

The Antitrust Source, August 2018. © 2018 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

# Roundtable on Antitrust Developments in China Ten Years On\*

## MODERATOR



**Fei Deng** is a partner at Edgeworth Economics and chairs the firm's China Competition Economics Practice. She is an editor of The Antitrust Source.

## PANELISTS



**Mark Cohen** is a lecturer in Law, Senior Fellow, and Director of the Berkeley Center for Law and Technology Asia IP Project. Prior to this position he served as Senior Counsel to the USPTO leading its China team.



**Ninette Dodoo** co-heads Freshfields' antitrust practice in China. She has acted on some of the most significant merger control matters and investigations in China, including in the shipping, beverages, health-care, and technology sectors.



**Michael Han** is a partner and the head of the antitrust practice of Fangda Partners, a Chinese law firm. His main practice areas are merger and investigations.



**Su Sun** is a vice president at Economists Incorporated. Besides his economic consulting work in the U.S., he has conducted economic analysis in antitrust and intellectual property matters before China's MOFCOM, NDRC and SAIC, and before the Chinese courts.



**Guanbin Xie** is a senior partner and founder of Lifang & Partners, a Chinese law firm. He has extensive experience advising clients on both antitrust and intellectual property matters and has over 20 years of litigation experience.

**Editor's Note:** This roundtable gathers a panel of seasoned practitioners with extensive hands-on experience advising clients on antitrust matters in China. They share their views on trends observed over the past decade of China's antitrust enforcement in merger, investigation, and litigation; implications of the recent consolidation of the Chinese antitrust agencies; hot topics, such as Standard Essential Patents, digital economy, discovery process, consideration of non-competition factors, and use of economic analyses and economic experts; and the outlook of future antitrust development in China. The Roundtable was conducted by Editor Fei Deng for The Antitrust Source. Fei, a partner at Edgeworth Economics, and Su Sun, a vice president at Economists Incorporated, were co-symposium organizers for the articles on China in this issue of The Antitrust Source.

**THE ANTITRUST SOURCE:** How has MOFCOM's merger review practice evolved over the past decade of enforcement, in terms of the procedural process and also the level of sophistication in its analysis?

**GUANBIN XIE:** From the implementation of China's Anti-Monopoly Law (AML) in 2008, until its recent replacement by a new agency, the State Administration of Market Regulation (SAMR), the Anti-monopoly Bureau of MOFCOM had been actively engaged in supervising concentrations of undertakings. Regarding the conduct of reviews, MOFCOM continuously optimized its review process and efficiency. It also made great strides in strengthening its evaluations of competition within industries and improved its data management and statistical analysis methods. MOFCOM

\* This Roundtable was conducted in writing.

*Over the past decade,*

*MOFCOM has issued*

*rules to give more*

*certainty and trans-*

*parency to the merger*

*review process.*

*The agency has also*

*improved in terms of*

*the timing for the*

*review process,*

*including introduction*

*of an expedited review*

*procedure for “simple*

*cases” and its overall*

*sophistication . . .*

—MICHAEL HAN

became increasingly specialized and professional in its work until its replacement. Also, MOFCOM attached great importance to international cooperation and carried out extensive cooperation with its counterparts in other parts of the world, such as the European Union and the United States. The experience that MOFCOM acquired, along with its mentality and attitude towards reviews and investigations, are all recorded in related guidelines and implementation rules that they produced, which provide detailed guidance on firms' notification filings.

**NINETTE DODOO:** MOFCOM's review practice has evolved significantly in the past ten years, as its decisions show. Three key hallmarks of the regime reflect developments in this period. First, China has established itself as one of the three major antitrust regimes in the world, alongside the European Union and the United States. MOFCOM's decisions (and now SAMR's) show that China will not hesitate to intervene in global deals—even if this means blocking a deal that its peers permit, imposing onerous remedies like its unique hold separate remedies, or delaying deal closure. Second, the number of notifications has continued to grow steadily on a year-to-year basis, likely due to the twin effects of increased scrutiny of failure to file cases and the introduction of the simplified case procedure in 2014 designed to accelerate review of no-issues deals. Finally, MOFCOM's decisions reveal increased levels of sophistication with greater use of economic tools and models comparable to those used elsewhere in the world, such as in the European Union and the United States.

**SU SUN:** I think MOFCOM has become more sophisticated analytically. When difficult analytical issues arise, they sometimes seek external expertise. Based on a couple of cases where I consulted for MOFCOM as their external economic expert, I got the impression that the staff had accumulated a lot of experience in merger review, from analyzing horizontal mergers to evaluating vertical and conglomerate mergers, from defining relevant markets to calculating shares and HHIs, and from evaluating price effects to considering issues, such as entry barriers, efficiencies, and innovation. They were interested in learning about frontier models and new tools, but were also mindful of their limitations. They showed a strong interest to do their work professionally and on a par with international best practices.

**MICHAEL HAN:** Over the past decade, MOFCOM has issued rules to give more certainty and transparency to the merger review process. The agency has also improved in terms of the timing for the review process, including introduction of an expedited review procedure for “simple cases” and its overall sophistication, providing more detail in its decisions, especially in remedies cases, with a greater emphasis on economic analysis of the impact a transaction may have.

In terms of potential areas of improvement going forward, it would be useful if SAMR could continue to improve the transparency of the merger review process and continue to provide fuller explanations of the economic rationale for merger decisions. In addition, I hope that SAMR will consider the possibility of loosening its requirements regarding market definition and market shares for non-issue cases or purely overseas transactions that have no impact on the China market. This would help to reduce the parties' market data gathering burden. I also hope that SAMR will consider whether in these situations it might be possible to leave the precise market definitions open.

**ANTITRUST SOURCE:** Now that the antitrust divisions within the NDRC and the SAIC, along with the Anti-Monopoly Bureau of MOFCOM, have merged into the new agency, SAMR, will there be more

consistency in the agency's enforcement, for example, with respect to price-related vs. non-price related conduct?

**MICHAEL HAN:** I anticipate that the merger of the three previous antitrust enforcement authorities into SAMR will improve the consistency of the law enforcement. For example, the SAIC and the NDRC used to have different rules with regards to the sliding scale for the reduction of fines imposed on leniency applicants (i.e., the level of the reduction of fines for the first, second, and third and subsequent applicants). I hope this discrepancy will be eliminated by the merger. The creation of SAMR also means that the agency will be able to look at both price and non-price related conduct in the same investigation. The elimination of overlapping jurisdiction means that undertakings will no longer bear any potential risk of responding to multiple investigations from different agencies with respect to the same conduct.

*[T]he potential for both*

*improvements, such*

*as greater efficiency*

*and synergies among*

*these former agencies,*

*and adverse outcomes,*

*such as inappropriate*

*influences among these*

*agencies, is enormous.*

**NINETTE DODOO:** Although each antitrust authority is ultimately subject to the AML, each authority developed its own unique approach to antitrust enforcement and its own set of implementing rules and regulations. This, in part, is due to differences in institutional design, jurisdiction, and practice among the three antitrust authorities. The merger of the antitrust authorities under SAMR can be expected to set a uniform tone and focus for antitrust enforcement in the future. I think it will enhance consistency of approach and streamline antitrust enforcement in China. The change may be gradual, however, as officials settle into new positions and roles at SAMR—and I anticipate that a new head of the Anti-Monopoly Bureau at SAMR will set the tone and the authority's future direction.

**MARK COHEN:** It is still too early to see how SAMR will evolve. However, the potential for both improvements, such as greater efficiency and synergies among these former agencies, and adverse outcomes, such as inappropriate influences among these agencies, is enormous. In relation to the IP area, not only have the three antitrust agencies been combined, but the State Intellectual Property Office (SIPO) and the Standard of Administration of China (SAC) are now also part of the agency. One of the first changes I have heard of is that SIPO will reportedly no longer be involved in proposing standards policy, as it had attempted to do under the prior government structure where it was not co-located with an antitrust agency.

—MARK COHEN

**ANTITRUST SOURCE:** How have China's antitrust agencies prioritized various complaints and investigations, given their limited capacity?

**NINETTE DODOO:** Unlike most major jurisdictions, the majority of investigations in China are currently triggered by complaints. Leniency applications have steadily increased as the antitrust authorities clarify the leniency regime and the business community's confidence in the regime has grown over time. As in many jurisdictions, the Chinese authorities have prioritized alleged anticompetitive conduct with a potentially significant impact on competition and consumer interests. The authorities initially focused on clear-cut infringements of the AML and, whether by design or coincidence, prioritized cases following the Chinese adage, "killing the chicken to scare the monkey," as a review of significant investigations suggest. And, as the authorities' experience with antitrust enforcement increased and investigative techniques matured, they increasingly pursued complex cases, including those with a cross-border element.

**MICHAEL HAN:** To date, the enforcement agencies appear to have taken an industry-focused

approach to investigation. Recently, their primary focus has been on industries with a direct impact on the welfare of individual Chinese citizens, such as the pharmaceuticals and automotive sectors. The agencies have also focused on a number of industries important to China's economic policies, including ports and public utilities, etc. International cartels are also one of the enforcement agencies' main areas of focus, the investigations into which are normally triggered by one or more leniency applications.

**SU SUN:** One other factor is how well parties can bring their arguments. Given the agency staff's busy schedule, they won't devote much time or resources to an investigation unless there is highly convincing evidence to support a complaint. Thus, those who bring a complaint need to present an analysis with both rigor and clarity, backed by sufficient and concrete evidence. Equally, those who respond to such complaints need to present their response with rigor and clarity as well, and fully address the core concerns. This is where economic analysis plays an important role by providing a useful framework under which parties can exchange arguments and analyses, so that the antitrust agency can be fully informed and evaluate opposing claims and analyses with confidence.

*The SAIC's IP rules*

*and the draft State*

*Council Anti-Monopoly*

*Commission IP*

*guidelines both*

*controversially refer to*

*an essential facilities*

*doctrine in relation to*

*essential IP.*

—NINETTE DODOO

**ANTITRUST SOURCE:** We have seen that both the SAIC's IP rules and the draft State Council Anti-Monopoly Commission IP guidelines include an essential facilities doctrine for "essential" IP. Have the agencies or the courts applied this doctrine in practice? Do you expect it to be a significant part of enforcement going forward?

**NINETTE DODOO:** The SAIC's IP rules and the draft State Council Anti-Monopoly Commission IP guidelines both controversially refer to an essential facilities doctrine in relation to essential IP. It is worth noting that the Chinese authorities' peers, such as those in the United States and the European Union, do not apply such a doctrine to IP. There is genuine concern amongst the business community that the inclusion of an essential facilities doctrine could open the floodgates to antitrust litigation or complaints involving IP rights and ultimately stifle innovation. Having said that, a careful assessment of the criteria under the SAIC IP rules and draft IP guidelines—as well as recent litigation—offers some hope that the strict refusal-to-supply standards set in the European Union will at a minimum inform the approach in China.

**GUANBIN XIE:** The refusal to grant licenses for essential IP has always been a point of contention because ownership of IP has traditionally been like most other forms of ownership: it has been exclusive in nature. Under the essential facilities doctrine, the owners of essential IP may be required to grant licenses to others on a compulsory basis, which in turn, would result in the IP owners losing their exclusive rights. The State Council Anti-Monopoly Commission's draft IP guidelines mention the essential facilities doctrine but do not discuss it in detail. The draft views the unjustified refusal to grant a license to essential IP as a major factor in deciding whether it constitutes refusal to deal. However, it is still to be seen in future practice how it will be applied by China's antitrust authorities.

**MICHAEL HAN:** Generally, the essential facilities doctrine is considered to be somewhat controversial when applied to IPRs. For example, during the drafting of the SAIC's IP rules and with respect to the State Council Anti-Monopoly Commission's draft IP guidelines, some commentators held the view that applying the essential facilities doctrine to IPRs would substantially impinge upon IPR

holders' core right to exclude, create disincentives for competitors to develop their own competing IPR, and discourage innovation in general in the long run.

I am not aware of any IP cases in China where the essential facilities doctrine has been applied by the antitrust agencies to date. Given that this doctrine has not yet been used in China and it is highly controversial, I anticipate that SAMR will take a cautious approach to its adoption in practice in the future.

**ANTITRUST SOURCE:** We've seen more and more Standard Essential Patent (SEP) cases litigated in China. Why is this happening? Is it easier to get injunctions in Chinese courts on SEPs?

*[B]oth antitrust enforcement agencies and courts in China have become more confident in pursuing difficult issues, such as FRAND.*

**MICHAEL HAN:** The increase in SEP litigation in China is not surprising considering the fact that China is one of the largest jurisdictions for SEP licensees. China is now host to a number of large OEMs (e.g., in the mobile phones market) which need to obtain licenses from SEP holders. When a dispute arises, this often leads to litigation before the Chinese courts. However, I don't believe it is generally easier to obtain injunctions pertaining to SEPs in China as opposed to other jurisdictions. In 2016, the Supreme People's Court issued its Interpretations (II) on Several Issues Regarding Law of Application During Trial of Cases Related to Patent Right Infringement Disputes, in which Article 24 imposes certain restrictions on a patent holder to obtain injunctions pertaining to SEPs in China. That is, if a patent holder violates its FRAND obligations in the negotiation of an SEP license agreement, the courts are unlikely to support the injunctions request by such patent holder. Nevertheless, there are two SEP cases after the 2016 Interpretations, namely, *Iwncomm v. Sony* and *Huawei v. Samsung*, in which both plaintiffs' requests for injunctions were upheld by the court as they did not violate FRAND obligations.

—*SU SUN*

**GUANBIN XIE:** There may be several reasons. First, China is a manufacturing behemoth. Because of this fact alone, the likelihood of SEP cases occurring in China is high. Second, the time scales involved in SEP infringement cases are the same as in normal patent cases in China. Additionally, these time scales are shorter than in the United States. Lastly, for patent infringement cases, the Chinese courts tend to grant injunctions as a tradition, which is limited by the recently adopted Supreme Court's rules that SEP holders have to comply with FRAND obligations in order to secure an injunction.

**SU SUN:** After China's (and perhaps the world's) first judicial decision on FRAND rate was made in *Huawei v. InterDigital* almost five years ago, I co-authored an article postulating three reasons for increasing SEP and FRAND cases in China: First, China's continuing integration into the world economy has led to an increasing need for Chinese companies to license patents from multinational companies, particularly in the Information and Communications Technology (ICT) industry. Second, China has been promoting the development of an innovation-based economy and has been promulgating new IPR rules and guidelines, including those related to SEPs. Third, both antitrust enforcement agencies and courts in China have become more confident in pursuing difficult issues, such as FRAND. I'd like to add now an additional observation—that some Chinese firms have emerged in recent years as SEP owners as opposed to merely implementers, for example, IWNCOMM in *Iwncomm v. Sony*, and Huawei in *Huawei v. Samsung*. Thus, Chinese firms, in addition to foreign SEP owners, may well initiate SEP litigation. It is likely that the fast-developing ICT industry and the changing licensor-licensee landscape in China will continue to prompt more SEP litigations.

*Chinese courts*

*generally follow*

*continental practice*

*in making injunctions*

*available absent*

*compelling contrary*

*public interests.*

*However, it would be*

*wrong to say that*

*injunctions are always*

*granted in IP cases,*

*and increasingly it*

*is wrong to say that*

*injunctions are always*

*denied in SEP cases.*

—MARK COHEN

**NINETTE DODOO:** There is increased focus on the interface between antitrust and SEPs—particularly those related to 3G/4G mobile communications standards—in China, as in other major antitrust regimes. This intensified interest occurs at a time when China has emerged as one of the largest producers of mobile handsets and some Chinese implementers remain concerned that foreign SEP holders may set unreasonable or discriminatory licensing terms or delay negotiations on licensing terms. The uptick in SEP litigation does not necessarily mean that seeking injunctive relief in China is easier. Recent guidance, such as the Guangdong High People’s Court’s guidance, notes factors that courts will consider when determining whether to grant an injunction. The guidance focuses on “subjective fault,” where injunctive relief is available when an infringing party has obvious fault, that is, the infringing party has not acted in good faith. This is broadly consistent with the “willing licensee” test articulated in the European Court of Justice’s *Huawei v. ZTE* judgment.

**MARK COHEN:** China is increasingly seen as a good jurisdiction to litigate patents. There are several reasons for this apart from the importance of the Chinese market and different approaches to SEPs. Some of the reasons include increased transparency of the courts, increased professionalism of the courts, the success of China’s IP courts and a proposed national appellate IP court, the introduction of technical assessors, increasing judicial attention on the issue of SEPs, and an increasingly professional and experienced Bar.

Regarding injunctions, China lacks an *eBay* doctrine. Chinese courts generally follow continental practice in making injunctions available absent compelling contrary public interests. However, it would be wrong to say that injunctions are always granted in IP cases, and increasingly it is wrong to say that injunctions are always denied in SEP cases. Preliminary injunctions have been especially rare in IP (patent) cases, but this also appears to be changing. Finally, it would be wrong to say that the high rate of injunctive relief means that there is high degree of injunction enforcement. Let’s begin with the last statement.

Once an injunction is issued, the injunction may be stayed pending appeal. In addition, the injunction may be subject to a separate judicial enforcement action. Thus far, the various reports of high injunctive relief have not looked at the judicial enforcement database to determine if the courts had to physically enforce the grant of the injunction. We do not, therefore, know if in fact there is a high rate of actually implementing injunctions.

Historically, preliminary injunctions were quite rare even if they were necessary for certain types of IP infringement (e.g., trademark counterfeiting and copyright piracy). The need for preliminary injunctions may also have been reduced because Chinese courts typically take seven months to adjudicate a patent case. Thus, if a company is financially solvent, there would be no need to pursue a preliminary injunction and instead avoid the risk of having to indemnify the defendant if one lost a case on the merits. There have, however, been two notable cases brought against U.S. companies where Chinese companies obtained preliminary injunctions (the *Veeco* and *Micron* cases), so circumstances may be changing. Thus far there have been no preliminary injunctions that I am aware of involving a SEP in China, although there have been grants of permanent injunctions (*Huawei v. Samsung*, *Iwncomm v. Sony*). However, the speed with which the courts have handled the preliminary injunction cases suggests that this is not an impossibility.

I believe it is likely that over the long run a blanket denial of injunctive relief in SEP cases will not continue to hold as the mainstream Chinese judicial practice. The high-water mark in that approach was the *Huawei v. InterDigital* case in Shenzhen, where InterDigital’s pursuit of an exclusion order at the ITC was in essence deemed a per se violation of Chinese antitrust law.

There was also a prior Supreme People's Court opinion on standards and patents, which is rarely cited, that addressed the same issue. Recent cases and policy guidance, such as the *lwncomm v. Sony* case, appear to be taking an approach based on good faith in negotiations to determine whether judicial intervention is warranted. As China becomes a bigger stakeholder in international standards, such as 5G-related standards, and, in light of China's efforts to become a technology licensor, I expect that China will no longer be viewing itself as a standards-consuming nation. It is my hope that the precedent however will increasingly "balance" itself so that the pathbreaking cases do not appear to principally involve foreign defendants brought before a Chinese court.

Finally, I caution against uncritically using injunction and win rate data, now available from the courts, to come to conclusions about China as a hospitable forum for foreign non-practicing entities (NPEs). The reality is that we have very few NPE-related cases reported as final decisions by the courts. As settled or mediated cases may not be reported, and since 30 to 50 percent of the cases overall may not be reported, it is difficult to estimate how many NPE cases there really are in the court dockets. We also need to recognize that a Chinese NPE may manifest itself quite differently from a foreign NPE. For example, the Chinese Academy of Sciences has a holding company (CASH) that asserts patents. Also, in the Beijing IP court, nearly one third of the patent assertions were brought by non-service inventors. Anecdotally, some attorneys are saying that China is now a good place for NPEs to litigate because of the availability of injunctive relief. We need to see how the system fully evolves.

*In terms of enforce-  
ability, Chinese courts'  
decisions can be  
enforced in China,  
but it is less clear  
how enforceable these  
decisions might be  
outside of China.*

—MICHAEL HAN

**ANTITRUST SOURCE:** Do Chinese courts have jurisdiction over the royalty rates applied in China? In other words, can a Chinese court decide on a global FRAND rate? How enforceable is it?

**GUANBIN XIE:** In principle, Chinese courts can make decisions on royalty rates but will not, in practice, make decisions that are out of their jurisdiction. However, as is stated in Article 16 of the Guidelines for the Trial of SEP Disputes promulgated by the Guangdong High People's Court, when a SEP holder or an implementer requests a court to determine a FRAND royalty rate, but the licensing territory of the subject SEPs goes beyond the jurisdiction of the court, if the other party raises no objection in the course of litigation or such objection is deemed improper by the court, the court may adjudicate and set a royalty rate for said licensing territory.

**MICHAEL HAN:** The Chinese courts have jurisdiction to set FRAND royalty rates applicable in China, and have previously done so (e.g., in the *Huawei v. InterDigital* case, where the Guangdong High Court upheld a lower court decision to determine the FRAND rate applied to InterDigital's SEPs). In terms of global FRAND royalty rates, due to comity and uncertainty about enforcement, I expect that the courts will take a conservative approach to setting global FRAND rates. To date, there have not been any IP cases in China where a global FRAND royalty rate has been adjudicated. Nevertheless, the Guangdong Higher People's Court recently issued guidelines on SEP cases, in which Article 16 suggests that courts in China do have the right to determine FRAND rates for other jurisdictions unless the respondent clearly objects and the objection is found to be reasonable by the court. It is to be seen in future practice whether there is any breakthrough in Guangdong Province where a global FRAND rate can be set in an IP case in China.

In terms of enforceability, Chinese courts' decisions can be enforced in China, but it is less clear how enforceable these decisions might be outside of China. This is especially true given the lack of anti-suit injunctions typically used by courts in the United States to deter challenges to the enforcement of a global FRAND rate, for example.

**MARK COHEN:** Chinese courts are increasingly inclined to determine global FRAND rates, particularly, as I understand, in Guangdong. However, Chinese courts rarely enter into any type of comity analysis in determining whether their cases should proceed forward or if a case will interfere with the adjudication in process in another jurisdiction. A good example of this was the *Huawei v. Interdigital* case mentioned before. An unduly aggressive approach towards asserting global jurisdiction could be highly disruptive. Clearly, Chinese courts currently do have a “chokehold” role in litigating patents, as the Chinese market has become very important and China is the largest manufacturer of high-tech products. Chinese courts also tend to ignore anti-suit injunctions. Although it is rare, one Chinese court in a non-IP case, *Huatai P&C Insurance Shenzhen Branch v. Clipper Chartering SA*, actually issued an anti-anti suit injunction.

**ANTITRUST SOURCE:** Other than those related to IP, what other types of antitrust litigation have been active in China?

**GUANBIN XIE:** Up to April 2018, there are 454 public judgments of antitrust cases available online, among which there are 20 on monopoly agreements and 82 on abuse of market dominance. There are also a small number of administrative monopoly cases. It is noteworthy that abuse of market dominance cases significantly outnumber other types of cases. Regarding the types of industries involved in antitrust litigation, traditional industries, such as automobile, medical, and building materials, play a more active role than others. Emerging industries, such as computers and telecommunications, have also started to witness quite a lot of antitrust disputes.

**NINETTE DODOO:** Landmark cases outside the IP context include *Qihoo 360 v. Tencent*, involving an abuse of dominance claim, and *Rainbow v. Johnson & Johnson*, involving RPM. Although private actions have steadily increased, including following adoption of the Supreme People’s Court’s Judicial Interpretation on the trial of antitrust-related disputes, antitrust litigation has yet to take off significantly in China. For example, we have yet to see significant follow-on damage claims come before the courts (although some cases may settle before trial). This is expected to change as antitrust enforcement intensifies in China and third parties rely on administrative decisions to seek damages in the courts. We have also yet to see substantive attempts to challenge administrative decisions in China. This may be due, in large part, to the negotiated settlement and/or decision that an investigated company will often broker with the antitrust authority.

**MICHAEL HAN:** There have been a number of cases related to vertical agreements, including RPM and suppliers’ allocation of customers between their distributors, in addition to abuse of dominance cases involving conduct, such as exclusive dealing. An example of these RPM cases is the *Rainbow v. Johnson & Johnson* case in 2013, where the court took a rule of reason approach, as opposed to the per se illegal approach taken by the NDRC (now SAMR), and ruled that the illegality of an RPM practice must be established on the basis of the harm caused to competition in the relevant market. This approach was also followed in the *GREE* case before the Guangzhou Intellectual Property Court in 2016, where the plaintiff was held to have failed to convince the court that the RPM agreement in question restricted or eliminated inter-brand competition in the Dongguan city air conditioning market.

An example of the customer allocation cases is one brought against Panasonic Electronics in 2014 by Rijin Electric Co., one of Panasonic’s distributors, after it was penalized for violating a customer-allocation agreement used by Panasonic to prevent competition among its distributors. The claim brought by Rijin was based on there being a horizontal agreement for customer allocation

but the court took the view that the agreement in question was actually a vertical agreement and therefore dismissed the claim.

In respect of exclusive dealing, a recent case of note is the coffee startup Luckin Coffee's litigation against Starbucks, accusing Starbucks of unfair competition arising out of exclusivity provisions in its rental and supply agreements.

**ANTITRUST SOURCE:** How does the discovery process in China work for litigation matters? Have you encountered any difficulty trying to get the evidence you'd like to obtain?

**MICHAEL HAN:** There is no formal discovery process in China that would be analogous to discovery in common law jurisdictions. In legal proceedings in China, the plaintiff is generally responsible for providing the court with all the supporting evidence necessary to support their arguments and the defendant will not be compelled to produce any documents except those they seek to rely on in the course of a case. Given the lack of discovery process in China, it can often be hard for a plaintiff to obtain sufficient evidence in a case to meet the requisite burden of proof. This often acts as a deterrent to plaintiffs considering whether to bring an antitrust action as they are required to produce most of the required evidence themselves.

*[T]here is no discovery process in China. The nearest legal concept to discovery is evidence exchange, which is mainly organized by the courts.*

—GUANBIN XIE

**GUANBIN XIE:** In the United States, the discovery process gives litigating parties access to their opponent's information, documents, and testimony. However, there is no discovery process in China. The nearest legal concept to discovery is evidence exchange, which is mainly organized by the courts. Evidence exchange and methods for dealing with spoliation of evidence are dealt with by the judiciary in accordance with laws, regulations, judicial opinions, and guidelines.

In IP infringement actions, the plaintiff has a preliminary burden of proof to show some form of infringement and the extent of such infringement. If such preliminary evidence is not rebutted, then a court may adopt that evidence and draw adverse inferences from the lack of rebutting evidence. As antitrust cases are also heard by IP judges, the same set of evidentiary rules is applicable in antitrust cases as well. Because IP owners often have great difficulties in producing evidence of infringement, the Beijing Intellectual Property Court has started to create an evidence discovery system for IP actions. This system can be regarded as a consolidation of laws and judicial interpretations. However, it still requires further adjustment and testing to make the system more suitable for Chinese judicial application.

**ANTITRUST SOURCE:** Are there other aspects of China's antitrust litigation process that U.S. companies or U.S. lawyers might find surprising when preparing for antitrust litigation in China, as compared to what they are used to in the United States?

**MICHAEL HAN:** There are a number of key differences in Chinese litigation that American companies or lawyers might find surprising. Some of the most prominent differences are: (1) there is a lack of discovery (as previously noted); (2) there is no class action procedure; (3) damages awards are quite low—plaintiffs can only claim actual losses, leading to lower overall awards of damages; and (4) there are no jury trials.

I would also like to note that antitrust cases in China are rarely settled—most cases proceed to trial, and cases generally proceed much more quickly than they would in the United States. Unlike the United States, there also have not been any criminal prosecutions for antitrust violations. In China, there is no criminal liability for antitrust infringement itself, unless there is an obstruction of an investigation.

**ANTITRUST SOURCE:** China has a very dynamic digital economy, led by long-time domestic champions, such as Tencent, Alibaba, Baidu, and newer ones, such as Didi and Mobike. What is the Chinese antitrust agencies' and Chinese courts' position when dealing with potential antitrust issues encountered in the digital economy?

**GUANBIN XIE:** In the digital economy, big data is transforming business, and increasingly, it is becoming a subject of concern for antitrust authorities. The Chinese authorities have begun to consider the role of big data in mergers and market competition more broadly. The situation is complicated because the anticompetitive acts of internet companies are often hidden and difficult to prosecute. This is a challenge for antitrust authorities, which generally encourage innovation and are trying to create an inclusive environment for the development of prescribed models and structures for internet businesses. They have also paid special attention to the behaviors exhibited by market entities battling for an increase in market share. Such behaviors include data mining and promoting tacit collusion by data sharing. Chinese antitrust authorities are now looking closely at the substitutability of different types of data for different purposes and the role of related but distinct factors, such as the availability of algorithms or other software used to process such data. Antitrust measures have begun to be applied to internet companies to promote economic development and protect consumers.

*The Chinese authorities have begun to consider the role of big data in mergers and market competition more broadly. The situation is complicated because the anticompetitive acts of internet companies are often hidden and difficult to prosecute.*

—GUANBIN XIE

**MICHAEL HAN:** Due to the dynamic nature of the digital economy, the Chinese enforcement authorities used to take a more relaxed laissez-faire approach to issues in this sector. For example, the Supreme Court held the opinion in 2014 in the *Qihoo 360 v. Tencent* case that the digital economy market is a dynamic market with active market entrants, and therefore a company's high market share did not necessarily translate to market power. Accordingly, Tencent was held not to have a dominant position even though its market share in the PC and mobile instant messaging market exceeded 80 percent.

However, given the rapid growth in the digital economy in the past decade, the formation of several internet giants, and the active mergers and acquisitions in this market, competition issues are increasingly on the radar of not only antitrust enforcement but also industrial regulatory authorities. In the past year the authorities have been monitoring and investigating big M&A transactions in the industry, conducting market surveys on the competition issues, and promulgating industrial regulations to prohibit "anticompetitive behavior." On the other side, increasing disputes between internet companies may also lead to potential antitrust investigations and litigation in the future.

**ANTITRUST SOURCE:** Do economic experts play any role in antitrust investigations and litigation in China? How do the antitrust government officials and judges in China view economic analyses presented in antitrust matters?

**SU SUN:** I think there is a clear trend of bringing in economic experts in antitrust investigations and litigation. Enforcement officials and judges are becoming more receptive to reviewing economic expert reports as part of the parties' submissions and hearing economic experts' testimony. In the *Tetra Pak* decision, the State Administration of Industry and Commerce (SAIC) spent many pages describing the economics behind the loyalty rebate schemes Tetra Pak employed and their anticompetitive effects. In the *Huawei v. Samsung* decision, the Shenzhen Intermediate People's Court described and compared the two sides' economic experts' opinions in its decision. I think we will see more of such reliance on economic analysis in the years to come.

*Complex mergers*

*(typically those*

*involving remedies),*

*dominance cases*

*(e.g., Qihoo 360 v.*

*Tencent), and SEP*

*disputes (e.g., Huawei*

*v. Samsung) have*

*recently proved to*

*be fertile ground for*

*economic expert*

*evidence in China.*

—NINETTE DODOO

**NINETTE DODOO:** Economic experts can play an important role in mergers, investigations, and litigation. The antitrust authorities are increasingly open to economic arguments, and the courts have shown that they will consider economic evidence in appropriate cases. With antitrust still evolving in China, reliance on economists and economic evidence can likewise be expected to evolve with time. For now, reliance on economists and economic evidence is driven by several considerations, including the type of case before the antitrust authority or the courts. Complex mergers (typically those involving remedies), dominance cases (e.g., *Qihoo 360 v. Tencent*), and SEP disputes (e.g., *Huawei v. Samsung*) have recently proved to be fertile ground for economic expert evidence in China. As follow-on private actions take off, this area could also lend itself to use of economic evidence and economists.

**MICHAEL HAN:** Economic experts do play a role in advising on the economic impacts of conduct subject to antitrust investigations and litigation in China. The courts and agency officials in China generally find economists to be useful in antitrust cases. Examples of high profile cases involving economists include the SAIC's *Tetra Pak* investigation (2016), the NDRC's *Qualcomm* investigation (2015), MOFCOM's review of *Thermo Fisher/Life Technologies* merger (2014), and the Supreme Court's *Qihoo 360 v. Tencent* decision (2014).

**GUANBIN XIE:** In China, economic analyses have been considered to be of great importance by relevant authorities for both antitrust investigations and litigation. There is a desire among government officials and judges to improve their professionalism in examining or hearing relevant cases by using economic tools. In addition, they may also resort to external experts in major cases to obtain more professional perspectives and support in handling such cases. One well-known example is the second instance of the dispute between Qihoo 360 and Tencent before the Supreme People's Court. Economic experts presented their analyses at the trial and played an important role in the case. This case is noteworthy because it is a guiding example set by the Supreme People's Court on the appropriate procedures to adopt when handling expert testimony in antitrust litigation, which is a subject not specifically addressed in China's Civil Procedural Law.

**ANTITRUST SOURCE:** This is a perpetual question from outside observers, but do non-competition factors, such as public interest and industrial policy, play a role when Chinese antitrust government officials or judges make decisions? Can you give us some concrete examples?

**NINETTE DODOO:** Non-competition factors can play a role. In the merger control context, the AML requires the antitrust authority to consider a transaction's impact on national economic development which implies that non-competition factors need to be taken into account. In the case of investigations, complaints, particularly from Chinese stakeholders, have generally been the source of most investigations in China. With the antitrust authority needing to prioritize cases, the focus has inevitably been on conduct and issues that are likely to affect a wide cross-section of Chinese industry and Chinese consumer interests—and which cases are pursued can be influenced by the prevailing priorities of the day.

**ANTITRUST SOURCE:** Has there been any appeal of government decisions? Why don't we see more like what we see in the United States or the European Union? Will this change in the future?

**MICHAEL HAN:** There have been a number of appeals of government decisions in China, most

recently in *Hainan Yutai Scientific Feed v. Hainan Price Bureau* (an appeal related to an RPM investigation) and a 2015 appeal before the courts in Shaanxi of a penalty decision made against a vehicle inspection fee cartel.

The United States relies on judicial enforcement of antitrust rules (as opposed to unilateral action by enforcement authorities), which has a clearer appeals process, and a much longer history of appeals. The European Union also has a longer history of enforcement actions and a greater body of case law to draw on in lodging appeals of enforcement decisions.

In China, the courts are still deferential to enforcement authorities, so it can be harder to challenge government decisions. There is also a shorter history of antitrust law, so cases are normally only appealed where there are procedural irregularities or legal errors in the government decision. Overall, this means that potential appellants are generally more reticent when it comes to lodging a possible appeal.

*We should watch for any indication that the new enforcement agency, SAMR, will build up its economic analysis capacity, and for any tendency that the courts will raise the bar for economic analysis and testimony so that there will be more rigor and clarity.*

—*SU SUN*

**ANTITRUST SOURCE:** What are the key things to watch for in China's antitrust enforcement in the next ten years?

**SU SUN:** We should watch for any indication that the new enforcement agency, SAMR, will build up its economic analysis capacity, and for any tendency that the courts will raise the bar for economic analysis and testimony so that there will be more rigor and clarity. Then, eventually, they will be more useful to the courts to adjudicate complex antitrust disputes.

**MICHAEL HAN:** In the next ten years, I anticipate that the creation of SAMR will lead to more active and aggressive enforcement of antitrust rules in China. Over time, I hope that we will also see more appeals of enforcement actions. I also anticipate that private enforcement actions (especially follow-on claims) will become increasingly common as case law in this area is built up. Accordingly, I anticipate that antitrust compliance for both domestic and international companies will become increasingly important and that the standard of antitrust compliance in China will continue to rise.

**NINETTE DODOO:** The merger of the three antitrust authorities into SAMR is part of broader institutional reforms in China and underscores the increasing importance of antitrust and its centrality to China's future development. The merger will shape the future course of antitrust enforcement in the next decade. And recent developments, such as dawn raids, and decisions suggest that the Anti-Monopoly Bureau at SAMR is set for robust enforcement of the AML. As part of an agency with a broad policy portfolio including to drive market reforms, public and national interest considerations could play a larger role in future antitrust enforcement. I think for companies doing business in China, an understanding of, and compliance with, China's AML is more important than ever before.

**GUANBIN XIE:** First, with the improving awareness of the AML in China, we may see more private civil actions for damages in the future. Investigation decisions made by antitrust authorities may be of relevance in private civil actions. However, the evidentiary value of such investigation decisions remains unclear. It is normal for Chinese courts to defer to the findings of fact made by antitrust authorities during investigations. Nevertheless, the courts have the authority to make a final review of relevant facts. The deference of the courts may lessen a plaintiff's burden of proof because they would only need to prove that they suffered harm from monopolistic behavior and quantify damages. During antitrust investigations, there are powerful procedural rules which can

help private entities to obtain evidence. Therefore, it remains unclear how the judicial practice would interpret the rules in this regard.

Second, with the development of “big data,” new antitrust disputes may arise in the future, such as price discrimination through identifying the highest price a consumer is willing to pay for a product. China’s AML prohibits price discrimination exercised by dominant companies, but it remains unclear how the judicial system would define the relevant market and a company’s dominance in that market. ●