STRATEGIES IN BRINGING ANTITRUST CIVIL CLAIMS IN CHINA

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I. INTRODUCTION

Since the establishment of China's antitrust law system, administrative enforcement agencies have been actively exercising their powers, initiating dozens of antitrust investigations with a high international profile, among which, the most influential cases include Qualcomm's abuse of dominant market positions and vertical monopoly agreements of several leading automobile companies, such as Audi and Mercedes-Benz.

Meanwhile, antitrust civil litigation plays an increasingly important role in China and has become an essential approach for market participants to resolve disputes. The number of antitrust civil lawsuits filed by victims allegedly to have suffered damages due to monopolistic conduct has rapidly grown.[5]

In this article, we make a preliminary introduction to the antitrust civil litigation system under the Chinese laws, and make a comparison between antitrust civil litigation and antitrust investigation. Based on these, we further discuss potential strategies available to market participants in antitrust disputes – both the alleged victims of monopolistic conducts and the alleged monopolists.

II. BASIC INTRODUCTION TO CHINA'S ANTITRUST CIVIL LITIGATION SYSTEM

Among the existing legislation, Article 50 of the Antimonopoly Law of PRC ("AML") and Provisions of the Supreme People's Court on Certain Issues concerning Application of Laws in Adjudication of Civil Disputes Arising from Monopolistic Conducts ("Antitrust JI") are the primary grounds for antitrust civil litigations.

On the whole, antitrust civil litigation shall abide by general laws and regulations governing civil litigation, with a few special provisions. For example, regarding courts with competent jurisdiction, cases of first instance of antitrust civil disputes are generally adjudicated by intermediate people's courts (or by intellectual property courts in municipals with intellectual property courts).[6] According to some newly promulgated provisions, high people's courts may also adjudicate some first-instance antitrust civil cases involving huge amounts in dispute, containing foreign factors, or of high profile.[7] Territorial jurisdiction is determined based on the individual circumstances of each case and according to the jurisdictional provisions of infringement disputes and contract disputes set forth in civil procedural law and relevant judicial interpretations. As to the burden of proof, general civil lawsuits follow the principle of "the party who asserts must prove," i.e. the plaintiff is required to provide evidence to prove its claims and bears the burden of proof. However, in antitrust civil litigation, the defendant alleged to have concluded a monopoly agreement is burdened to prove the absence of exclusive or restrictive effect of its monopoly agreement, and the defendant alleged to have abused market dominance, where he defends by arguing justifications, must present evidence to prove such justifications. These cases always involve issues

5 Widely-known cases include *Rainbow Technology and Trading Co., Ltd v. Johnson & Johnson (Shanghai) Medical Devices Co., Ltd and Johnson & Johnson (China) Medical Devices Co., Ltd* (August 2013, Shanghai High People's Court) concerning vertical monopoly agreement, *Huawei Technologies Co., Ltd. and InterDigital Technology Corp, InterDigital Communications Inc, and InterDigital* (October 2013, Guangdong High People's Court) concerning alleged InterDigital's abuse of dominance, *Beijing Qihoo Technology Co., Ltd v. Tencent Technology (Shenzhen) Co., Ltd and Shenzhen Tencent Computer System Co., Ltd* (October 2014, Supreme People's Court) concerning Tencent's alleged abuse of dominance, *Apple, Inc. v. Qualcomm Incorporated* (docketed by Beijing Intellectual Property Court in January 2017, pending) concerning alleged Qualcomm's abuse of dominance and licensing terms of standard essential patents, and the so-called "first antitrust case in Chinese petrochemical industry" – *Yunnan Ying Ding Bio-energy Co., Ltd. v. Sinopec Sales Co., Ltd. and Sinopec Sales Co. Yunnan Branch* (September 2017, Yunnan High People's Court) concerning Sinopec's refusal to deal.

6 See Article 3 of Notice of Supreme People's Court on Intellectual Property Courts' Jurisdiction and Relevant Issues, "an intellectual property court has jurisdiction over civil disputes of first instance in the city it locates; Guangzhou Intellectual Property Court has jurisdiction over civil disputes of first instance in Guangdong Province."

7 For example, in Beijing High People's Court's Regulations on Adjusting the Jurisdiction of Intellectual Property Civil Cases in Beijing, Article 1, "Beijing High People's Court has jurisdiction over the following cases: (1) first instance civil intellectual property cases with dispute amount over RMB 200,000,000 yuan and both parties reside in Beijing; first instance civil intellectual property cases with dispute amount over RMB 100,000,000 yuan and one of the parties reside outside Beijing; or first instance civil intellectual property cases with foreign (or Hongkong, Macau, Taiwan related) factors … (4) first instance civil intellectual property cases with huge influences in Beijing…" For another example, in Shanghai High People's Court's Regulations on Adjusting the Jurisdiction of Intellectual Property Civil Cases in Beijing, Article 3, "Shanghai High People's Court has jurisdiction over the following cases: (1) first instance civil cases with dispute amount over RMB 200,000,000 yuan; first instance civil cases with dispute amount over RMB 100,000,000 yuan and one of the parties reside outside Beijing; or first instance civil cases with foreign (or Hongkong, Macau, Taiwan related) factors, and subject matter is related to patents, plant new species, integrated circuit design, technology secret, computer software, and antitrust…"

that require expertise, calling for experts (including economists, legal experts, technical experts, etc.) to participate. Parties are entitled to apply for participation of persons with professional knowledge to explain professional issues, or apply to engage professional organizations or professional persons to issue reports on specific issues.

In addition, considering the characteristics of antitrust law, many problems inevitably arise when it is combined with the civil litigation system (for example, whether "claim of affirmation" is applicable, how to determine the eligibility of both parties, how to identify "interest in suit," how to determine "losses," how to determine the causal relationship between conduct and losses, etc.). Therefore, the antitrust law and the civil litigation system are still in the running-in process, with many problems remaining to be further explored in practice.

III. ANTITRUST CIVIL LITIGATION VS ANTITRUST ADMINISTRATIVE INVESTIGATION

In China, at present, the alleged victim in an antitrust dispute who claims to have suffered losses from suspected monopolistic conduct may complain to antitrust law enforcement agencies and request an antitrust investigation into such suspected monopolistic conduct. It may also bring an antitrust civil lawsuit against the suspected monopolist before courts. Compared with the antitrust investigation carried out by an administrative law enforcement agency, which the public may be more familiar with nowadays, antitrust civil lawsuits between equal entities before the courts differ in several aspects. In the following paragraphs, we discuss the major differences between these two procedures which may impact on overall strategies of the parties concerned, to further clarify the characteristics of antitrust civil litigation compared with the administrative antitrust investigation.

First of all, in terms of standards of case docketing, the requirements of case docketing for antitrust civil litigation are relatively clear. Courts adopt a registration approach for case docketing, and accept cases as long as the requirements of case docketing for common civil litigation are met.[8] In contrast, whether an administrative agency would accept an antitrust complaint and initiate an investigation seems hard to predict. Enforcement agencies have discretion, leaving it uncertain whether a case would be docketed and when it would be docketed. Generally, antitrust enforcement agencies tend to give priority to, and thus devote limited resources to, cases with obvious competition law concerns. For example, they may pay close attention to industries which the public has alleged to have severe monopoly concerns, and focus on leading operators with high profile.

Second, with regard to possible claims, requests in an antitrust civil litigation may be subject to more restrictions than those in a complaint to enforcement agencies. A plaintiff in an antitrust civil lawsuit is required to prove "interest in suit," and claims lacking interest may be dismissed. In contrast, enforcement agencies do not impose strict requirements on whether the complainant has interests at stake. A complainant can primarily focus on issues in which it has stake, while also mentioning other relevant issues.

Third, from the perspective of the difficulty of producing evidence by both parties in dispute, the burden of proof on the plaintiff in civil litigation is heavier than that of the complainant in an administrative investigation. As mentioned above, civil litigation generally follows the principle of "the party who asserts must prove," and basically abides by the doctrine of "preponderance of evidence,"[9] meaning that the party can only prevail when the probability of evidence it produced outweighs that of the other party to a certain degree, which is a high standard that is hard to meet. In antitrust civil lawsuits, it is very difficult to prove the definition of market, the proof of market dominance, the causal relationship between monopoly behavior and loss and the amount of loss. As to the administrative investigation, informants usually need to provide some preliminary evidence to persuade the antitrust law enforcement agencies to docket the case and file an investigation. Once the antitrust law enforcement agency decides to start the investigation, it has greater authority to investigate and collect evidence. Accordingly, whistleblowers may be less likely to collect evidence.

8 See Article 119 of the Civil Procedure Law of the People's Republic of China, "[t]o institute an action, the following conditions must be satisfied: (1) the plaintiff must be a citizen, legal person or other organization with a direct interest in the case; (2) there must be a specific defendant; (3) there must be a specific claim and a specific factual basis and grounds; and (4) the action must fall within the range of civil actions accepted by the people's courts and within the jurisdiction of the people's court with which it is filed.

9 See Article 73 of the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings, "[w]here the parties to a case produce conflicting evidence on the same fact but neither has sufficient evidence to rebut the evidence submitted by the other party, the people's court shall assess whether or not the evidence submitted by one party is clearly more persuasive than the evidence submitted by the other party, taking into consideration the circumstances of the case as a whole, and if so, affirm which party's evidence has greater probative value; where the facts of a case cannot be determined due to difficulties in assessing the persuasive value of the evidence, the people's court shall adjudicate the case on the basis of the rules concerning the burden of proof."

Fourth, in terms of the standards in identifying substantive issues, the courts have some different opinions from those of the enforcement agencies. Taking identification of vertical monopoly agreement as an example – there exist two conflicting theories, i.e. "*per se* illegal" and "rule of reason." "*per se* Illegal" means that concluding and practicing vertical monopoly agreements constitutes illegality, unless there is evidence proving that such conduct does not have effects that exclude or restrict competition. "rule of reason" means that a vertical monopoly agreement is only illegal where it unreasonably excludes or restricts competition. Seen from the current cases, some courts tend to adopt the "rule of reason." In adjudicating the first vertical monopoly agreement case (the *Johnson & Johnson* case)[10] in China, Shanghai High People's Court expressly states that, horizontal monopoly agreements in general trigger more severe concern than vertical monopoly agreements, and "anti-competition effect" is a requirement for identifying horizontal monopoly agreement, so it makes more sense to request the plaintiff in a vertical monopoly agreement case to bear the burden of proving anti-competitive effect.

In the *Gree* case,[11] Guangzhou Intellectual Property Court takes a similar analytical approach. In contrast, recently the enforcement agencies tend to adopt a method of "restriction in principle with exemptions," i.e. where operators conclude an agreement that is expressly prohibited by law, such agreement is illegal, unless the operators can prove exemption conditions are met. It is worth noting that, in December 2017, in the first vertical price monopoly agreement administrative lawsuit,[12] from the perspective of judicial review, the court positively recognized the legality of enforcement agencies' applying the "restriction in principle with exemptions" approach in identifying a vertical price monopoly agreement.

Fifth, as to the extent of information disclosure, an antitrust civil litigation discloses more than an antitrust investigation. In an antitrust civil lawsuit, after docketing the case, some important courts (e.g. Beijing Intellectual Property Court) may issue public notice of the acceptance of a case, through a press release or its official Wechat account, draw press attention and comments. There is less restriction on plaintiffs' taking initiative to disclose information related to the litigation to the public. In comparison, in an administrative investigation, the enforcement authorities rarely disclose relevant information of such investigation in an early stage, even after docketing. Of course, where a dawn raid is taken by enforcement authorities at the investigatee's place of business, or a Request of Information has been issued to the potential investigatee and other relevant operators, prior to the official docketing, then the investigatee (or even some public) may become aware of relevant information at a relatively early stage.

Sixth, as to the cost of legal actions, the cost of an antitrust civil lawsuit may be higher than an administrative complaint in many ways. In an antitrust civil lawsuit, the parties concerned shall bear the costs for investigation, evidence collection, litigation fees (including the fee for case acceptance, fee for potential preservation, and potential authentication fees), therefore the cost is relatively higher. Although a court may adjudicate the losing party to bear all litigation fees, a plaintiff still has to pay all relevant expenses in advance. In comparison, there is no need for a complainant to pay litigation fees, though during the investigation, a complainant is entitled to submit materials, such as expert reports, to the enforcement agency, to assist the agency to issue an investigation decision that is in favor of the complainant.

Seventh, as to extent of participation, parties concerned in antitrust civil litigation generally are able to exert certain influence in the lawsuit; in comparison, a complainant usually does not have control in an antitrust investigation. For example, in principle, a plaintiff can withdraw the claim at any time before the judgment is made, for any reason (e.g. a settlement has been reached with the defendant), and a court usually will allow the withdrawal (for a withdrawal requested after the court debate, consent from the defendant is usually required); also, it is very common for a plaintiff or a defendant to request an extension period for adducing evidence. In contrast, in an administrative investigation, where a case is docketed, the enforcement agency will take the lead, and the investigation will proceed at the enforcement agency's discretion. In extreme cases, even where the complainant and the investigatee have reached a settlement and expressed their intent to terminate the investigation, the enforcement authorities can still carry forward the investigation out of certain concerns (e.g. for public interest).

Eighth, as to remedies, in an antitrust civil lawsuit, parties concerned can allege damages suffered due to the other party's monopolistic conduct, requesting the termination of infringement and remedies; in comparison, in an administrative investigation, if monopolistic conduct is identified after investigation, the sanction is always to stop the monopolistic conduct, confiscation of illegal gains, and imposing fines, however no damages will be directly rewarded.

10 See second instance opinion of *Rainbow Technology and Trading Co., Ltd v. Johnson & Johnson (Shanghai) Medical Devices Co., Ltd and Johnson & Johnson (China) Medical Devices Co., Ltd.* ((2012) Hu Gao Min San (Zhi) Zhong Zi No.63).

11 See first instance opinion of *Dongguan Hengliguochang electronics and home appliances store v. Dongguan Shengshixinxing Gree Trading Co., Ltd. and Dongguan Heshi Electronics Co., Ltd* ((2015) Yue Zhi Fa Shang Min Chu Zi No. 33).

12 See second instance opinion of *Price Bureau of Hainan Province v. Hainan Yutai Technologies fodder Co., Ltd.* over a sanction decision dispute ((2017) Qiong Xing Zhong No. 1180).

IV. STRATEGIES UNDER THE ANTITRUST CIVIL LITIGATION SYSTEM

The Chinese antitrust civil litigation system, in legislation and in practice, has been through long and steady development, and is playing a more and more important role. Against this background, once potential antitrust disputes arise, in determining whether to file a complaint to relevant enforcement agencies, or to bring antitrust claims in court (or to do both), a party has to conduct an in-depth analysis, taking the purpose and specific circumstances into consideration, based on a clear understanding of the differences of these two legal procedures.

As antitrust civil litigation and investigations have respective characters (as mentioned in Section II above), engaging both procedures may have complementary and multiplication effect, i.e. imposing bigger pressure on the opposing party, to increase the possibility of prevailing. Under the current judicial system, there is no restriction on adopting both measures at the same time. Correspondingly, the party being sued/investigated shall take coping measures for both the procedures.

Of course, in certain cases, due to the cases' traits or specific requests of a party concerned, one procedure will be given priority. For example, in some cases, a party concerned may not want to aggravate the conflict, and desires to exert certain control over the proceedings. To set a better environment for settlement, such a party will choose civil litigation over investigation, and then as the case proceeds, it may determine whether to file a complaint for investigation depending on the circumstances. In certain other cases, the party concerned may find it difficult to bear the litigation fees, also the burden to adduce evidence is relatively heavy. In this case such party would first consider filing a complaint for investigation. Correspondingly, the party being sued/investigated will cope with such measure first. As the case proceeds, the possibility of taking the other measure cannot be excluded, and thus a party has to prepare for the other procedure to not fall in a passive position.

Another possible scenario is that, once the enforcement authority determines that one business operator has engaged in monopolistic activities, and issues the sanction decision, the victims suffering from such monopolistic conducts may bring civil claims based on the sanction decision, requesting remedies for their damages. This scenario not only applies in abuse of dominant position cases, but also in monopoly agreement cases. This scenario favors plaintiff as it lowers a plaintiff's burden of proof, because of the findings in the sanction decision. In the European Union and the U.S., this scenario is fairly common. However, to our knowledge, this scenario has been rare in China – many potential lawsuits like this are settled in private, and therefore public cases are difficult to find.

Recently, in China, there has been a type of case where a party requests "affirmation of conducts" (e.g. to affirm a plaintiff's conduct not in violation of antitrust law). Beijing Intellectual Property Court accepted a case filed by Qualcomm Incorporated ("Qualcomm") against Meizu Technology Co., Ltd., in which one of Qualcomm's claims was to confirm that the licensing terms were not in violation of AML. This case successfully went through the case acceptance stage, and eventually settled between the parties. Therefore we cannot see the court's opinion on relevant issues, including whether the court recognizes the claim of affirmation, and whether the court is willing to issue an opinion on a claim of affirmation. This shows new possibilities of using the antitrust civil litigation system. In reality, more and more business operators with significant market power are facing the risk of antitrust legal actions. In certain circumstances, such operators are of urgent need to exclude the uneasy status. Recognizing a claim of affirmation can be of help in solving this problem, balancing the interests among different market participants, and further promoting the "perfect order" of market competition.