposing unreasonable SEP licensing terms and conditions and preventing customers from challenging other unreasonable conditions.

In addition to ordering Qualcomm to cease the above-mentioned abusive activities, the NDRC also required Qualcomm to (1) provide a detailed list of relevant patents to the licensees, and (2) stop using the wholesale net selling price of the end device as the royalty base while insisting on high royalty rates at the same time. As part of the "rectification plan," Qualcomm also undertook to license its Chinese SEPs at a royalty base of 65 percent of the net selling price.[8]

This landmark fine and rectification plan will likely have a long lasting impact on the licensing practice of telecommunication SEPs for both domestic and foreign parties in China. The most significant element of the rectification plan is the 65 percent royalty base, the rationale for which is still unclear. However, this at least suggests that under the AML, using the price (or partial price) of the end product as the royalty base is permissible in SEP licensing. Either way, this compromise reached by both NDRC and Qualcomm will undoubtedly influence the determination of fair and reasonable royalty rates for other licensors in the telecommunications industry.[9]

B. *Abuse Of Dominance Investigations Involving State Owned Companies*

The SAIC initiated a number of abuse of dominance investigations in 2015, particularly in the public utilities sector. For example, the SAIC fined the state-owned Liaoning tobacco company RMB 4.33 million ($658,000) for bundling popular and unpopular cigarettes.[10] In addition, a Hainan water company which provided public utilities was fined RMB 631.7 thousand ($96,000) for imposing unreasonable conditions by charging its customers illegal deposits.[11]

More significantly, three state-owned telecommunications companies, *China Telecom*, *China Unicom* and *China Mobile* were investigated for bundling broadband with landline and mobile phone services in Ningxia and Inner Mongolia, two provincial regions in western China.[12] All of the abuse of dominance investigations involving the major telecommunications operators terminated with commitments to rectify the anticompetitive conduct. China Mobile was also investigated for monthly expiration of data packages and had to make a commitment to optimize its data plans offered and allow monthly rollover of data usage.

C. *First Fines Imposed For Refusal To Supply And Failure To Cooperate*

In 2015, for the first time, the SAIC investigated and fined a pharmaceutical company,

8 Press Release, Qualcomm Inc., Qualcomm and China's National Development and Reform Commission Reach Resolution (February 9, 2015), https://www.qualcomm.com/news/releases/2015/02/09/qualcomm-and-chinas-national-development-and-reform-commission-reach.

9 The NDRC Published the Decision of Administrative Penalty for the Qualcomm AML Investigation with Noticeable Omissions, FANGDA LEGAL BRIEF (March 3, 2015), http://www.fangdalaw.com/images/The%20NDRC%20Published%20the%20Decision%20of%20Administrative%20Penalty%20150305.pdf.

10 State Administration for Industry and Commerce, Administrative Penalty Decision (June 1, 2015), available in Chinese at http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201508/t20150813_160207.html.

11 State Administration for Industry and Commerce, Administrative Penalty Decision (January 9, 2015), available in Chinese at http://www.saic.gov.cn/fldyfbzdjz/dxal/201508/t20150811_160064.html.

12 State Administration for Industry and Commerce, Termination of Antitrust Investigation Decisions, available in Chinese at http://www.saic.gov.cn/zwgk/gggs/jzzf/.

Chongqing Qingyang Pharmaceutical Co., Ltd. ("Qingyang"), for abusing its dominant position by refusing to supply counterparties.[13] The investigation concerned the supply of the pharmaceutical ingredient (API) used in Allopurinol tablets; [14] Qingyang was the only manufacturer of API in China and was found by the SAIC to have a 100 percent monopoly in the market. The SAIC determined that Qingyang's suspension of supply of API to downstream manufacturers of Allopurinol tablets for six months was an attempt to maximize its monopoly benefit in favor of its own downstream Allopurinol tablets. Qingyang's cooperation with the SAIC in the probe resulted in a reduced fine of RMB 439,308 ($67,000), or 3 percent of its annual turnover in 2013. Although refusal-to-deal cases are rare in China, this case may open the door for similar cases in the future.

Notably for the first time, a company was fined for failure to cooperate with an antitrust investigation. *Sunyard*, a Chinese IT system company,[15] was fined by the SAIC RMB 200,000 ($30,000) for refusing to respond to information requests from the SAIC. However, the grounds for the investigation of Sunyard were not stated in the SAIC's public announcement.

The investigations of Chinese state owned entities, *China Telecom*, *China Unicom* and *China Mobile,* are an interesting development. In the past, the Chinese authorities have been criticized for selectively pursuing antitrust enforcement against foreign multinationals in order to benefit domestic operators. Although fines were not imposed and the SAIC accepted commitments from the parties, these recent dominance investigations indicate that Chinese state owned enterprises may not be as sheltered from antitrust enforcement as one might have expected.

13 SAIC, Administrative Penalty Decision (October 28, 2015), available in Chinese at http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151222_165152.html.

14 Allopurinol Tablets are the only inexpensive drug available in China for treating hyperuricemia.

15 State Administration for Industry and Commerce, Administrative Penalty Decision (September 8, 2015), available in Chinese at http://www.saic.gov.cn/zwgk/gggs/jzzf/201511/t20151105_163657.html.

IV. CARTELS

Horizontal agreements have been a priority for both the NDRC and SAIC in recent years. While the Chinese authorities have previously investigated local companies for cartel behavior, this year saw the Chinese authorities continue to launch investigations into high profile international cartels that were previously the subject of antitrust investigations in other jurisdictions.

A. *Global Cargo Ocean Shipping*

The NDRC initiated an investigation of nine global roll-on/roll-off cargo ocean shipping carriers for their alleged bid rigging cartel in 2014, following investigations in a number of other jurisdictions including the United States, Canada, Japan and the Republic of Korea. The investigation was initiated based on leniency applications and concluded on December 28, 2015.[16] The first leniency applicant, Japanese carrier Nippon Yusen Kabushiki Kaisha (NYK Line) was exempted from any penalty, while the NDRC imposed fines on seven other companies[17] totaling RMB 407 million ($61.74 million), representing from four percent to nine percent of their China-related turnovers in 2014.

The Norwegian carrier Höegh Autoliners was the only company that was investigated but found by the NDRC to be unrelated to the cartel after it successfully defended its case. This is the first time the NDRC has formally initiated an investigation against a multinational company and acquitted it after hearing defenses and conducting extensive investigations.[18] Previously there was a percep-

16 Mark Briggs, China Fines Vehicle Shippers for Price Fixing, GLOBAL COMPETITION REV., January 5, 2016, http://globalcompetitionreview.com/news/article/40233/china-fines-vehicle-shippers-price-fixing/. See Press Release, National Development and Reform Commission, Eight Global Roll-on Roll-off Cargo Shipping Companies Fined RMB 407 Million for Bid Rigging Cartel (December 28, 2015), available in Chinese at http://jjs.ndrc.gov.cn/gzdt/201512/t20151228_769084.html.

17 The seven companies are Kawasaki Kisen Kaisha (the K-Line), Mitsui OSK Lines (MOL), EUKOR Car Carriers, Wallenius Wilhelmsen Logistics (WWL), Compañía Sud Americana de Vapores (CSAV), Eastern Car Liner and Compañía Chilena de Navegación Interoceánica (CCNI).

18 Fangda Partners represented Höegh Autoliners in the investigation.

tion of presumed guilt once the NDRC opened an investigation, and the only variable would be the size of the fine imposed. However, this case shows that a strong defense can affect the result of an NDRC investigation.

B. *Administrative Agency Sponsored Cartel*

The NDRC for the first time investigated and sanctioned a cartel among four major state-owned telecommunications companies (*China Telecom, China Unicom, China Mobile and China Tietong)*[19] in the Yunnan Province. Interestingly, the cartel was organized and sponsored by the Yunnan Provincial Administration of Telecommunications (the provincial industry regulator). The regulator was found to have organized the operators to reach an agreement restricting their promotion activities, and even provided a uniform maximum ceiling for promotion incentives to customers. The cartel agreement also had government backed punishment provisions. The NDRC ordered the regulator to stop the illegal cartel organization and fined the four state-owned operators RMB 13.18 million ($2 million).[20]

C. *Increased Cooperation With International Competition Authorities*

One of the most important developments in global cartel investigations in recent years has been the increased cooperation among competition agencies around the world. The NDRC and the SAIC have both previously signed memoranda of understanding ("MOUs") with the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in the United States, as well as the Fair Trade Commission of the Republic of Korea ("KFTC").

In 2015, the Chinese agencies expanded their cooperation with other national competition agencies. The SAIC signed MOUs with the Canadian Competition Bureau[21] in March and with the Russia Federal Anti-monopoly Service ("FAS") in September.[22] The NDRC signed MOUs with the Japan Fair Trade Commission ("JFTC") [23] in October and with the Australian Competition and Consumer Commission ("ACCC") in November.[24] The increased willingness of the Chinese authorities to cooperate with their international counterparts means that companies involved in global cartels, who are considering applying for leniency, should now also consider whether China has been affected by the cartel and the possibility of applying for leniency in China.

V. VERTICAL AGREEMENTS

In 2015, the NDRC continued its focus on Resale Price Maintenance ("RPM") infringements in the automobile industry. In May 2015, the authority's Jiangsu provincial bureau fined Mercedes-Benz[25] approximately RMB 350 million ($53.2 million), or seven percent of its 2014 revenue in the relevant geographic area (e.g., Jiangsu Province) for RPM infringements. The investigation covered both RPM for cars as well as the aftersales of auto parts and services.

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19 China Tietong is now a subsidiary of China Mobile.

20 See Press Release, National Development and Reform Commission, Abuse of Administrative Power to Eliminate and Restrict Competition by Yunnan Provincial Administration of Telecommunications in violation of AML was Corrected in accordance with Law (June 2, 2015), available in Chinese at http://jjs.ndrc.gov.cn/gzdt/201506/t20150602_694801.html.

21 Press Release, State Administration for Industry and Commerce; The SAIC Minister Heads a Delegation to Canada (March 26, 2015), available in Chinese at http://www.gov.cn/xinwen/2015-03/26/content_2838701.htm.

22 Press Release, State Administration for Industry and Commerce, The SAIC Signs MOU on Cooperation and Exchanges with the Russian FAS (September 29, 2015), available in Chinese at http://www.saic.gov.cn/ywdt/gjjl/201509/t20150929_162394.html.

23 Press Release, National Development and Reform Commission, Deputy Commissioner Hu Zucai Meets with the JFTC Chairman Kazuyuki Sugimoto and Signs Bilateral Antitrust MOU with the JFTC (October 13, 2015), available in Chinese at http://jjs.ndrc.gov.cn/gzdt/201510/t20151013_754530.html.

24 Press Release, National Development and Reform Commission, Director General Zhang Witnesses the Signing of China-Australia Antitrust MOU (November 16, 2015), available in Chinese at http://www.sdpc.gov.cn/gzdt/201511/t20151106_757760.html.

25 Jiangsu Provincial Price Bureau, Administrative Penalty Decision (May 20, 2015), available in Chinese at http://cclp.sjtu.edu.cn/Show.aspx?info_lb=682&info_id=3592&flag=679.

In September, the Guangdong provincial bureau of the NDRC fined Dongfeng-Nissan,[26] Nissan's joint venture in China. Dongfeng-Nissan was fined RMB 123.3 million ($18.74 million), or three percent of its 2014 revenue in the relevant geographic area (i.e., Guangdong Province) for RPM infringements, while several dealers RMB 19.12 million ($3 million) for participating in cartels. The Guangdong provincial bureau found that between 2012 and 2014, Dongfeng-Nissan restricted its dealers' resale price by methods such as delaying or ceasing supply of popular models in violation of Article 14 of the AML (concerning vertical agreements). The restriction was so comprehensive that it covered the dealers' offered price and final sale price provided over the internet, phone, and in store. In addition, Dongfeng-Nissan established a "private organization" in the Guangzhou municipal area called "Guangzhou Regional Cooperation Alliance," the members of which were all dealers in the region. Through this Alliance, Dongfeng-Nissan organized a cartel among the dealers in violation of Article 13 of the AML (concerning horizontal agreements).

The two RPM cases followed similar investigations in 2014 involving FAW-VW (Audi) and Chrysler. However, the Dongfeng-Nissan case demonstrated some new trends in NDRC enforcement. Initially the bureau found it difficult to obtain concrete evidence as the participants managed to avoid virtually all written or email correspondence, but eventually evidence was found in electronic documents on the parties' internal IT system. Furthermore, the case covers both RPM imposed on dealers and cartels between dealers, and the NDRC fined both auto makers and their dealers at the same time.

26 See Press Release, National Development and Reform Commission, Guangdong Development and Reform Commission Fines Dongfeng-Nissan RMB 120 Million (September 11, 2015), available in Chinese at: http://fgs.ndrc.gov.cn/xtjl/201509/t20150925_752485.html. The full text of the Dongfeng-Nissan decision had not been made public at the time this article was written.

VI. NEW ANTITRUST GUIDELINES

A. *Draft Auto Sector Antitrust Guidelines*

Given the prevalence of antitrust enforcement actions in the auto sector in recent years, the NDRC is currently preparing sector specific guidelines for the auto sector under the authorization of the Anti-Monopoly Commission of the State Council. Although the final text of the guidelines has not yet been released, the draft released for public comment cover horizontal, vertical and unilateral conduct. Some of the more noteworthy aspects of the draft guidelines are summarized below:

- Horizontal agreements: Risk-sharing joint R&D agreements are likely to be exempt as long as the auto manufacturers concerned can provide evidence to prove the pro-competitive effects of the agreements.

- RPM: In relation to new cars, the draft guidelines provide for certain circumstances under which RPM may be exempted, for example, during a promotion period of up to six months for 'new energy' cars (i.e., electric cars), or where there are auto sales by dealers only acting as intermediaries.

- Unilateral conduct: Covers issues related to the supply of after-sales auto parts. Under the draft guidelines, auto manufacturers may be viewed as having a dominant market position in the auto after-sales market for their own brands and as a result should not restrict after-sales spare part supply without "justifiable" reasons.

Companies should note that the draft guidelines are mostly descriptive which means businesses will need to self-assess their conduct to determine whether they meet the criteria for exemption under Article 15 of the AML.

B. *SAIC IP Antitrust Rules*

In April 2015, the SAIC promulgated the *SAIC IP Antitrust Rules*,[27] covering licensing ar-

27 Rules on Prohibition of Abuses of Intellectual Property Rights Eliminating or Restricting Competition (promulgat-

rangements, FRAND-encumbered IPRs, patent pools and the like. Importantly, new rules such as safe harbors for horizontal arrangements have also been introduced. The SAIC IP Antitrust Rules also cover the somewhat controversial "essential facilities" doctrine, under which an IPR holder having a dominant market position shall not refuse to license its IPRs under reasonable terms, where such IPRs constitute so-called "essential facilities." In response to questions on how this provision will be applied in practice, SAIC officials commented that the essential facilities provision will only be applied with "great caution" and under limited circumstances. Therefore, its application still remains to be tested and there is no guidance provided on how the SAIC will determine whether an IPR is considered "essential." However, the SAIC IP Antitrust Rules do clarify that there is no presumption of dominance for IP holders; whether an IPR holder has a dominant market position will be determined by a number of factors rather than just the mere ownership of an IPR.

C. *Anti-Monopoly Commission-Level IP Antitrust Guidelines*

The SAIC IP Antitrust Rules are a useful reference for cases at the intersection between IP and antitrust. However, the SAIC's mandate is limited to the enforcement of non-price related conduct. In order to provide a consistent approach among China's antitrust agencies towards IP and antitrust issues, the Anti-Monopoly Commission has requested the NDRC, SAIC, MOFCOM and the State Intellectual Property Office ("SIPO") to submit their own versions of draft IP antitrust guidelines. The Anti-Monopoly Commission of the State Council will then release a consolidated final guidance document. Currently, the NDRC and SIPO have sought public comments on their respective versions and the work will continue in 2016.

ed by the State Administration for Industry and Commerce, April 7, 2015, effective August 1, 2015), available in Chinese at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201504/t20150413_155103.html.

D. *Further Guidelines Expected In 2016*

In 2015, the NDRC has been drafting various other guidelines covering leniency applications, suspension of investigations and illegal gains. Currently there is a consultation process underway in which the NDRC is seeking comments from businesses, academia and government departments on the various draft guidelines. According to some press reports, the finalized drafts are expected to be submitted to the Anti-Monopoly Commission by June 2016 for approval and promulgation. Although it is too early to predict the effective dates for the guidelines, the guidelines we can expect to see in 2016 include:

- Guidelines on Leniency Applications with regard to Horizontal Monopoly Agreement: The draft leniency guidelines aim to provide more guidance to leniency applicants. The draft guidelines describe the requirements for leniency applications, including the provision of key evidence. In addition, a marker system will be introduced so as to fix the time sequence of various leniency applicants. This means an applicant can make a preliminary report on the monopoly agreement first and supplement the report with details within a set time period. Basically, the marker system will fix the position among various applicants to whom different fine reduction rates will apply. The guidelines also provide further details on disclosure and confidentiality rules so as to make the application process fairer and more transparent for applicants.

- Guidelines on Commitment and Suspension of Investigations: Expected to provide more guidance on procedural aspects of an undertaking's application for suspension/termination of antitrust investigations where commitments are offered to rectify the anti-competitive conduct.

- Guidelines on Calculation of Illegal Gains and Fines: Expected to provide detailed rules on the methods to determine and calculate an undertaking's illegal gains to be confiscated and fines to be levied for its AML

violations. This will include outlining the authorities' approach to aggravating and mitigating factors in calculating fines.

- Guidelines on Procedural Rules for Exemption Application with regard to Monopoly Agreement: Expected to outline the process for making exemption applications or self-assessment of the availability of AML exemptions by providing a more workable roadmap that is absent in the current antitrust rules.

While the Chinese authorities are improving in terms of issuing guidelines, vertical restraints are still very much a grey area in China and there is no uniform analytical framework that applies to the assessment of vertical agreements. For example, unlike the European Union, there is no safe-harbor regarding market shares in vertical agreements and it is not clear how the exemption criteria in Article 15 of the AML are applied. This is one area in particular where general guidelines or further publications of enforcement decisions would be particularly welcomed.

VII. ANTITRUST LITIGATION

In 2015, we saw the Chinese courts handle more private antitrust actions than previous years, increasing from 86 cases in 2014 to 141 cases from January to October of 2015. Notable court cases in 2015 included one of the first judicial reviews of an administrative antitrust enforcement decision, as well as a number of abuse of dominance claims in the internet and IT sector. Some of the more high-profile cases are summarized below.

The mobile application provider, *eMiage*, initiated an abuse of dominance claim against security software provider, *Qihoo 360* ("Qihoo"). The case followed the landmark case *Qihoo 360 v Tencent* in 2014. eMiage is a mobile app that features e-business card, contacts management, caller identification and instance messaging. Qihoo has a mobile security app that features, among others, the screening and filtering of unsafe SMSs, contacts management and caller identification. eMiage alleged that Qihoo's mobile security app (1) replaced eMiage's caller identification feature with its own and (2) blocked eMiage's e-business cards sent via SMS with its unsafe SMS screening feature, which constituted illegal restrictive trading. In addition, eMiage claimed Qihoo had bundled its security app with its caller identification function, resulting in unfair competition.

The first-instance court dismissed eMiage's claims, holding that eMiage had failed to prove Qihoo's dominant position in the relevant market. In addition, the court found the alleged behaviour of Qihoo did not constitute an abuse of market dominance since Qihoo's filters blocked the plaintiff's SMS based on protocols for certain content while not targeting any specific market competitor. Upon appeal, Beijing High People's Court agreed with the lower court and ruled in favor of the defendant on April 30, 2015.[28]

The Japanese metals company, *Hitachi Metals*, faced an abuse of dominance claim from four Chinese rare earth magnet producers.[29] This was the first case in which plaintiffs requested the court to license non-SEPs based on the "essential facility doctrine," arguing that the patents in question should be considered as *de facto* standards and an essential facility for the industry.[30] Normally, only SEP holders who have committed to licensing that SEP on FRAND terms are obligated to license, while holders of non-SEPs are at will to make their own licensing decisions. While the case is still pending, the decision will have important implications for the development of jurisprudence regarding non-SEPs and the essential facility doctrine in China.

In October, we saw one of the first few cases in which the respondent in an admin-

28 The First Antitrust Case in the Mobile Internet Sector Concluded and eMiage Lost, CAIJING MAGAZINE (May 13, 2015), available in Chinese at http://tech.caijing.com.cn/20150513/3881477.shtml.

29 The four plaintiffs were Ningbo Ketian Magnet, Ningbo Permanent Magnetics, Ningbo Tongchuang Strong Magnet Material and Ningbo Huahui Magnetic Industry.

30 Four Ningbo Magnet Companies v Hitachi Metals-Monopoly of Market the Key Issue, 21ST CENTURY BUSINESS HERALD (Dec. 30, 2015), available in Chinese at http://epaper.21jingji.com/html/2015-12/30/content_28573.htm.

istrative antitrust enforcement action sought judicial review of the decision. The Ezhou AIC found that *Ezhou City Green Burning Natural Gas* had restricted competition by charging illicit fees for the construction of gas pipelines.[31] *Ezhou City Green Burning Natural Gas* appealed the decision by the local AIC before the local court. While the plaintiff was not successful in the appeal, it may mean further judicial review applications of the Chinese antitrust authorities' decisions in the future.

In December 2014, a trial court ruled against *Sinopec*, the state owned oil company, in an abuse of dominance claim taken by Yingding, a bioenergy company. The court ruled that the defendant's refusal to trade with the plaintiff constituted abuse of its dominant position. The court held that Sinopec must incorporate the plaintiff's product into its sales channels within 30 days. However, the court dismissed the plaintiff's claim for monetary damages. Both parties subsequently appealed.[32]

Sinopec's appeal was held on April 22, 2015. In August, the second-instance court upheld Sinopec's appeal and found that the trial court failed to determine the correct relevant market of the product concerned and the plaintiff had not satisfied its burden of proof that the defendant held a dominant market position. On that basis the court revoked the lower court's decision and remanded it, which means the case must be sent back to the lower court for a second trial.[33] The case received much public and press attention in China as it was the first time a Chinese state-owned enterprise had lost a first-instance private antitrust case.

The high-profile case involving *Huawei* and *InterDigital* continued in 2015. In October 2013, the Guangdong High Court issued its final judgment, affirming the lower court's decisions and holding that InterDigital abused its dominance by charging Huawei anticompetitive licensing fees and engaging in tying arrangements and discriminatory treatment. InterDigital filed a petition for retrial of the case to the Supreme People's Court in April 2014 and two hearings were convened in October 2014 and April 2015.[34] The Supreme Court's decision is still pending.

In April 2014 and July 2014, Chinese telecommunications company *ZTE* and Taiwan-based technology company *Arima* filed abuse of market dominance complaints against InterDigital in Shenzhen and Nanjing courts respectively. The ZTE case is currently pending and public information is limited. On June 10, 2015, Arima and InterDigital announced that they reached a settlement agreement to dismiss the pending antitrust litigation. In its press release, InterDigital stated that the settlement agreement "maintains the existing patent license agreement and resolves all pending payment disputes between the companies."[35]

VIII. CONCLUSION

It has been widely acknowledged that active antitrust enforcement is fast becoming the "new norm" in China's economic and social order. During the early years of the AML, the fines were relatively modest in most cases (less than $200,000). In 2015, we have seen fines of over $60 million imposed in the cargo ocean shipping carriers cartel case and the near $1 billion fine imposed on Qualcomm. With the Chinese antitrust authorities gaining expertise and confidence in initiating and conducting antitrust investigations, it looks like this trend is set to continue in 2016.

31 State Administration for Industry and Commerce, Ezhou City Green Burning Natural Gas Fined RMB 1.59 million and Lost Administrative Petition and Appeal at Court, CHINA INDUS. & COMM. NEWS (September 30, 2015), available in Chinese at http://www.saic.gov.cn/jgzf/fldyfbzljz/201509/t20150930_162481.html

32 Yunnan Bioenergy Company Wins Antitrust Trial against Sinopec, KUNMING DAILY (December 18, 2014), available in Chinese at http://finance.ifeng.com/a/20141218/13365857_0.shtml.

33 Sinopec's Refusal to Trade Case Involving a Yunnan Private Company Remanded, XINHUANET (Sept. 8, 2015), available in Chinese at http://news.xinhuanet.com/finance/2015-09/08/c_1116501390.htm.

34 See InterDigital Inc.'s 10-Q quarterly filing with the U.S. SEC, December 2015.

35 Press Release, InterDigital Inc., InterDigital and Arima Enter Into Settlement Agreement (June 10, 2015), http://ir.interdigital.com/releasedetail.cfm?ReleaseID=917310.

While some of the investigations undertaken by the Chinese antitrust agencies in 2015 mirror those taken in other jurisdictions, foreign companies and their advisors should understand that the rules and procedures in China are different from those in other parts of the world, not only in the way certain types of behavior is interpreted but also the way investigations are carried out. In order to provide more transparency for companies doing business in China, the agencies are striving to come up with additional guidelines to provide details on how the AML will be enforced procedurally and substantively.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF ADMINISTRATIVE MONOPOLISTIC CONDUCT

BY MENG YANBEI [1]

I. OVERVIEW

Administrative monopolistic conduct is also considered conduct of abusing administrative power to eliminate or restrict competition. There are three stages in Chinese laws to regulate administrative monopolistic conduct. Stage One: regulate administrative monopolistic conduct mainly through policies and documents (1978-1992).[2] Stage Two: regulate administrative monopolistic conduct mainly through the *Anti-Unfair Competition Law* ("AUCL") and *Administrative Procedure*

1 MENG Yanbei, Associate Professor, Renmin University of China School of Law and Secretary Commissioner, MRLC. This article is also Chapter 5 of the MRLC IP & Competition Law 2014 Annual Report of China.

2 These policies and documents include Provisional Regulation of the State Council on Promoting Economic Integration (July 1, 1980), Provisional Regulation of the State Council on the Development and Protection of Socialist Competition (October 7, 1980), Decision of Central Commission of CPC and the State Council on Prohibiting Party and Government Organs and Officials from Engaging in Business or Starting an Enterprise (December 3, 1984), Notice on Breaking Up the Inter-Regional Market Blockade and Further Revival of Circulation of Merchandise (November 10, 1990), etc.

Law (1993-2007).[3] In particular, Article 7 and 30 of the AUCL issued in 1993 have special provisions on administrative monopolistic conduct specifically regulating administrative monopolistic conduct as unfair competition. Stage Three: regulate administrative monopolistic conduct mainly through *Anti-Monopoly Law* ("AML") and *Administrative Procedure Law* (2007-present). Administrative monopolistic conduct is enumerated in a special chapter of the AML in China, that completely establishes a regulating system for administrative monopolistic conduct from the aspects of purpose, principle, behavioral expression and legal duty. After the enforcement of the AML, the anti-monopoly enforcement agency issued supporting regulations one after another to specifically regulate administrative monopolistic conduct, that mainly include: *Provisions on the Procedure for the Industrial and Commercial Administrations to Stop Acts of Abusing Administrative Power for Excluding or Limiting Competition* issued by the State Administration for Industry and Commerce ("SAIC") on May 26, 2009 (came into force on July 1, 2009); the *Regulation on the Prevention of Conduct Abusing Administrative Powers to Eliminate or Restrict Competition* issued by the SAIC on December 31, 2010 (came into force on February 1, 2011).

Typical cases in China of administrative monopolistic conduct after the enforcement of the AML include: (1) the case of *Anti-counterfeiting ventures v. the General Administration of Quality Supervision, Inspection and Quarantine* in 2008, which aroused broad attention at home and abroad as the first case after the enforcement of the AML in China; (2) the case of *Ministry of Industry and Information Technology ("MIIT") "Green Dam Youth Escort" Software* in 2009. In this case, scholars and lawyers questioned that the *Notice Regarding Requirements for Pre-Installing Green Filtering Software on Computers* (MIIT software [2009] No. 226) was involved in "abusing administrative power to restrict and eliminate competition and harm the interests of consumers,"[4] which led to the cancellation of this compulsory requirement announced by MIIT; (3) the case of G*uangdong GPS operators v. Certain municipal government of Guangdong province*. In this case, Guangdong Administration for Industry and Commerce offered an anti-monopoly enforcement proposal to the Guangdong Government for "rectifying certain government's conduct that has abused its administrative powers to eliminate and restrict competition pursuant to law" regarding certain administrative enforcement conduct of promoting motor GPS by the government. The Guangdong Government decided to remove the specific administrative acts of the municipal government.[5]

II. LEGISLATION AND POLICY DEVELOPMENT

In 2014, legislation and policy in China on the prohibition of administrative monopolistic conduct further developed.

In July, 2014, the State Council issued *Several Opinions on Promoting Fair Market Competition and Safeguarding the Normal Market Order* (NDRC (2014) Order No.20), which aims to break regional blockades and industry monopoly. A round of comprehensive clean-up shall be conducted with regard to the regulations, rules and provisions formulated by governments at all levels and their departments that touch on market entry and busi-

3 In this stage, a large number of laws and regulations were formulated relating to regulating administrative monopolistic conduct, mainly including the *State Compensation Law* (1994), the *Administrative Penalties Law* (1996), the *Administrative Reconsideration Law* (1999), the *Administrative Licensing Law* (2003), the *Tender and Bidding Law* (2000), the *Drug Management Law* (2001), etc

4 Refer to Scholars and lawyers doubted the legitimacy of pre-installing "Green Dam". Source: http://misc.caijing.com.cn/templates/inc/webcontent.jsp?id=110182910&time=2009-06-11&cl=100&page=all Date of Upload: June 11, 2009, Date of Access: January 30, 2015.

5 Refer to Minutes of meetings designating undertakings, Industry and Commerce Administrations exercising rights to propose for the first time, Anti-Monopoly Law targeting local government's eliminating and restricting competition – Documentary report of Guangdong Administration for Industry and Commerce investigating cases of abusing administrative powers to eliminate or restrict competition. Source: http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201107/t20110727_111694.html Date of Upload: July 27, 2011, Date of Access: January 30, 2015.

ness code of conduct. For instance, to abolish the provisions and practices that hinder the formation of a unified national market and fair competition, to correct the activities of introducing preferential policies in violation of laws and regulations to attract foreign investment, and to rectify the activities of imposing discriminatory market entry conditions and chargeable items on non-local goods or services, setting discriminatory prices and designating the purchase of products or services in violation of laws and regulations. Efforts shall be made to apply the concession model to the fields of public utilities and important public infrastructure, to introduce competition mechanisms and to liberalize the competitive business of natural monopoly industries.[6]

On October 23, 2014, the 4th plenary session of the 18th CPC Central Committee passed the *Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law*, which provides for: strengthening law enforcement supervision, firmly eliminating interference with law enforcement activities, preventing and overcoming the phenomena of local and departmental protectionism, and strictly punishing corruption in law enforcement.[7]

On November 1, 2014, *the Administrative Procedure Law* was passed and entered into force on May 1, 2015. Article 12 of the newly revised *Administrative Procedure Law* provides that: "the people's courts shall accept the following suits brought by citizens, legal persons or other organizations: [...] (8) Cases where an administrative organ is considered to have misused administrative power to exclude or restrict competition; [...]." The revision of this provision has the effect of promoting and strengthening the people's court's role in prohibiting administrative monopolistic conduct. Attention shall be paid to that according to the provision of Article 37 of the AML: "administrative authorities shall not abuse their administrative powers to set rules with content of eliminating or restricting competition," but according to the provision of Article 13 of the revised *Administrative Procedure Law*, "the people's courts shall not accept suits brought by citizens, legal persons or other organizations against administrative rules and regulations, or decisions and orders with general binding force formulated and announced by administrative organs." There still exist legislative obstacles and judicial difficulties when courts hear cases of administrative monopolistic conduct manifesting as abstract administrative conduct.

III. MAJOR CASES

In 2014, after the Handan Industry and Commerce Bureau investigated a case where the housing management department abused its administrative powers to limit others from accepting undertakings designated by it, Hebei Administration for Industry and Commerce instructed the entire province to carry out examinations and enforcement in this area; after the Deyang Industry and Commerce Bureau investigated another case where the meteorological department overcharged for lighting detection rods, Sichuan Administration for Industry and Commerce began supervising and examining the conduct of restricting competition by meteorological departments within the entire province.[8]

1. The Hebei Province Department of Transportation and other departments abused administrative power to eliminate or restrict competition.

In 2014, National Development and Reform Commission ("NDRC"), in accordance with the law, investigated the case where the He-

6 Refer to Several Opinions of the State Council on Promoting Fair Market Competition and Safeguarding the Normal Market Order. Source: http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm Date of Upload: July 8, 2014, Date of Access: January 29, 2015.

7 Refer to Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law (passed in the 4th plenary session of the 18th CPC Central Committee). Source: http://news.xinhuanet.com/ziliao/2014-10/30/c_127159908.htm. Date of Access: January 28, 2015.

8 Refer to 2014 General Description of Industry and Commerce Administration on enforcement of anti-monopoly and anti-unfair competition. Source: http://www.saic.gov.cn/ywdt/gsyw/sjgz/xxzx_1/201501/t20150128_151713.html Date of Upload: January 28, 2015, Date of Access: January 29, 2015.

bei Department of Transportation, the Hebei Price Bureau and the Hebei Department of Finance implemented preferential policies of tolls on passenger buses of the province, which is deemed abuse of administrative power to eliminate or restrict competition in the relevant market. The survey found that, Hebei Department of Transportation, Price Bureau and the Department of Finance jointly issued the *Notice on the Integration of Provincial Passenger Bus Turnpike Tolls Vehicle Classification Standard* (Hebei Transportation Highway [2013] No. 548), which determined that from December 1, 2013, there would be an adjustment on the province's toll road's toll vehicle classifications, and effectively implemented preferential policies of tolls on passenger buses of the province. On October 30, 2013, Department of Transportation issued the *Notice on the Implementation of the Province's Turnpike Tolls Passenger Bus Vehicle Classification Criteria Related Matters* (Hebei pay public [2013] No. 574), which further clarified that, "preferential policies only apply to the passenger buses that operate on fixed routes within the province upon approval by the road transportation regulatory organization." NDRC, according to the relevant provisions of the AML, sent a law enforcement recommendation letter to the General Office of Hebei Provincial People's Government, recommending that the Department of Transportation and other departments correct the related behavior and give fair treatment regarding the toll to all passenger transportation enterprises in the province that have fixed operation routes. Corrections of the related behaviors will help to ensure fair competition among all the passenger transportation business.[9] On September 23, 2014, the Hebei Department of Transportation, the Hebei Price Bureau and the Hebei Department of Finance adjusted in time the practice of offering preferential policies of tolls only on passenger buses of the province, and jointly issued the *Notice on the Adjustment of Preferential Policies of Tolls on Passenger Buses of the Province* (Hebei Transportation Highway [2014] No. 407), which clearly provided that, from October 1, passenger buses of other provinces (or cities or districts) among passenger buses between provinces jointly operated and running from opposite directions against passenger buses of Hebei shall enjoy the same preferential policies of tolls with the passenger buses of Hebei Province.[10] The significance of this case is to indicate that the AML in China, through endowing anti-monopoly enforcement agencies with rights to propose law enforcement actions, has already brought administrative monopolistic conduct into the frame of anti-monopoly law enforcement, which enables anti-monopoly law enforcement agencies to play an active role in the prohibition of administrative monopolistic conduct.

(2) *Bureau of Education of Guangdong Province abused administrative powers to eliminate or restrict competition.*

On April 22, 2014, Shenzhen Tsinghua Sware Software Hi-Tech Co., Ltd. ("Thsware") sued Bureau of Education of Guangdong Province for abusing administrative powers by specifying the use of software programs from another company in a national tryout, which was suspected of being in violation of relevant provisions of the AML. According to reports, at the beginning of 2014, the Ministry of Education for the first time listed "Basic Skills of Construction Cost" as one of the competition items in the "2013-2015 National Vocational Students Skills Competition." In April, 2014, the organizing committee of construction cost for "Basic Skills of Construction Cost" of Guangdong Province combined with Bureau of Education, Vocational Colleges, industries and enterprises, etc. of Guangdong Province, specified the use of Goldon software. Thsware

9 Refer to *The National Development and Reform Commission pursuant to law recommends Hebei Provincial People's Government to correct the conduct of the Department of Transportation and other departments of violation of Anti-Monopoly Law and abuse of administrative power to eliminate or restrict competition.* Source: http://jjs.ndrc.gov.cn/gzdt/201409/t20140926_626773.html Date of Upload: September 26, 2014, Date of Access: January 29, 2015.

10 Refer to *extend the same treatment on tolls to passenger bus jointly operated and running from opposite directions in Hebei Provinc*e. Source: http://jjs.ndrc.gov.cn/gzdt/201410/t20141030_635205.html Date of Upload: October 30, 2014, Date of Access: January 29, 2015.

claimed the conduct of specifying exclusive software for the competition by the Bureau of Education of Guangdong Province was suspected of abusing administrative powers and violating the AML. The Bureau of Education of Guangdong Province claimed the competition procedures of Guangdong tryouts were based on the documents of the Ministry of Education. Furthermore, the organizing commission office of "National Competition" is managed by the Ministry of Education, that on April 2, 2014, issued the *Competition Procedures for "Basic Skills of Construction Cost"*, that clearly provided the use of software exclusively provided by Goldon. In terms of organizing commission of "National Competition" specifying the use of Goldon software, before the lawsuit against the Bureau of Education of Guangdong Province, on April 16, Thsware filed an administrative reconsideration to the Ministry of Education. Since the "National Competition" of skills of construction cost that was to be held on June 13 did not take place, Thsware withdrew the application of administrative reconsideration on June 18. Goldon, the third party of this lawsuit, claimed that Goldon attended the oral examination of open selection on February 27, 2014, and after the selection, the organizing commission finally determined that Goldon shall provide support on the competition platform, software and technology for the competition of "Basic Skills of Construction Cost." Furthermore, Thsware and Shanghai Luban Software Ltd. also participated in this selection, so there was no issue of abusing administrative powers.[11] On June 26, 2014, Guangzhou Intermediate People's Court opened the first court session on this case. It is the first administrative monopoly lawsuit officially accepted and heard by the court and came to material trial stage after more than 6 years' enforcement of the AML. On February 2, 2015, Guangzhou Intermediate People's Court affirmed that, the conduct of the Bureau of Education specifying Goldon software as the exclusive competition software in the provincial competition of "Basic Skills of Construction Cost" was in violation of the AML's regulations.[12] This case indicates that the court, due to its relevance and independency, will play a greater role in the practice of regulating administrative monopolistic conduct in China.

China's market economy has been reforming for over 30 years, but due to the nature of "path dependence" and the rigidity of ideology under a planned economic system, the government's function was not clarified completely vis-à-vis the said market economy. There may be some inaccurate orientation regarding what the government should do and how to do it. The government may over-regulate, omit to regulate, replace the role of the market with itself or improperly interfere with the decision-making of the micro economic entities in the market, etc. Therefore, administrative monopolistic conduct in China is a systemic problem. The establishment and perfection of a system that can prohibit administrative monopolistic conduct in China is closely related to the reforms of the economic and political systems in China. The perfection and enforcement of the legal system is a significant measure that will help solving administrative monopolistic conduct, but the ultimate settlement of administrative monopolistic conduct still depends on the completeness of systemic economic and political reforms in China.

11 Refer to *The Department of Education of Guangdong Province was sued for suspected administrative monopoly due to specifying competition software*. Source: http://www.legaldaily.com.cn/legal_case/content/2014-12/04/content_5873102.htm?node=33809. Date of Upload: December 4, 2014. Date of Access: January 29, 2015.

12 Refer to Wan Jing, *Judicial judgment said no to administrative monopoly for the first time*. Source: http://www.legaldaily.com.cn/index_article/content/2015-02/16/content_5972433.htm?node=5954&from=timeline&isappinstalled=0. Date of Upload: February 16, 2015. Date of Access: February 28, 2015.

CHINESE ANTITRUST INVESTIGATIONS IN 2015

BY **JOHN YONG REN** [1] & **JASON LIU** [2]

I. INTRODUCTION

In China, there are three administrative authorities that serve as enforcement authorities of the Anti-Monopoly Law ("AML"): the Ministry of Commerce ("MOFCOM") reviews concentration of undertakings (merger review) and the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC") investigate monopolistic agreements (cartels and vertical restraint) and abuses of dominant market position. Specifically, the NDRC investigates cases involving pricing issues, and the SAIC is in charge of cases without pricing issues.

This article intends to present an overview of the antitrust activities of the NDRC and SAIC in 2015, followed by a discussion on the trends and prospects of the antitrust investigation in China.

1 Managing partner and team lead of the Antitrust Practice Group at T&D Associates in Beijing, China.
2 T&D Associates.

II. OVERVIEW OF THE ACTIVITIES OF THE AUTHORITIES IN 2015

During the early years such as 2013 and 2014, the public witnessed a number of antitrust investigations initiated by the authorities, some with tough measures including dawn raids. Notable cases involved multinationals including Microsoft (dawn raided by the SAIC in July 2014),[3] Qualcomm (dawn raided by the NDRC in November 2013)[4] and Tetra Pak (dawn raided by the SAIC in April 2013).[5] With intensive media coverage, those law enforcement activities drew a lot of attention in China and abroad, and were viewed as a series of "antitrust enforcement storms." Domestic and foreign enterprises have learned from those high-profile cases and started to put antitrust compliance as one of the priorities during their daily operations.

Compared with the previous years, the Chinese antitrust investigation authorities may be regarded by some observers to be relatively quiet in 2015, as fewer cases were reported by the media. However, this is just a myth. As a matter of fact, the NDRC and SAIC had still been very active in antitrust investigation throughout the past year. Beyond the previous investigation into high-profile cases, their approaches towards the law enforcement have become more and more comprehensive and sophisticated. The activities of the NDRC and SAIC in 2015 will be reviewed separately in the following sections.

A. *NDRC*

AML enforcement activities by the NDRC were fruitful and diverse in 2015. As rightly pointed out by themselves, the AML enforcement by the NDRC is becoming normalized and subtilized.[6] Besides handling a substantial number of cases, the NDRC also exploited different measures in the enforcement, and actively participated in the relevant legislation.

1. *The Enforcement Activities of the NDRC Have Not Slowed Down*

Contrary to the impression to some that its enforcement activities have slowed down in 2015, the NDRC has actually maintained a robust level of anti-monopoly law enforcement. Although a relevant "low-key" approach was adopted by the NDRC in dealing with numerous cases in 2015, there were also some influential cases taking place during the year. Specifically:

- In February 2015, the NDRC concluded its investigation into Qualcomm, and determined that Qualcomm was in violation of the AML by abusing its dominant market position in several key telecom standard essential patents and chips by charging excessive royalty rates, tying wireless and non-wireless patents, and attaching conditions to chip sales. The company was fined RMB 6.088 billion ($971.1 million), or eight percent of its sales revenue in China in 2013.[7]

- In April 2015, Jiangsu Province Price Bureau, a provincial branch of the NDRC, found that the dealers of Mercedes-Benz in Nanjing, Wuxi, and Suzhou violated the AML by reaching monopoly agreements to enforce minimum prices for final products and fix prices for components. Mercedes-Benz received a fine of RMB 350 million ($56.4 million), or one percent of the company's sales revenue of the previous year. The bureau also fined the dealers a total of RMB 7.86 million ($1.27 million).[8]

- In December 2015, the NDRC fined eight shipping companies (among which Nippon Yusen Kabushiki Kaisha was exempted from the fine as the first company applying for leniency) a total of RMB 407 million ($63 million) for price-fixing (concerted bidding).

3 See, http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html, last visited on January 20, 2016.

4 See, http://news.xinhuanet.com/legal/2015-02/11/c_127484902.htm, last visited on January 20, 2016.

5 See, http://www.chinanews.com/gn/2013/07-31/5108197.shtml, last visited on January 20, 2016.

6 See, http://news.xinhuanet.com/mrdx/2015-03/23/c_134089028.htm, last visited on January 20, 2016.

7 See, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201502/t20150210_663873.html, last visited on January 20, 2016.

8 See, http://www.js.xinhuanet.com/2015-04/23/c_1115061914.htm, last visited on January 20, 2016.

The fines accounted for four to nine percent of each company's 2014 sales revenue in the international maritime transportation service of rolling cargo that were relevant to the Chinese market.[9]

Besides the above cases that were reported by the media, NDRC also conducted a number of investigations that were not disclosed to the public. Those unannounced investigations concerned several industries that are important for the people's livelihood. NDRC put the same efforts in those investigations as the announced case, and in some cases the targeted companies were dawn raided. The reasons that those cases were not disclosed were mainly because the investigations are still pending, or the NDRC closed the investigation by concluding the questioned activities were not illegal.

2. *Extensive Methods to Conduct Investigation*

Another reasons for the "being quiet" myth is that the NDRC had extensive approaches of AML enforcement in 2015. First, NDRC conducted several informal investigations, sometimes in the form of market survey, to examine the potential competition issues in a certain industry, which may possibly lead to formal investigation. In certain cases, NDRC may work with industrial associations to conduct the market survey.

Second, the NDRC's provincial branches were more involved in the antitrust investigations. In 2015, some of the important cases have been handled by provincial pricing bureaus, with the NDRC playing the role of supervisor offering guidance. For example, the Mercedes-Benz case investigated by Jiangsu provincial pricing bureau, and the Korean tire company case[10] investigated by Shanghai pricing bureau, etc.

The NDRC's provincial branches are playing a very important role in assisting the NDRC in carrying out investigations, including dawn raids. Comparing to the NDRC, it is easier and more convenient for the provincial branches to liaise with the local target companies and collect the related evidences. The NDRC's provincial branches (Shanghai Pricing Bureau is one of the good examples) have done a lot of material works during the investigations in 2015 and have been proved to be very professional and effective during its work with both companies and legal counsels. It is expected that more anti-monopoly investigations will come handled by provincial authorities.

In order to involve the provincial branches, the NDRC continually hosted trainings for the officials of the provincial branches in order to raise their level of professional skills. For example, from September 14 to September 17, 2015, the NDRC held training sessions for price supervision officials from the provincial level.

It can be seen from the above enforcement activities that the NDRC has strengthened the enforcement of the AML with different investigative methods and by coordinating its resources with the provincial branches.

3. *Mediation Has Been Exploited As A New Tool of AML Enforcement*

Besides expanding the investigative methods, NDRC also exploited mediation as a new tool of AML enforcement. NDRC successfully supervised and urged Dolby and HDMI to settle with the relevant color TV enterprises with regard to certain standard essential patent issues.[11] The mediation by NDRC reduced the litigation expenses of the enterprises and created a good environment for their development.

4. *Administrative Monopoly Has Been Targeted by NDRC*

In 2015, the NDRC has also targeted administrative monopoly. Specifically:

- On March 27, 2015, the NDRC published the decision of the administrative an-

9 See, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201512/t20151228_769085.html, last visited on January 20, 2016.

10 See, http://auto.ifeng.com/pinglun/20150914/1046961.shtml, last visited on January 20, 2016.

11 See, http://www.chinanews.com/life/2015/08-18/7473249.shtml, last visited on January 20, 2016.

ti-monopoly case in Shandong. According to the report, the NDRC conducted an investigation into Shandong Department of Transportation for its alleged conduct of eliminating and restricting competition in the market of monitoring platform and vehicle terminal. Pursuant to the relevant provisions of AML, the NDRC issued an enforcement advice letter to the general office of the Shandong Provincial People's Government and advised the latter to order the Department of Transportation to correct the relevant conducts and maintain market order of fair competition.

- On August 17, 2015, the NDRC issued a letter to the Anhui Provincial Government, and requested it to correct the administrative monopolies in government drug procurement programs. The NDRC's letter concerns the abuse of administrative power to restrict and eliminate competition by the Municipal Health & Family Planning Commission of Bengbu City.

According to the NDRC, they will continue to advance the AML enforcement against abuses of administrative power in restricting and eliminating competition.

5. *The NDRC Participated in the Drafting of the Anti-Monopoly Guidelines*

In 2015, as arranged by the Anti-Monopoly Commission of the State Council, the NDRC kicked off the drafting work of the anti-monopoly guidelines on leniency, exemption procedure, commitments, determination on illegal gains and fines, automobile industry and intellectual property rights.

At the end of 2015, the NDRC started soliciting public comments on the draft Anti-Monopoly Guideline on Abuse of Intellectual Property Rights. The Guideline will regulate the exercise of the intellectual property rights and the business in technology-intensive industries. The other guidelines were under drafting or internal discussion before seeking public comments.

B. *SAIC*

The SAIC, which is responsible for non-price related antitrust enforcement in China, also kept its pace in 2015 compared with the past. We provide our impression of the features of the SAIC's implementation of the AML in the last year from the perspectives of both legislation and enforcement.

1. *Moving Forward the AML Enforcement in 2015*

Since the AML took effect in 2008, the SAIC has initiated 58 antitrust investigations, focusing on public service industries including water supply, power supply, fuel gas and insurance. By 2015, 27 cases were concluded, 5 were terminated. The targets included state-owned enterprises, foreign-invested enterprises, industrial associations, etc.[12]

In 2015, the SAIC published 14 punishment decisions. Telecommunication industry is the premier target of the SAIC. Among the 14 cases, 5 cases are related to telecommunication industry, which accounts for 35.7 percent.[13] Despite this, various industries were targeted by the agencies, including insurance, water, tobacco, pharmacy, concrete, etc. Most of these industries are related to people's national economy and the people's livelihood. In respect of the targets, all of the 14 cases published by the SAIC in 2015 are related to domestic companies. Among them, it is notable that China Railway Telecom, China Unicom, China Mobile and China Telecom, which are State Owned Enterprises ("SOE") in telecommunication industry, were also targeted by the SAIC. On the other hand, there are also some on-going cases related to foreign companies, including the *Microsoft* case.[14]

2. *Active enforcement at the provincial level*

The SAIC's enforcement of the AML has a significant feature: most of the cases are completed by its provincial branches. For exam-

12 See, http://finance.sina.com.cn/roll/2016-01-13/doc-ifxnkkux1257936.shtml, last visited on January 20, 2016.
13 See, http://www.saic.gov.cn/zwgk/gggs/jzzf/, last visited on January 21, 2016
14 Id., note 10.

ple, the latest case announced by the SAIC is *Ao Du Concrete Monopoly Agreement* case.[15] In this case, again, the SAIC authorized its Hunan Provincial branch to investigate. In fact, all 14 cases published in 2015 were investigated by the SAIC's provincial branches, among which, Ningxia (3 cases) and Hunan (2 cases)[16] seem to be the most active provinces. This decentralized enforcement mechanism may be beneficial to the SAIC because it may enable it to focus the scarce resources on the most difficult cases, and spread antitrust culture at the local level in the meantime.

3. *Types of abusive cases*

In 2015, the SAIC and its provincial branches have dealt with various kinds of abusive cases. Tying and bundling are still the major focus of the authorities. For example, in *Shankai Sports* case,[17] the undertaking concerned abused its dominance in the 2014 World Cup ticket sale market, bundling the ticket with hotels and tourist product. The investigation is terminated because Shankai provided satisfactory commitments. It is also notable that, China Railway Telecom, China Unicom and China Telecom, all the three SOEs are investigated because they tied the network service and fixed-line telephone together by force. The investigations are terminated because the three companies provided satisfactory commitments.

Recently, the SAIC dealt with a case concerning refusal to deal. Before, abusive cases related to refusal to deal are mainly in courts.[18] However, the SAIC and its Chongqing branch has investigated Qingyang Medical Limited for it refusal to supply crude drug of allopurinol to the market for 6 months with no justifiable reasons. In this case, the authority defined the relevant market as crude drug of allopurinol and proved Qingyang had dominance in this market from the following four aspects:

1) Qingyang's market share in the relevant market is 100 percent;

2) Qingyang is able to control the downstream market;

3) The entry barrier of the relevant market is significant; and,

4) Downstream customers' dependency on Qingyang is significant.

It seems rare for a plaintiff to challenge the defendant successfully in a civil litigation involving the issue of refusal to deal. The main difficulty is to prove the defendant's market dominance. This case may provide reference for the plaintiff about how to prove the existence of the defendant's market dominance in civil antitrust cases.

As the first refusal to deal case dealt by Chinese administrative antitrust agency, *Qingyang* case indicates the SAIC's determination and ability to deal with refusal to deal cases. However, as a complicated issue in antitrust regime, how the administrative agencies will enforce the AML to refusal to deal case remains to be seen.

4. *Active in legislation*

SAIC's *Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition* ("SAIC's IP Provisions") implemented on August 1, 2015, was a significant effort made by the SAIC.

SAIC's IP Provisions for the first time answered many difficult questions in the crossing field of antitrust and intellectual property rights protection. For example, it confirms that an operator shall not be directly inferred to have dominant market position in the relevant market only based on its ownership of the intellectual property rights. The licensors, therefore, may exercise the IPRs more freely because Article 17 of the AML will not apply to them automatically.

More importantly, Article 5 of the SAIC's IP Provisions provide a safe harbor to cer-

15 See, http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165504.html, last visited on January 20, 2016

16 See, http://www.saic.gov.cn/zwgk/gggs/jzzf/, last visited on January 21, 2016

17 See, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201501/t20150112_151219.html, last visited on January 20, 2016

18 For example, Yingding Bio oil Ltd. v. Sinopec; Gaoyou Tongyuan Oil Transport Ltd. v. Taizhou Petrochemical Co. Ltd, yangzi petrochemical and Sinopec, etc.

tain IP rights owners for the exemption of Article 13(6) and Article 14(3) of the AML:

> (1) the aggregate market shares of the competitors are no more than 20 percent in the relevant technology or product market; or there are at least four other competitors with closely substitutable independently controlled IP rights in the relevant technology and product markets; or;
>
> (2) Neither the company nor any of its trading partners has more than 30 percent market share in the relevant technology or product market; or there are at least two other undertakings with closely substitutable independently controlled IP rights in the relevant markets.

Although the scope of this safe harbor seems limited (only Article 13(6) and Article 14(3) are covered), it is able to provide legal certainty for the licensors to a large extent. For example, there is no need for a licensor whose market share does not exceed the threshold to worry about its non-price related vertical agreement in IPR field.

This provisions also deals with other antitrust issues in IP field, such as antitrust concerns in patent pool, exclusive grant-back and standardization.

Like NDRC, the SAIC is also drafting the Anti-Monopoly Guideline on Intellectual Properties for the Anti-Monopoly Commission of the State Council. It is expected more detailed and operable rules related to antitrust enforcement in IP field will be issued soon.

III. TRENDS AND PROSPECTS

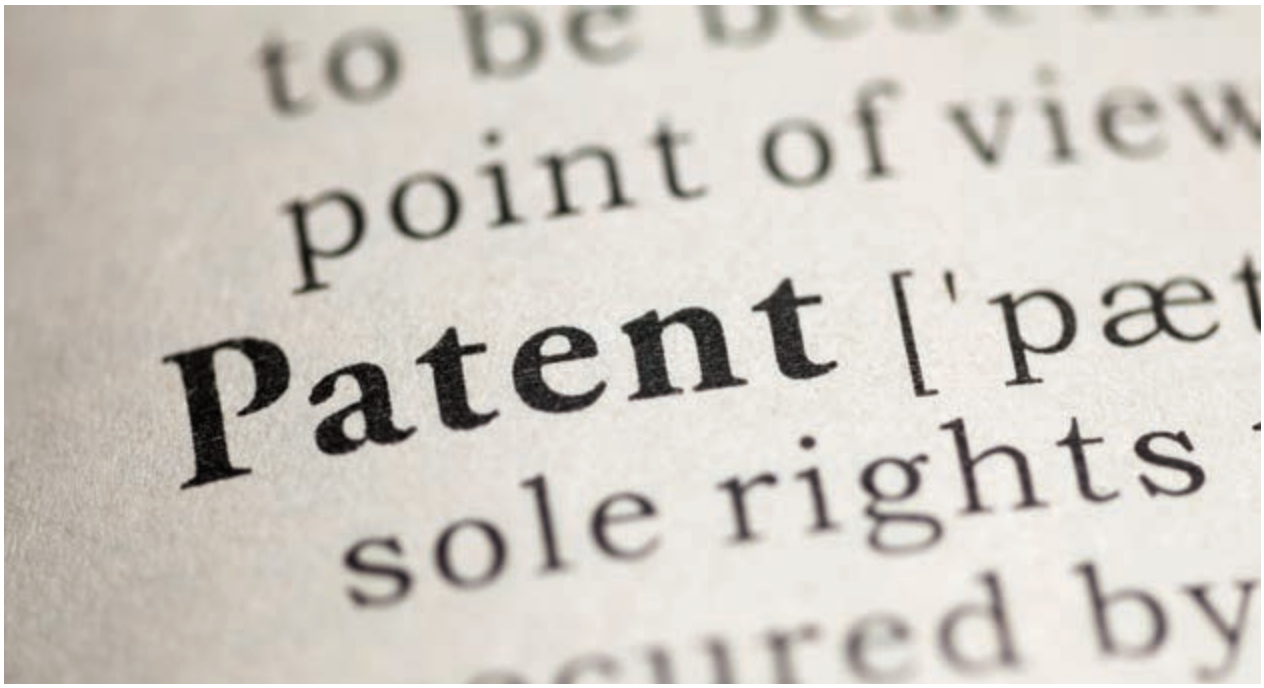
After 7 years' practice since the AML took effect in 2008, NDRC and SAIC have accumulated many experiences in antitrust investigation and AML enforcement at large. In 2015, the authorities maintained the forceful enforcement, and went deeper and more sophisticated in the investigations.

Looking ahead, we expect that the authorities will actively keep pushing China's anti-monopoly law enforcement, and the industries closely related to common people's livelihood such as pharmaceuticals and medical devices will be the focus on the next steps. The involvement of provincial market regulators into the investigation will vest the authorities more resources to deal with more cases across the country. In the meanwhile, the legislation will be another focus that the authorities pay attention to. The antitrust authorities are gathering the academics and practitioners to work on drafting Anti-Monopoly Guidelines, that will be finally released by the Anti-Monopoly Commission of the State Council. It is believed that those guidelines will provide the antitrust investigation with more uniformity and foreseeability from both procedural and substantive perspective. Moreover, investigations against Chinese companies still accounts for a larger percentage of the authorities' overall enforcement works, and the multinationals and domestic companies will be treated equally as the target being investigated.

RISKS OF GRANT-BACK PROVISIONS IN LICENSING AGREEMENTS: A WARNING TO PATENT–HEAVY COMPANIES

BY **SUSAN NING** [1], **TING GONG** & **YUANSHAN LI**





I. SUMMARY

In recent years, the interplay between intellectual property rights ("IPRs") and antitrust issues has been on the radar of antitrust authorities in China.[2] Since 2014, the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC") have launched a number of investigations relating to the abuse of IPRs, which includes the high-profile investigation into IDC and Qualcomm.[3] From litigation perspectives, in 2013 Guangdong People's High Court issued a thorough and in-

1 Susan Ning is a Senior Partner and Head of Antitrust & Competition at King & Wood Mallesons Beijing office (see: http://www.kwm.com/en/cn/people/susan-ning). Tong Gong and Yuanshan Li are associates of Antitrust & Competition at Beijing office.

2 There are currently three antitrust authorities in China. The Ministry of Commerce ("MOFCOM") is responsible for merger filings; the National Development and Reform Commission is in charge of price-related antitrust issues; the State Administration for Industry and Commerce is entrusted with the non-price related antitrust issues. In practice, there are jurisdictional overlaps between NDRC and SAIC when dealing with antitrust behavioral issues.

3 The NDRC issued the decision suspending its investigation to IDC in May 2014; in addition, the NDRC issued the administrative penalty decision to Qualcomm on February 9, 2015 (the administrative penalty decision of the NDRC [2015] No.1), Chinese version of the decision is available at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html (last visited on January 28, 2016).

triguing verdict on *Huawei v. IDC,* which is an Anti-monopoly dispute regarding the abuse of IPRs.[4]

Against this backdrop, the article will focus on one of the highly controversial issues of IPRs, the grant-back provision, which is widely used by companies doing businesses in China. We will analyze this provision under the Chinese laws, in particular the Anti-monopoly Law of the People's Republic of China ("AML").[5] Lately, this provision has been regarded, by its very nature, as being likely injurious to the proper functioning of normal competition, the article also intends to shed some lights on patent-heavy companies when they do businesses in China.

II. SCRUTINY OF GRANT-BACK PROVISION BEFORE THE ENACTMENT OF THE AML

A grant-back is an arrangement under which a licensee agrees to authorize the licensor of IPRs to use the licensee's improvements to the licensed technology or new application obtained in using the licensed technology.[6] Generally, a grant-back is deemed to have pro-competitive effects of reducing the licensing risks for licensors, promoting investments and application of new technology, and facilitating innovation and competition accordingly. On the other hand, however, exclusive grant-backs may allow licensors to be able to control the improvements or innovative achievements and therefore reduce licensors' motivation to innovate. The latter has become an increasing phenomenon in China. The negative effects of grant-backs on innovation and competition are therefore the focus of China's legislation. Before the enactment of the AML, grant-back provisions in licensing agreements were mainly scrutinized under China's Contract Law, the Foreign Trade Law, and the Regulations on Technology Import and Export Administration.

A. *Abusive Use Of The Provision To Exchange Improved Technologies Shall Be Void Under China's Contract Law*

According to Article 329 of the Contract Law of the People's Republic of China ("Contract Law"), "a technology contract that illegally monopolizes technology, impedes technological progress shall be null and void."

China's Supreme People's Court further identified circumstances that are applicable to Article 329 of the Contract Law, such as restricting one party from making new research and development on the basis of the contracted technology, or restricting a licensee from properly using the improved technology, or imposing unfair and disproportionate conditions on either of the parties exchanging the improved technologies. As an example, a provision that includes the following content will be automatically void: requiring a licensee to gratuitously provide the licensor with the improved technology; or transfer improvements to the licensor non-reciprocally; or the licensor jointly or solely owns the IPRs of the improved technology without consideration.[7]

B. *Exclusive Grant-Backs Are Of Competition Concerns*

According to China's Foreign Trade Law, where the IPR owner is involved in incorporating an exclusive grant-back condition in a licensing

4 Appeal case Huawei v. IDC on abuse of market dominant position, the verdict of final judgment in Chinese is available at: http://www.cpahkltd.com/UploadFiles/20140418175022999.pdf (last visited on January 28, 2016).

5 Anti-monopoly Law of the People's Republic of China was adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007.This Law entered into force as of August 1, 2008.

6 See Article 2(2) of Section II, the Draft Antitrust Guideline on the Abuse of Intellectual Property Rights in China (NDRC's part) ("Draft Guidelines of the NDRC"). The NDRC, after about six months of preparation, published its part of the draft about the Antitrust Guideline on the Abuse of Intellectual Property Rights on December 31, 2015, seeking public comments globally. The definition of grant-backs is also available in 5.6 U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, April 6, 1995, available at: http://www.justice.gov/atr/public/guidelines/0558.htm (last visited on January 28, 2016).

7 See Article 10 (1), the Interpretation of the Supreme People's Court on Some Issues Concerning the Application of Law in the Trial of Technology Contract Dispute Cases. The Contract law was issued on March 16, 1999 and took effect on October 1, 1990.

contract, which impairs the fair competition order of foreign trade, the authority entrusted by the State Council with the task to manage foreign trade may take necessary measures to eliminate such impairments.[8]

C. *Provisions To Restrict Technology Improvements Shall Not Be Included In A Technology Import Contract*

According to Article 29 of the Regulations on Technology Import and Export Administration of China, a technology import contract shall not contain restrictive provisions restraining the receiving party from improving the technology provided by the supplying party, or restraining the receiving party from using the improved technology.[9]

In view of the above, the forms of grant-backs that are legally risky are grant-back provisions without any payments, non-reciprocal grant-backs, and exclusive grant-backs. The article will further discuss different forms of grant-backs in the following section III.

III. GRANT-BACK PROVISION UNDER THE AML

First of all, as a general principle enshrined in the AML, the proper use of IPRs is not subject to the scrutiny of the AML. Only the abuses of IPRs are to be held liable under the AML.[10]

Moreover, when assessing a grant-back provision, a licensor's market power is crucial to establish a potential antitrust violation by a grant-back provision under the AML. The stronger the position of the licensor, the more likely it is that exclusive grant-back obligations will have restrictive effects on competition in innovation.[11]

Furthermore, under the AML's analytical framework there are two approaches to assessing a grant-back provision: the rules regarding dominance (Article 17 AML) and the rules regarding vertical restraints (Article 14 AML). It is worth noting that, in practice, we are aware that most grant-backs in China are scrutinized under the dominance rules. It is only in the latest draft of SAIC and NDRC's draft guidelines that it explicitly brings a grant-back provision under the scrutiny of Article 14 AML, which the article will discuss in Section III.B.

A. *Grant-Backs Under Dominance Rules*

1. *Article 17 (1) Of The AML*

In light of Article 17(1) of the AML, an operator who holds a dominant market position is prohibited from engaging in selling commodities at excessively high prices.

In the *Qualcomm* case the NDRC stressed that a grant-back requirement is not *per se* illegal but Qualcomm's grant-back requirement was problematic. The underlying reason was that Qualcomm required licensees to license back their non-Standard Essential Patents (non-SEPs), and to grant-back patents of the licensees free of charge. Qualcomm argued that the grant-back requirement was designed to protect its business and to protect its customers from patent infringements. However, the NDRC rejected such argument and ascertained that Qualcomm should respect licensees' innovative achievements and should consider the value of the patents granted back by the licensees, especially in cases where some Chinese licensees also have patent portfolios of high value. Qualcomm's requirement of royalty-free grant-back restrained the impetus for technology innovation, hindered the innovation and development of wireless communication technologies, and eliminated or restricted the competition in the market of wireless communication technologies.[12]

Finally, the NDRC condemned the royalty-free grant-back provision imposed by

8 *See* Article 30, Foreign Trade Law which was issued on April 6, 2004 and took into effect on July 1, 2004.

9 The Regulations on Technology Import and Export Administration was issued on December 10, 2001 and took into effect on January 1, 2002.

10 Article 55, the AML.

11 In the Draft Guidelines of the NDRC, it proposed additional factors for assessing whether a IPRs holder has a dominant position on relevant markets, particularly: (1) the likelihood and cost for the transaction counterpart switching to other substitute IPRs; (2) the extent of the downstream market relying on commodities with relevant IPRs involved; (3) the countervailing power of the transaction counterpart to the operators. In addition, in the latest development of the AML, Standard Essential Patents ("SEPs") will not be considered as constituting a single relevant market in which the holder of SEPs has a dominant position per se. Instead, the Draft Guidelines of the NDRC furnishes five elements in establishing the market power of an SEP holder.

12 Point 1-(2) of section 2, NDRC Decision of Administrative Penalty (2015) No.1.

Qualcomm to the Chinese licensees on the basis that it was in violation of Article 17 (1) of the AML.

In another scenario, the parties may agree upon the pricing conditions on which the licensor will license or sell the improvements of its licensee to third parties. The so agreed proceeds realized from each such licensing or sale shall then be shared between the parties.[13] It is understood that if the original patentees are unable to share the value of their future improvements, they would insist on a higher royalty in order to cover the cost on research and development of the licensed technology, or even decline to license to third parties. Sharing royalties of improvements could facilitate the exploitation and dissemination of new technology. Nevertheless, the Chinese antitrust authorities still raised concerns about such arrangements especially when they are in conjunction with exclusive grant-back agreements, given the licensee still lacks the right of enjoying its absolute interests of innovation in this case.

2. *Article 17 (5) Of The AML*

According to Article 17 (5) of the AML, an operator who holds a dominant market position is prohibited from engaging in imposing unreasonable trading conditions without justification.

Pursuant to Article 10(1) of the Rules on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition issued by SAIC on April 7, 2015 ("IP Rules of SAIC"), as an unreasonable trading condition, an undertaking with a dominant position is prevented from requiring the transaction counterpart to exclusively (without any justification) license back the improved technology without justification, which may violate Article 17(5) of the AML.

Provisions of exclusive grant-back are considered to reinforce the position of licensor on the technology and product market, and mitigate the innovation motives of licensees in the relevant market, as their rights of utilizing the improvements are restricted. In line with this reasoning, Article 10(1) of the IP Rules of SAIC provides that an exclusive grant-back has concerns of restricting or eliminating market competition when the licensor occupies a dominant position in the relevant market.[14]

In the antitrust jurisdictions in the European Union and the United States, the effects of exclusive grant-back on competition are considered different depending on whether the improvement under a grant-back obligation is severable from the licensed technology. An improvement is severable if it can be exploited without infringing upon the licensed technology. An obligation to grant the licensor an exclusive license to severable improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting his improvements, including by way of licensing to third parties. This is the case both where the severable improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology.[15] As to the *INCO* case in the United States, the licensees were required to license back only patents that could not be exploited without risking infringement of INCO's basic patent. The court cleared the concerns that INCO's control of the industry is thus substantially increased through the obligation of grant-backs. It asserted that anyone wishing to exploit one of these improvements without the

13 The exclusive grant-back refers to the grant-backs that only allow the licensor to implement the improvements or innovative achievements created by the licensee.

14 In the European Union and the United States, an obligation to grant the licensor an exclusive license for the improvement of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee from exploiting the improvements, including by way of licensing to third parties. See COMMUNICATION FROM THE COMMISSION Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014) O.J. C89/03 (the "EU Guidelines"), and Section 5.6 U.S. Department of Justice and the Federal Trade Commission, supra note 6).

15 See point 109, the COMMISSION REGULATION (EU) No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, (21 March 2014) O.J. L 93/17 ("TTBER"). Also Van Bael & Bells, Exclusive Patent Grant-Back License Does Not Violate Competition Law, (published on June 20, 2014), available at: http://www.mondaq.com/x/322080/Patent/Exclusive+Patent+GrantBack+License+Does+not+Violate+Competition+Law (visited on January 28, 2016).

risk of infringement would have to come to INCO for a license regardless of who held the rights to the improvements. In effect, much of the control over the improvements during the life period of the basic patent that INCO gains by the license-backs it already has by virtue of its basic patent.[16]

However, the aforementioned justification for an exclusive grant-back is yet to be tested in China since the attitude of the antitrust enforcement authorities in this regard is still vague. Compared with an exclusive grant-back, a non-exclusive grant-back, which leaves that licensee free to license improvements technology to others, is less likely to have anticompetitive effects.[17]

3. *Reciprocal Grant-Backs May Still Trigger Antitrust Risks*

In cases where licensees are required to make their improvements to the contractual technology available to the licensor, the licensor is also sometimes obliged to circulate any improvement made by him or any other licensees. As such, either party to the agreement is free to use and benefit from the improvements.

In China, the positive effects of reciprocal non-exclusive grant-backs in promoting competition have been affirmed by SAIC.[18] However, the risk of antitrust concerns regarding reciprocal exclusive grant-backs is not excluded. It is understood when the reciprocal arrangement is in conjunction with exclusive grant-backs, it may facilitate the improvements funneling into the licensor whose power of control on the relevant market ramps up.

4. *Other Grant-Backs Scenario With Antitrust Concerns*

Although the Draft Guidelines of SAIC and NDRC were not mentioned explicitly, there are other scenarios involving grant-backs that may still trigger the scrutiny of the antitrust authorities when referring to the experience of the European Union and/or the United States.

For example, if the innovation subject to grant-backs occurs very late in the life of the underlying patent or the obligation of grant-backs is not subject to the termination of a license agreement, the result will be to transfer to the licensor a promising patented technology that would otherwise belong to the licensee. This will be considered an anti-competitive effect on market competition so as to create or prolong monopoly unreasonably.[19]

5. *Penalties Of Grant-Backs Under Dominance Rules Of The AML*

According to Article 48 of the AML, where an operator is condemned for abusing their dominant market position, the competent authorities shall order a halt to the offending behavior, confiscate the illegal earnings, and impose a fine of between 1 and 10 percent of the previous year's sales. In the *Qualcomm* case, the NDRC finally issued an administrative sanction decision finding Qualcomm guilty of breaking the AML. In consideration of other abusive behaviors of Qualcomm, the NDRC laid down a fine in total of RMB 6.088 billion ($975M). Besides, NDRC required Qualcomm to implement multiple measures to fulfill its commitment, one of which is to withdraw the requirement for a Chinese licensee to grant-back their patents to Qualcomm for free in a license agreement.

B. *Grant-Backs Under The Rules Regarding Vertical Restraints*

The antitrust committee under the state council is in preparation of issuing a consolidated antitrust IP-related guideline. The three leading antitrust law enforcement agencies are currently drafting their IPRs-related guidelines respectively. In addition to the Draft Guidelines of the NDRC, SAIC also disclosed its sixth version of draft Guidelines on January 8, 2016 soliciting public opinions ("Draft Guidelines of SAIC"). In the meantime, the Ministry of Commerce ("MOFCOM") has almost completed its own version and also sought comments among experts. Exclusive grant-backs have been referred to in the published version of the two draft guidelines. In line with the IP rules of SAIC, both the Draft Guidelines of the NDRC and SAIC deem exclusive grant-backs as an unreasonable condition imposed by an undertaking with a dominant position.

16 The *International Nickel Company, Inc, (INCO) v. Ford Motor Company and Caswell Motor Company, Inc.*, 166 F. Supp. 551; 1958 U.S. Dist. LEXIS 3578; 119 U.S.P.Q. (BNA) 72; 1958 Trade Cas. (CCH) P69,169; see also Van Bael & Bells, Exclusive Patent Grant-Back License Does Not Violate Competition Law, (June 20, 2014), available at: http://www.mondaq.com/x/322080/Patent/Exclusive+Patent+GrantBack+License+Does+not+Violate+Competition+Law (visited on January 28, 2016).

17 Section 5.6, supra note 6.

18 Article 18, the Draft Guidelines of SAIC.

19 See International Nickel Co. v. Ford Motor Co., supra note 16.

The Draft Guidelines of the NDRC, for the first time, introduce an analytical approach for assessing an exclusive grant-back under the vertical rules.[20]

According to the Draft Guidelines of the NDRC, even if the licensor has no dominant market position, exclusive grant-back provisions entered into between operators with no competitive relationship may still raise concerns about eliminating or restricting competition in line with Article 14 of the AML regarding vertical restraints.

The Draft Guidelines of the NDRC requires the analysis of vertical agreements including exclusive grant-backs to be made "in combination with items (1) and (2) of Article 14 of the Anti-Monopoly Law." Article 14(1) and 14(2) refer to the resale price maintenance ("RPM") violations. Accordingly, it seems to indicate that vertical restraints in IP agreements including exclusive grant-backs shall be considered as AML violations only if they are related to or involve RPM.

Furthermore, the whole Draft Guidelines of the NDRC do not refer to Article 14(3), i.e. the catch-all provision relating to vertical monopoly agreements other than RPM. In view of this, it seems that only price-related grant-back provisions will likely be subject to the AML rules regarding vertical restraints. Neither the Draft Guidelines of SAIC refers exclusive grant back to any indent of Article 14. Therefore, the following is expected to see in the final version of the guidelines or cases on what approach would be taken by the NDRC in handling grant-backs provision: would they consider exclusive grant-backs as a separate violation or would they only punish it when it is a part of an RPM scheme? Especially it may be technically difficult for the enforcement agencies to "combine" Article 14(1) and 14(2) of the AML during their assessment of such other vertical restraints as exclusive grant-backs.

1. *Exemption Of Monopolistic IP Agreements*

The Draft Guidance also provides for a rebuttable "safe harbor" for monopolistic IP agreements.

Article 2(3) of Section II of the Draft Guidelines of the NDRC provides that "If one of the following conditions is met, the IPR agreement can be presumed as exempted in accordance with the provisions of Article 15 of AML:

> The total market share of the undertakings with competitive relationships in the relevant market is below 15 percent; the market share of each undertaking without a competitive relationship in the relevant market involved by the agreement is no more than 25 percent.

However, the NDRC leaves discretion for its enforcement of the safe harbor. Even if the relevant IPR agreement is in accordance with the threshold of the safe harbor, if the NDRC finds evidence to prove that it restricts competition significantly or consumers are not able to enjoy the benefits, the exemption is not applicable. As Chinese authorities used to refer to the experience in the European Union and the United States, it expects to see if exclusive grant-backs provision could apply under the threshold of the safe harbor in China.[21]

2. *Reciprocal Non-Exclusive Grant-Backs Is Generally Cleared Of Antitrust Concerns*

SAIC has emphasized in Article 18 of its Draft Guidelines that reciprocal non-exclusive grant-backs generally have no effects of eliminating or restricting competition.

20 Article 2(2) of Section II of Draft Guidelines of the NDRC provides four factors in evaluating whether exclusive grant-backs will restrict or eliminate competition, i.e. whether the licensor provides substantial consideration for the grant-back; whether the grant-back is reciprocal; whether the grant-back leads to IPRs funneling to one single entity, resulting in the acquiring or strengthening of the control of the relevant market by the entity; and whether the grant-back damages the incentive of the licensee to innovate.

21 In the European Union, provisions of exclusive grant-back are not subject to the block exemption and should be assessed case-by-case. See point 109, supra note 15.

3. *Penalties Under The Rules Regarding Monopolistic Agreements*

In line with Article 46 of the AML, where a monopolistic agreement is reached and implemented in violation of the AML, the anti-monopoly authorities shall order the operators to cease doing so, and shall confiscate the illegal gains and impose a fine of 1 percent up to 10 percent of the sales revenue in the previous year. Where the monopoly agreement has not been performed, a fine of less than RMB 500,000 shall be imposed.

Where any business operator voluntarily reports the conditions on reaching a monopoly agreement and provides important evidence to the anti-monopoly authority, it may receive a mitigated punishment or exemption from punishment as the case may be.

IV. CONCLUSION

In view of the above, grant-back provisions are always under the spotlight of China's laws and regulations, and will also be an enforcement priority of the AML in the future given China is considered as a big IP recipient state. Based on the draft guidelines and published cases under the AML, patent holders should be cautious of including grant-back provisions into license agreements, especially when the provisions impose a free or exclusive grant-back obligation on the licensee. As to other kinds of grant-back requirements, they are not without risk under the Chinese legal regime.

Multinational companies with market power and strong patents (e.g. SEP holders) should therefore be very cautious when reaching agreements involving grant-back provisions. In addition, given the current practical and legal uncertainties, technology-intensive companies specialized in the fields of information and telecommunication, pharmaceuticals, medical devices, automobiles and agriculture machinery are advised to step up their compliance with China's antitrust rules and review their business models and contracts in a timely manner to avoid the potential risk of violating the relevant Chinese laws.

A LOOK INTO THE SAIC NEW IPR ABUSE RULES: FROM THE PERSPECTIVE OF COMPLIANCE

BY **REN QING** [1]
& **WU PENG** [2]

I. INTRODUCTION

On April 13, 2015, SAIC promulgated the *IPR Abuse Rules* that became effective on August 1, 2015.

As a special regulation on IPRs related to AML issues, the drafting of the IPR Abuse Rules can be dated back to SAIC's efforts of drafting the *Guideline for Law Enforcement on IPR Antitrust* (the "Guideline") in 2009. Due to the complexity and sensitivity of the issue and the absence of law enforcement experience, SAIC has decided not to promulgate comprehensive guidelines but to formulate rules instead to regulate the major issues as a priority. Since 2013, SAIC has solicited opinions from various industries and released an exposure draft on its website for public comments ("Exposure Draft') in June, 2014.[3]

1 Partner at Zhong Lun Law Firm in Beijing. Mr.Ren's practice focuses on international trade law, international investment law and competition law

2 Partner at Zhong Lun Law Firm in Beijing. Since he began to practice law in 1993, Mr. Wu, a fluent speaker of Japanese, has provided legal counseling for dozens of well-known transnational companies. His expertise covers foreign investment, international trade, international financing, international investment, anti-dumping, intellectual property, labor affairs, litigation and arbitration.

3 See the official website of SAIC: Drafting Notes for Soliciting Public Opinions on Rules of Industry & Commerce Authorities on Prohibiting the Exclusion or Restriction of Competition through Abusing Intellectual Property Rights, available at: http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html.

The IPR Abuse Rules primarily regulate the following six aspects:

(1) defining monopolistic conducts that eliminate and restrict competition, relevant markets and the like;

(2) prohibiting monopoly agreements between undertakings through IPRs' implementation, and stipulation of "safe harbor" rule;

(3) prohibiting the abuse of dominant market position in the course of implementation of IPRs and prohibitive regulations on specific abusing conducts;

(4) regulating patent pool and monopolistic conducts during the formulation and implementation of standards;

(5) clarifying analysis, principles and framework of SAIC system's AML enforcement in connection with IPRs;

(6) administrative sanctions.

This article will conduct a preliminary look into the IPR Abuse Rules from the perspective of compliance in the context of some recent cases.

II. BACKGROUND

First of all, IPRs related to AML issues have become a hotspot in Chinese AML law enforcement and judicial practice. National Development and Reform Commission ("NDRC") has investigated and adjudicated InterDigital and Qualcomm's abuse of dominance cases since 2013. Guangdong Higher People's Court has ruled the case of Huawei v. InterDigital on abuse of dominance in connection with Standard Essential Patents ("SEPs"). Chinese Ministry of Commerce ("MOFCOM") has imposed restrictive conditions on the concentration of Microsoft's acquisition of Nokia's mobile business and Merck KGaA's acquisition of AZ Electronic Materials. Besides, SAIC is currently conducting an AML investigation against Microsoft. Against such backdrop, the promulgation of the IPR Abuse Rules naturally attracts extensive attention.

Secondly, before the issuance of the IPR Abuse Rules, there are also some laws and regulations dealing with IPR related monopoly issues in China.

- From the perspective of law, according to Article 55 of Antimonopoly Law ("AML"), "this Law shall apply to any conduct of an undertaking whereby intellectual property rights are abused to eliminate or restrict competition." In other words, all regulations related to monopoly agreements, abuse of dominance and concentration of undertakings in AML can be applied to IPRs.

- According to Article 329 of the *Contract Law of the People's Republic of China*, a technical contract that "illegally monopolizes technologies, impedes technological progress" is deemed as null and void. Article 343 regulates that technology transfer contract "shall not restrict technological competition and development." Article 344 regulates that "a patent exploitation license contract shall be valid only within the period of continued existence of the patent. If the valid duration of the patent right expires or the patent right is declared invalid, the patentee may not conclude a patent exploitation license contract relating to that patent with others."

- According to Article 30 of *Foreign Trade Law of the People's Republic of China*, for circumstances "where an intellectual property rights owner prevents a licensee from querying the validity of intellectual property rights contained in a license contract, implement compulsory blanket licensing, or stipulate exclusive grant back conditions in a license contract" occurring during foreign trade, MOFCOM may adopt necessary measures to eliminate such impact. From the perspective of administrative regulations.

- Article 27 to Article 29 of the *Regulations of the People's Republic of China on the Administration of the Import and Export of Technology ("Regulations of the Import and Export of Technology")* and Article 43 of the *Regulations for the Implementation of the Law of the People's Republic of China on Si-*

no-foreign Equity Joint Ventures have similar provisions.

- From the perspective of Judicial Interpretation, Article 10 of *Interpretation of the Supreme People's Court on Issues relating to Applicable Laws for Trial of Dispute Cases involving Technical Contracts* ("Judicial Interpretation") regulates 6 circumstances belong to "illegal monopoly of technology and obstruction of technological advancement" that render a contract null and void.

As a departmental regulation of SAIC, the IPR Abuse Rules only implement the AML in some specific respects and will not rule out the application of the above laws, regulations and judicial interpretation. In other words, certain conducts cannot be deemed as compliance with the AML and/or other applicable rules only on the grounds that the IPR Abuse Rules fail to make express reference to them as monopolistic conducts.

Thirdly, China applies dual-track regime (i.e. administrative law enforcement and judicial practice) in AML field. There is a further "separate law enforcement" framework involving three law enforcement agencies: NDRC, MOFCOM and SAIC. As a departmental regulation of SAIC, the IPR Abuse Rules only apply in law enforcement activities conducted by SAIC and its provincial counterparts. For People's Courts system, the legal basis for trial primarily includes laws and regulations, while generally departmental regulations only acts as a reference. Therefore, in trying AML cases involving IPR, it is not mandatory for a judge to apply the IPR Abuse Rules. In the field of administrative law enforcement, monopolistic conducts in connection with IPR can encompass three areas including monopoly agreements, abuse of dominance and concentration of undertakings. The IPR Abuse Rules do not touch upon concentration of undertakings, which is MOFCOM's responsibility, for example, whether undertakings' participating in patent pool (especially the Joint Ventures set up for patent pool) constitutes concentration of undertakings, whether such transaction will trigger an obligation to notify the operation and how to conduct merger review on such transaction, etc. Another noteworthy point is that although IPR abusing conducts usually intertwined with price behavior and non-price behavior, due to the divergent responsibilities between SAIC and NDRC, the IPR Abuse Rules only regulate non-price related monopoly agreements and abuse of dominance. A comparison between the IPR Abuse Rules and its Exposure Draft can further elaborate this issue: brackets are added in Article 3 of the IPR Abuse Rules, further elaborating "except for price monopoly." Article 12 deletes the term of "price" as "competition-related sensitive information" in requiring "members of the patent pool shall not make use of patent pool…to conclude a monopoly agreement." The above further indicates that for purposes of compliance, companies cannot merely observe the IPR Abuse Rules, but shall also pay attention to judicial practices of the courts, regulations and law enforcement of NDRC and MOFCOM.

In a nutshell, while the IPR Abuse Rules are of guiding significance for the AML compliance in IPR, the IPR Abuse Rules are not a "master key" for all. Only through systematized mindset, keeping the foothold on the whole system of China's AML and other applicable laws and rules and the AML law enforcement and judicial practice can companies follow the AML compliance in connection with IPRs.

In light of the foregoing, we hereby analyze the principal articles of the IPR Abuse Rules.

III. PRINCIPAL ARTICLES OF THE IPR ABUSE RULES

A. *Basic Definitions and Application Scope*

Looking at the title and most articles, the IPR Abuse Rules seem to apply to all types of IPR abusing conducts. However, the word "technology" appears repeatedly in Articles 3, 5, 10, 12, 13, etc., and Article 12 and 13 only refer to or mainly target at patent issues. It

can be inferred that the IPR Abuse Rules primarily regulate the abuse of technology-related IPRs, including patent, software copyright, layout designs of integrated circuit, etc., while rarely touch upon trademark right, geographical indications or copyrights outside the realm of software.

According to Article 3, abuse of IPRs to eliminate and restrict competition shall refer to violation of the provisions of the AML by undertakings in exercising their IPRs and carrying out monopoly conducts (except for price monopoly conducts) such as implementation of monopoly agreements and abuse of dominance. Such definition provides little guidance in determining the relevant monopolistic conducts, and its main merits are: firstly, generally providing that IPR monopolistic conducts may appear as monopoly agreements and abuse of dominance; secondly, price-related monopolistic conducts do not fall into the scope of the IPR Abuse Rules. For example, the "monopoly agreements" in Article 4 and 5 and "discrimination" in Articles 11 and 12, which shall have a broad extension, do not cover price-related conducts in these IPR Abuse Rules.

Paragraph 2 of Article 3 also provides the definition of "relevant market," which requires "taking into account impact of such factors as IPR and innovation," but fails to explain in detail how to take such factors into account. The only clarification here is that "the relevant product market can be either relevant technology market or relevant goods market covering specific IPR" while the relevant technology market refers to "the market formed as a result of competition among the technology concerned in exercising the IPR and substitutable technologies of the same type." We believe that when trying to determine whether two or more technologies are "substitutable" or "competitive," the nature, function and royalties of the technologies shall be taken into consideration.

In NDRC's investigation against Qualcomm ("Qualcomm case"), the relevant commodity markets defined by NDRC contained both the technology market, i.e., "a set of separately formed relevant product markets for license of each wireless SEP" or "wireless SEP portfolio license market" and the commodity market concerning IPR, i.e., CDMA baseband chip market, WCDMA baseband chip market and LTE baseband chip market.[4]

B. *Monopoly Agreement and "Safe Harbor"*

One distinctive feature of the IPR Abuse Rules is that it makes abuse of dominance the key point of regulation (Article 6 through Article 11, Article 12 and Article 13) while makes few provisions on monopoly agreement (Article 4, Article 5 as well as Paragraph 2 of Article 12).

Among these provisions, Article 4 merely quotes Article 13, Article 14 and Article 15 of the AML, indicating that these three articles apply to IPRs with no further or detailed regulations. In other words, the IPR Abuse Rules fail to elaborate any "other monopoly agreements" where Paragraph 6 of Article 13 and Paragraph 3 of Article 14 of AML empowers the SAIC to do so, including categorizing other monopoly agreements in connection with technological development collaboration and technology license. To that end, this article seems to fail the drafters' expectation "to further implement the relevant requirements of the AML, to regulate law enforcement practices of SAIC and guide undertakings to exercise IPR pursuant to the law"[5], rendering the IPR Abuse Rules lack of certainty and predictability.

Notwithstanding the foregoing, by reference to the aforementioned provisions of Judicial Interpretation and *Regulations Import and Export of Technology*, the following agreements may be exposed to the risk of being regarded as "other monopoly agreements": (1) restricting one concerned party from carrying out new R&D on the technical basis of the subject matter of the contract or

4 *See* NDRC: Administrative Sanction Decision against Qualcomm Company (Fa Gai Ban Jia Jian Chu Fa (2015) No.1) http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

5 *See* "New Regulation released by SAIC: Prohibition of Abusing Intellectual Property Rights to Eliminate and Restrict Competition," News Release on SAIC Official Website.

restriction of its use of improved technology or agreement on free grant-back; (2) restricting one party from obtaining from other sources a technology that is similar or competitive to that of the technology provider; (3) imposing obviously unreasonable restriction in terms of quantity, variety, price, sales channel and export market of product manufactured or service provided by the assignee of the technology through implementing such technology; (4) requiring licensee to accept conditions that are not essential for the implementation of the subject technology, including purchase of non-essential technologies, raw materials, products, facilities, services and takeover of non-essential personnel; (5) unreasonably restricting the channel or source of technology in terms of purchase of raw materials, parts, products or facilities by the assignee of the technology; (6) prohibition of raising objection by the assignee of the technology on the validity of the subject technology IPRs or imposing conditions on such objection; (7) requiring assignee to pay usage fees or undertake related responsibilities for expired patent or technologies that are declared void.

Article 5 is the "safe harbor" rule, i.e., where the parties' aggregate market share does not exceed certain threshold or there are alternative technologies in the relevant markets, then generally such agreements will not be regarded as "other monopoly agreements." This article may be interpreted from the following perspectives:

Firstly, since Article 4 or other articles of the IPR Abuse Rules fail to categorize "other monopoly agreements," which makes Article 5 in a way like "a tree without roots." As discussed above, agreements with seven circumstances including exclusive grant-back face the risk of being regarded as "other monopoly agreements," however, as long as any of those circumstances meets the threshold of "safe harbor," such agreements will not be regarded as monopoly agreements.

Secondly, Article 5 fails to specifically provides any conduct that does not constitute monopoly agreements, or any conduct that may be "presumed" not constitute monopoly agreements, but simply provides certain conducts which "may not be deemed as a monopoly agreement." In other words, even if certain agreements fit the prerequisites of "safe harbor," they still may be regarded as monopoly agreements. SAIC has large discretion in this respect, which may reduce the actual value of "safe harbor."

Thirdly, Article 5 fails to regulate the calculation method for "market share" in the technology market. In practice, there are two approaches: first, the market share for the technology itself, taking technology licensing as an example, is the market share of the undertaking's technology in the competing technology market. Second, the market share is the proportion of sales of products containing the technology concerned in the market of products incorporating technology concerned or substitutable technologies of the same type. In Qualcomm case, NDRC adopted the first approach in calculating Qualcomm's market share in the relevant wireless SEP license market, i.e., finding that Qualcomm hold 100 percent market share in each wireless SEP license market on the ground that SEPs are "unique and non-substitutable," further, Qualcomm also holds 100 percent market share in wireless SEP portfolio licensing market. However, NDRC adopts the second approach in calculating Qualcomm's market share in baseband chip market.[6]

C. *Abuse of Dominance*

Article 6 primarily regulates the determination of dominant market position, providing that an undertaking cannot be presumed to hold dominant market position merely based on its ownership of IPR. However, from the final judgment of *Huawei v. InterDigital*[7] and the Administrative Sanction Decision that NDRC issued to Qualcomm ("ASD"), it seems the undertakings holding SEPs will more likely be regarded as holding dominant market position.

6 See NDRC's Administrative Section Decision to Qualcomm Incorporation

7 Higher People's Court of Guangdong Province (2013) Yue Gao Fa Min San Zhong Zi No. 306 Paper of Civil Judgment.

Articles 7 through 11 regulate 5 types of conducts on abuse of dominance, namely, refusal to license, exclusive dealing, tying, imposing unreasonable transaction terms and discriminating among transaction counterparties with equal standing.

The common constitutive element among these five conducts is the undertaking has dominant market position. Under circumstances that do not concern SEPs, undertakings will less likely be regarded as holding dominant market position, and accordingly the risk of being found in violation of Article 7 through Article 11 of the IPR Abuse Rules is relatively low. However, it is noteworthy that while Article 7 through Article 11 prohibit undertakings with dominant market position from doing certain conducts, it does not necessarily mean that undertakings not holding dominant market position are allowed to do the above conducts. As discussed above, if undertakings without dominant market position abuse IPR, such as exclusive dealing, exclusive grant-back, prohibiting transaction with third parties, may still be exposed to the risk of being regarded as concluding "other monopoly agreements."

We will elaborate the constitutive elements for each of the above five conducts as follows:

1. *Refusal to License*

To constitute "refusal to license," the following requirements shall be fulfilled: (1) the subject undertaking's IPRs constitute "essential facilities" for other undertakings' business activities, i.e. such IPRs can hardly be reasonably substituted (which cannot be reasonably substituted by IPRs of any third party or cannot be developed by other undertakings or the costs for development are manifestly high), making it an essential factor for other undertakings to compete in the relevant market; (2) the undertaking refuses to license to other undertakings or disguisedly refuse to license by imposing unreasonable conditions; (3) there are no justifiable causes for such refusal to license. Although Article 7 has not directly defined "justifiable causes," it makes reference to Article 8 of *Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position*, which provides that whether there are "justifiable causes" or not shall be decided from both the positive and negative aspects: on one hand, whether such refusal to license may have adverse impact on competition or innovation and further harm consumer welfare or public interests; on the other hand, whether licensing of such IPRs will cause unreasonable harm to the IPR holders.

It is worth noting that the so-called "reasonable conditions" shall have included reasonable price condition. However, since the IPR Abuse Rules are not applicable to price-related monopolistic conducts, it is still subject to further clarification from the law enforcement agency whether refusal to license by charging excessive license fees falls within the regulation scope of the IPR Abuse Rules.

2. *Exclusive Dealing*

To constitute "exclusive dealing," the following requirements shall be reached: (1) requiring a transaction counterparties to only deal with itself or its designated undertakings; (2) there are no justifiable causes for such restricting; (3) such exclusive dealing eliminates or restricts competition. It is worth noting that whether exclusive dealing naturally eliminates or restricts competition shall be decided upon further analysis on the impact on competition in accordance with Article 16 of the AML; however, conducting such further analysis seems to narrow the scope of application of Paragraph 1 of Article 17 of the AML.

Moreover, Article 8 fails to define "justifiable causes." Therefore, in practice, reference may still be made to Article 8 of *Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position*, i.e., taking the following factors into comprehensive consideration: (1) whether such exclusive dealing conducts adopted by an undertaking for its normal business activities or normal benefit; and (2) the impact of

such conduct on the economic operation efficiency, public interests and economic development. ("without justifiable cause" is also a constitutive element for "tying" and "discriminating among transaction counterparties with equal standing," with similar determination mindset, thus we will not dwell on this in the following text.)

3. *Tying*

Article 9 provides some detail in regulating tying in connection with IPRs, i.e., an undertaking should have (1) forcibly engaged in bundled sale or combination sale of different products against trade practice or consumption habits, etc., or without regard to the functionalities of the relevant products, (2) such tying enables the undertaking to leverage its dominant position on the tying product market to the tied product market, thereby eliminating or restricting competition of other undertaking(s) on the tying product market or tied product market. It is worth noting that these two conditions need to be fulfilled concurrently. In other words, forcibly tying which fail to cause extension of the undertaking's dominant market position will not be prohibited by the IPR Abuse Rules. We understand, the extension of dominant market position here does not refer to having dominance in both the tying product market to the tied product market, but refers to the fact that the undertaking's leveraging of its dominance in the tying product market to eliminate and restrict competition in the tied product market.

In Qualcomm case, NDRC found that Qualcomm had incurred in patent tying conduct. Qualcomm raised three defenses including that most licensees voluntary chose to obtain licenses to the whole patent portfolio, and it is very difficult to distinguish wireless-SEPs from non-wireless-SEPs, etc. NDRC held that "non-wireless-SEPs and wireless SEPs are different in nature, independent from each other," thus licensing wireless non-SEPs and wireless SEPs respectively will not affect their utilization and value. Qualcomm "setting a single fixed royalty rate and adopting the method of licensing a whole portfolio [...] has tied non-wireless-SEP license to wireless SEP license without justifiable causes by leveraging the dominant position in wireless SEP market."[8]

4. *Imposing Unreasonable Transaction Terms*

Article 10 specified five types of prohibited conducts imposing unreasonable transaction terms, namely, requiring exclusive grant-back; prohibiting transaction counterparties from questioning the validity of the subject IPRs; restricting the transaction counterparties from making use of competing commodities or techniques upon expiry of the licensing period without infringing the IPRs; continuing to exercise IPRs for expired patents or invalid patents; prohibiting the transaction counterparties from entering into transactions with third parties.

In Qualcomm case, NDRC found transaction terms such as "charging royalties for expired wireless SEPs," "requiring free cross-license from licensees," etc. As regards the first issue, Qualcomm responded that, although there are certain patents becoming expired each year, a larger number of new patents are being added into the patent portfolio, therefore, this issue of charging royalties for expired patents does not exist. However, NDRC found "the position that newly added patents can make up for the value of expired patents cannot be proven." As regards to the second issue, Qualcomm responded that free cross-licenses were part of the overall exchange of value with licensees, while NDRC considered such view lacking support of facts and evidences.[9]

From the perspective of compliance, it is worth noting that undertakings that have no dominant market position conducting such conducts may also be found as "other monopoly agreements," especially when there are prohibitive regulations on exclusive grant-

8 See NDRC: Administrative Sanction Decision against Qualcomm Incorporation

9 See NDRC Administrative Sanction Decision against Qualcomm Incorporated. Chinese text of the decision is available at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

back and exercising rights on void IPRs in the *Foreign Trade Law, the Regulations of the Import and Export of Technology* and the *Judicial Interpretation*.

5. *Discriminating among Transaction Counterparties with Equal Standing*

Article 11 provides similar regulations in the AML, considering it fails to provide specific guidance for determination of "equal standing." Under the context of technology license, to determine whether the transaction counterparties are of equal standing, we shall take into comprehensive consideration the factors including technical purpose and technical application of the transaction counterparties, the attribute of the products applying the technology concerned, scope of sales (e.g. within the territory of certain country or worldwide), sales volume, sales amount and profits, etc.[10]

D. *Two Special Circumstances*

While Article 4 through 11 are general regulations for IPR-related abusive conducts, Article 12 and Article 13 provide two special circumstances, i.e. operation of patent pool and SEPs.

1. *Operation of Patent Pool*

Paragraph 2 of Article 12 prohibits undertakings from concluding horizontal or vertical monopoly agreements through the operation of a patent pool. Compared with the AML, in light of the practices of the operation of patent pools, this clause additionally provides that members of a patent pool shall not make use of the patent pool to exchange sensitive competition-related information such as output or market allocation. For setting up and operating patent pool, exchange of certain information, such as the number, value, term of the relevant patents of members, seems to be inevitable, and such information should not be included in the category of "sensitive competition-related information" under this provision.

Paragraph 3 prohibits patent pool management organizations with dominant market position from making use of patent pool without justifiable causes to implement the following abusive conducts to eliminate or restrict competition. Items 3 and 4 substantially correspond with the provisions of Article 10; while Items 1, 2, 5 focus on the particular issues of patent pool, i.e. patent pool management organizations shall not restrict a patent pool member from licensing patent(s) as an independent licensor outside of the patent pool, nor shall they restrict a patent pool member or a licensee, independently or jointly with a third party, from carrying out research and development on technologies competing with the pooled patents, or discriminate among patent pool members or licensees with equal standing on the same relevant market in terms of trade conditions.

It is worth noting that, with respect to these prohibited conducts listed in Items 2, 3 and 4 of Paragraph 3, undertakings without dominant market positions may violate the relevant provisions on monopoly agreements in the AML.

2. *SEPs*

SEPs become a key issue in recent enforcement and judicial practice, including InterDigital case and Qualcomm case investigated by NDRC, *Huawei v. InterDigital* case tried before Guangdong Higher People's Court, and Microsoft's acquisition of Nokia's mobile business reviewed by MOFCOM.

Article 13 of the IPR Abuse Rules is SEP related. Paragraph 1 of this clause is a general regulation. Given that Paragraph 2 provides detailed regulation only on abuse of dominance, it is particularly important for undertakings to look into Paragraph 1 for IPR related monopoly agreements.

Paragraph 1 of Article 13 has provided clarification of the term "standard" in brackets. However, literally, there might be different interpretations towards the clarification in brackets: first, it might mean that standards are mandatory requirements included

10 *See* LIU Xu: Opinions on Rules on Prohibition of Abusing of Intellectual Property Rights to Eliminate or Restrict Competition (Exposure Draft), p. 201, July, 2014【这一条引用建议明确来源】

in national technical specifications; second, it might mean that standards are mandatory requirements including without limitation to national technical specifications. We tend to concur with the latter. Apart from the mandatory requirements formulated by the State authorities, standards should also include normative documents formulated and promulgated by standard setting organizations or alliances through consultation and uniformly applied within the industry[11] or standardized technical solutions jointly formulated by the industry players through cooperation.[12]

Paragraph 2 of Article 13 prohibits two types of abuse of dominance without justifiable causes: (1) "patent hijack" in the process of participation in standard setting; (2) undertakings' failure to comply with the fair, reasonable and non-discriminatory principles ("FRAND" principle). "FRAND" principle is recognized worldwide, however, consensus lacks on regulation of specific conducts, and case-by-case analysis is required. Moreover, it seems inappropriate to qualify the undertakings in "with dominant market position" for the conducts described in this paragraph, as these conducts should be prohibited for undertakings with or without dominant market positions.

E. *Administrative Sanction*

According to Article 17, in the event of IPR abuses, law enforcement agencies may order to cease the illegal conduct, confiscate illegal income, and impose a fine of no less than 1 percent but no more than 10 percent of the turnover concerned in the preceding year. This clause is basically the same with Articles 46, 47 and 49 of the AML without providing further guidance on the practice and predictability to the penalties. In particular, with respect to the sanction amount, the following two issues are still pending clarification in future regulations or practices:

(1) The definition of the term "turnover." It seems unclear whether the turnover means the turnover gained directly from the IPR abuses or the turnover of all affiliates within the same group; whether it refers to global revenue or only revenue within China; whether it covers revenues from all relevant markets or only one relevant market.

(2) The wide discretion of 1 percent to 10 percent of turnover. There is no specific guidance on imposing specific level of sanctions. Based on practice in other jurisdictions, the fine imposed on IPR abuses are lighter than that on monopoly agreements. In the meantime, to encourage innovation, there can be certain differences in the level of sanctions on IPR-related monopolistic conducts and regular monopolistic conducts.

In the Qualcomm case, NDRC ordered Qualcomm to cease the illegal act and imposed a fine. The amount of the fine is 8 percent of its annual turnover within China in 2013.

IV. CONCLUSION

As the first legal document specially regulating IPR-related AML issues, the IPR Abuse Rules are of important significance for AML enforcement in China. However, given its limited applicable scope as a departmental regulation, the IPR Abuse Rules are unable to cover all IPR related monopolistic conducts. There is still room to improve practicability and predictability. Undertakings shall avoid interpreting and applying the IPR Abuse Rules in an isolated manner, and shall instead ensure AML compliance by looking comprehensively at all other relevant laws and regulations in a comprehensive and systematic fashion.

11 *See* Ministry of Commerce Public Announcement Concerning Merger control review Decisions on Conditional Approval of Microsoft's Acquisition of Nokia's Devices and Services business. Chinese text of the announcement is available at: http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

12 *See* NDRC Administrative Sanction Decision against Qualcomm Incorporated. Chinese text of the decision is available at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

CPI Spotlight

PROBLEMS WITH THE EUROPEAN COMMISSION'S PLATFORM SURVEY AND LESSONS LEARNED FROM THE ECONOMICS OF MULTI-SIDED PLATFORMS AND PRIVACY

BY **JAMES C. COOPER, DOUGLAS H. GINSBURG, BRUCE H. KOBAYASHI, KOREN W. WONG-ERVIN, & JOSHUA D. WRIGHT** [1]
INTRO BY **JUAN DELGADO** (GLOBAL ECONOMICS GROUP)

The hype about online platform competition and about the sharing economy has led several competition authorities across Europe to launching market investigations and studies on the subject. The first obstacle facing such exercises is the broad scope of the online platform concept itself and the complexity and diversity of platform markets. Gathering the right market data and making the right interpretation of it is already a challenge. As suggested by the Global Antitrust Institute at George Mason University School of Law in this month's column, any intended regulatory intervention in platform markets should be rooted in sound economic analysis.

The European Commission (EC) recently published a public consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data, Cloud Computing, and the Collaborative Economy. According to the EC, the aim of this wide-ranging consultation was

1. Professor of Law Joshua D. Wright, Ph.D. (economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. Koren W. Wong-Ervin is the Director of the GAI and former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission. Professor of Law Douglas H. Ginsburg is a Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Professor of Law Bruce H. Kobayashi, Ph.D. (economics), is a GAI Senior Scholar and Founding Director. Associate Professor of Law James C. Cooper, Ph.D. (economics), is the Director of the Program on Economics and Privacy at the Law & Economics Center, George Mason University School of Law.

to understand the role and impact of online platforms on various fields such as on-line services, content and privacy issues, free movement of data, and the so-called "sharing economy." The consultation consisted of a lengthy survey with the opportunity to submit a written comment.

On December 29, 2015, the Global Antitrust Institute (GAI) at George Mason University School of Law submitted a comment in response to the consultation in which it: (1) raised concerns that the EC's survey methodology and design is not conducive to generating reliable and policy-relevant data; (2) provided an economic analysis of platforms and multi-sided markets; (3) outlined the dangers to competition and consumers of new ex ante regulation designed to regulate platforms, as opposed to relying upon existing European competition and consumer protection laws to address any potential anticompetitive effects or consumer harm arising from conduct by platform owners; and (4) discussed the economic analysis of privacy and data security and its implications for new regulation. This short article summarizes the GAI's comment, which can be found in full at the link provided below.

CONCERNS THAT THE EC'S SURVEY METHODOLOGY AND DESIGN IS NOT CONDUCIVE TO GENERATING RELIABLE AND POLICY-RELEVANT DATA

As the GAI explained in detail, providing specific examples of problematic questions, there are several problems with the EC's survey, including the use of "yes/no" questions (which introduces a systemic source of bias that has produced an inflation effect of 10% across a number of studies); a self-select Internet survey approach (with its inherent selection bias); closed-ended questions that do not provide an exhaustive list of response options; and ambiguous and potentially prejudicial questions. These problems led the GAI to express concern over whether the survey methodology and design the EC employed in this consultation is conducive to generating reliable and policy-relevant data.

THE ECONOMICS OF PLATFORMS AND MULTI-SIDED MARKETS

The GAI set forth the basic economics of multi-sided platforms, emphasizing that an important economic feature of the complexities and interdependencies of platforms is that even relatively small changes can hinder the efficient operation of platforms and negatively affect innovation. The economics of platforms and multi-sided markets implies that the application of many of the standard regulatory principles developed in the nonplatform setting will likely lead to perverse results in the platform setting. Indeed, the economic literature that has developed since 2000 shows robustly that many results derived from models of one-sided businesses generally do not apply to multi-sided platforms that serve different interdependent customer groups.

THE DANGERS OF EX ANTE REGULATION AND THE BENEFITS OF RELYING ON EXISTING EUROPEAN COMPETITION AND CONSUMER PROTECTION LAWS

The GAI cautioned that creating ex ante regulation prohibiting undesirable conduct by platforms risks sacrificing the benefits of platforms by imposing rules that may lack the flexibility of existing European competition and consumer protection laws. Indeed, a key benefit of relying on the existing laws is that they proceed primarily through fact-specific case-by-case analyses, which are more likely to maximize consumer welfare than are ex ante regulations.

In discussing the topic, the GAI considered the economics of regulation, including the theoretical basis for economic regulation and the problems of regulatory capture and of "public choice," offering three "lessons" to the modern regulator. First, absent a significant and identifiable market imperfection, there is no valid basis for an economic regulation. Second, an identifiable market imperfection is a necessary, but not sufficient basis for economic regulation. Other solutions, including private ordering or reliance on existing and more flexible laws, may be preferred options. Third, there should be a strong but rebuttable presumption against regulation favoring incumbents over new entrants or accepting invitations from disgruntled firms to have the competition agencies sue their rivals. Applying these lessons, the GAI advised against regulation partly because no such market imperfection appears to exist in the platform sector and existing European laws will more likely

maximize consumer welfare. Indeed, the sector appears to be characterized by a wealth of competitive high-tech markets and platforms, with a plethora of new entry and innovation, all signs of competitive markets. Moreover, as explained in the comment, the imposition of regulation is likely to make things worse.

THE ECONOMIC ANALYSIS OF PRIVACY AND DATA SECURITY AND ITS IMPLICATIONS FOR NEW REGULATION

A central feature of many online platforms is the collection and use of consumer data. More recently, with the rise of "big data," algorithms also are using large and diverse datasets of consumer information to predict propensities. These practices create clear benefits for consumers: customized content, access to relevant offers, and better security. At the same time, however, they can give rise to privacy concerns. Although there are many different definitions and views of privacy, a core element of privacy as it relates to online platforms is the ability to control the amount of personal information that is available to others.

As the above suggests, there is an inherent tradeoff when regulating data flows: some segments of the population may derive privacy benefits, but retarding firms' ability to collect and use data also results in fewer transactions and a lower quality platform experience, both of which lower consumer welfare. What is more, in light of the recent advent of the "Internet of things" and of big data, restrictions on the collection and use of data can deprive society of benefits outside of the commercial sphere, such as discovering more effective medical treatments, policing strategies, or farming techniques. All of this strongly suggests that regulators should employ a benefit-cost framework focused on consumer welfare, and rooted in economic analysis, to guide privacy policy. There is widespread agreement that the adoption of an economically-grounded consumer welfare standard in competition law has been extremely beneficial to consumers. A consumer welfare approach to privacy regulation—one that would focus on actual harms to consumers, and rely to the extent feasible on revealed preference as opposed to survey data, anecdotes, and hypotheticals—similarly would provide benefits to consumers. According to the suggested analysis, restrictions on the use of big data for differential pricing are premature. Such pricing may enhance consumer welfare, improve income distribution, and, in some circumstances, lower prices for all consumers, and there is little evidence that firms are engaging in differential pricing.

Full comment submitted by the GAI to the EC on December 29, 2015, available at http://masonlec.org/site/rte_uploads/files/GAI_Comment%20on%20EC%20Platform%20Consultation_12-29-15_FINAL.pdf.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