

A Review of Non-Merger Antitrust Enforcement and Litigation Developments in the PRC in 2015



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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.

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

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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.





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 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

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.





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

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/cfd/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/>.





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

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

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.

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.





seven other companies¹⁷ totaling RMB 407 million (\$61.74 million), representing from four percent to nine percent of their China-related turnovers in 2014.

The Norwegian carrier Høegh 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 perception 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 Bureau²¹ 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

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 Høegh Autoliners in the investigation.

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/gjil/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.





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-Benz²⁵ 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.

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.

VI. NEW ANTITRUST GUIDELINES

A. *Draft Auto Sector Antitrust Guidelines*

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.

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.





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 arrangements, 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.

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

²⁷ *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/zwggk/zyfb/zjl/fld/201504/t20150413_155103.html.





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 anticompetitive 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 administrative 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

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.

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.





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.

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.

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>.

