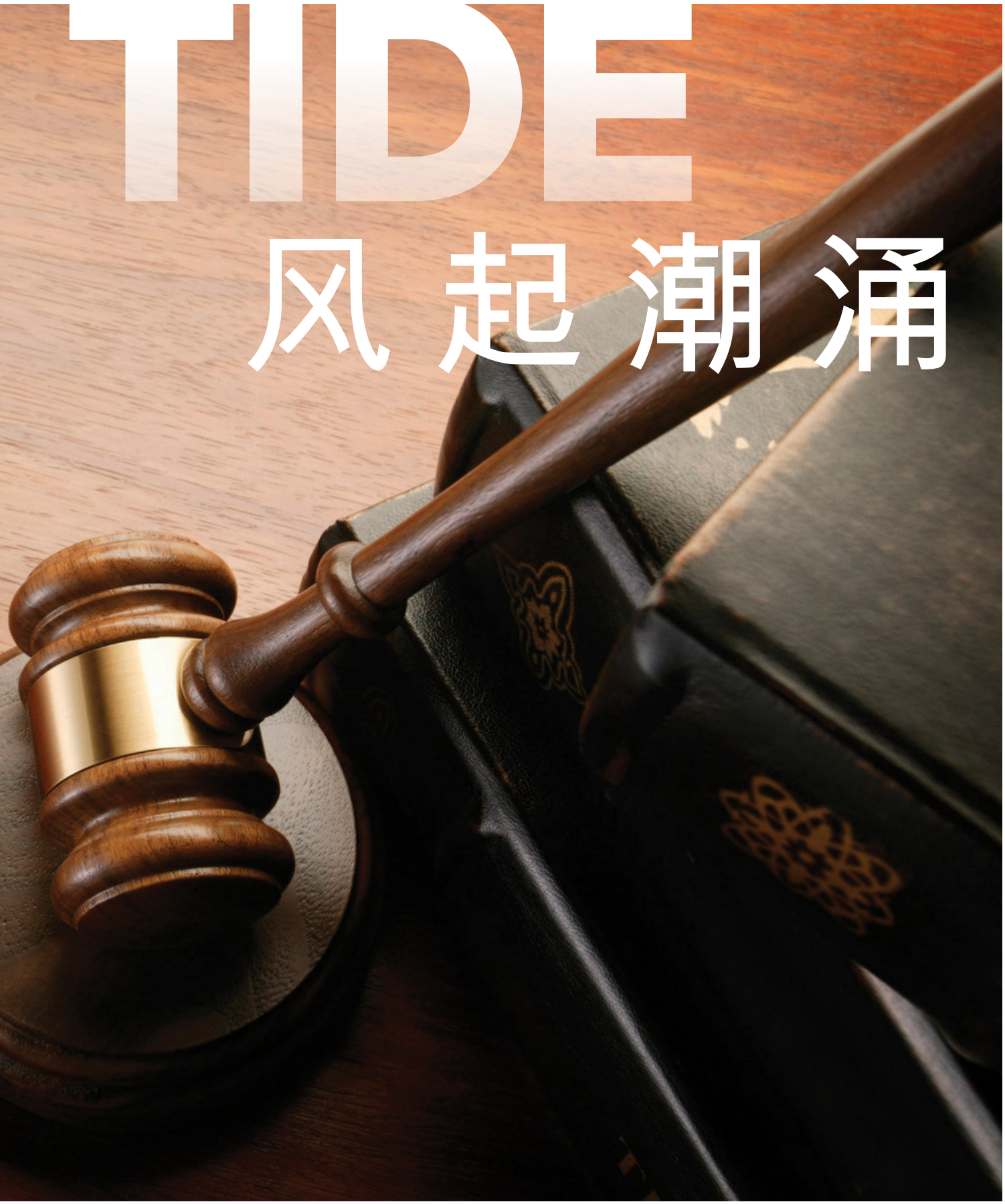
RISING

AS COMPANIES INCREASINGLY GO TO BATTLE ON THE ANTI-MONOPOLY FRONT IN CHINA, LAWYERS PLAY A KEY ROLE IN THE CAVALRY. WITH SEVERAL HIGH-PROFILE CASES GRABBING HEADLINES IN RECENT MONTHS, INCLUDING QIHOO 360 V TENCENT, ANTITRUST LITIGATIONS ARE NOTABLY ON THE RISE. COMPETITION SPECIALISTS ARE JOINING FORCES WITH LITIGATORS TO FIGHT FOR THEIR CLIENTS, AND IT APPEARS THAT DEDICATED ANTITRUST LITIGATION PRACTICES MAY MAKE AN APPEARANCE ON THE DOMESTIC LEGAL SCENE SOONER RATHER THAN LATER, FINDS **CANDICE MAK**

在中国，由于越来越多公司正在走上反垄断战场，因此律师的角色显得愈发重要。随着近几个月数宗影响巨大的反垄断案件登上新闻头条（包括奇虎360诉腾讯案），反垄断诉讼的发生率明显上升。Candice Mak发现，反垄断及反不正当竞争业务方面的专家已纷纷加入诉讼律师的行列，共同为其客户争取权益，而专注于反垄断诉讼方面的法律业务也可能很快会出现在国内法律舞台上。

The Chinese translation of this story was prepared by Synmax Translation　　** 鑫马翻译提供中文译文 **

TIDE
风起潮涌



By the end of 2011, there were 61 antitrust civil litigation cases accepted by the Chinese courts since the onset of the Anti-Monopoly Law (AML) in 2008. The vast majority of these related to abuse of dominance and of the 61, 53 have closed – most ending in settlements. These figures, as released by the Supreme People's Court (SPC), reflect that antitrust litigation has been on a steady rise in China over the past few years. Susan Ning, a senior partner and the head of King & Wood Mallesons' Beijing-based international trade, antitrust and competition group, says she has noticed and experienced an increasing number of companies considering employing the AML to protect their interests: "This has become the new battlefield, in particular for companies who feel that their rights and interests have been unduly infringed by more powerful industry leaders." Philip Monaghan, a Hong Kong-based competition specialist at Mayer Brown JSM also observes the same trend. "Even when the AML first came into force, parties immediately started to take the initiative of going to court to enforce the conduct prohibitions in the law. This was a very striking development at the time and I think quite surprising to many," he says.

One hypothesis that is being bandied about by legal practitioners as to why competition courtroom battles are increasing is that of the inactivity of two of the three AML enforcement authorities. Since the AML came into effect, enforcement has been largely confined to the Ministry of Commerce's (MOFCOM) screening of large M&As. Officials at the National Development and Reform Commission (NDRC) and the State Administration for Industry & Commerce (SAIC) have largely stayed on the sidelines. The NDRC concentrates mainly on monopoly pricing issues, while the SAIC enforces other antitrust rules, including those on monopoly agreements. "The comparative lack of institutional enforcement of the relevant behavioural rules has clearly provided an incentive for private action," says Monaghan.

Whatever the impetus, all the lawyers *ALB* spoke with confirm that antitrust litigations are on the up-and-up, and are expected to further swell. "AML litigation is an area of law that is rapidly developing," asserts Fangda Partners' Beijing lawyer, Fang Qi.

NEW REGULATORY UPDATES

On May 3, the SPC issued the Provisions on Several Issues Concerning the Application of the Law in Trials of Civil Dispute Cases Arising from Monopolistic Acts (Judicial Interpretation). The rules came into effect

"IN THE LONG RUN, AS THE PRACTICE MATURES, DEDICATED ANTITRUST LITIGATORS COULD BE REAL ASSETS FOR COMPANIES SEEKING SUCH SERVICES."

SUSAN NING, King & Wood Mallesons

"从长远角度看,随着反垄断司法实践的逐步成熟,专业反垄断诉讼律师对寻求该领域服务的公司而言或将成为真正的资产。"

— 宁宣凤律师,金杜律师事务所

自2008年实施《反垄断法》("《反垄断法》")以来,截至2011年年底,中国法院已受理了61 宗反垄断民事诉讼案件,其中大部分案件与滥用市场支配地位相关,在这61宗诉讼案中,已有53宗结案,其中大部分都以和解结案。最高人民法院("最高院")公布的这些数据反映出近几年来中国反垄断诉讼案件数量正在稳步攀升。金杜律师事务所的反垄断及反不正当竞争业务团队的主管宁宣凤律师说,她注意到也已切实感受到,越来越多的公司正在考虑利用《反垄断法》保护自身权益:"这块业务已成为一个新的战场,对于那些认为自身权益遭到更强势的行业领军者不当侵犯的公司而言更是如此。"美亚博国际法律事务所香港反垄断及反不正当竞争业务专家Philip Monaghan同样注意到了这一趋势。他指出:"即使在《反垄断法》刚出台时,各方便已开始主动向法院申请强制执行反垄断法项下的禁止性规定。这在当时是一个重大发展,我认为许多人对此都颇感惊讶。"

业内有一种普遍假设,反垄断及反不正当竞争方面的诉讼不断增加与三个反垄断执法机构中两个机构的消极不作为有关。自《反垄断法》生效以来,反垄断执法工作主要由负责审查大宗并购交易的商务部("商务部")负责。国家发展和改革委员会("发改委")与国家工商行政管理总局("工商总局")却在很大程度上置身事外。发改委主要关注垄断定价问题,而工商总局则负责执行其他反垄断规则,包括针对垄断协议的反垄断规则。Monaghan认为:"行政机关对相关行为规则执法方面的相对欠缺已明显刺激了私人诉讼的产生。"

无论是什么因素促使反垄断诉讼在不断增加,接受ALB采访的所有律师均认为,反垄断诉讼的热潮正在形成,并将进一步扩大。方达律师事务所北京办公室的Fang Qi律师称:"反垄断诉讼是正在迅速发展的一个司法领域。"

新法速递

5月3日,最高院公布了《关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定》("《司法解释》")。该《司法解释》于6月1日起生效,旨在为解决垄断民事纠纷案件构建一个司法框架。目前,公司或个人均可直接向人民法院提起反垄断诉讼,无须获得行政部门的确认或授权。宁律师称:"《司法解释》清楚地阐明了反垄断私人诉讼中的某些关键性问题,比如:原告地位、司法管辖权、举证责任、证据规则、专家证人、司法程序、民事责任的形式以及诉讼时效。"宁律师认为,该新规则可能

on June 1, and they seek to construct a judicial framework for civil anti-monopoly disputes. Now, companies or individuals may institute antitrust actions directly with the People's Court without recognition or authorisation by administrative departments. "The Judicial Interpretation provides welcome clarifications on some key issues in AML private actions, such as the standing of plaintiffs, jurisdiction, burden of proof, evidentiary rules, expert witness, the judicial process, the form of civil liabilities, and the statute of limitations," says Ning. She outlines that the new law may impact antitrust disputes by: i) Encouraging more consumers or smaller enterprises to file private actions under the AML, as it clarifies that primary courts may also have jurisdiction over civil monopoly cases of the first instance; and ii) By lessening the plaintiffs' burden of proof, which should encourage more private actions.

In relation to the latter, the Judicial Interpretation stipulates that: i) A plaintiff does not bear the burden of proving a horizontal monopoly agreement has anti-competitive effects; ii) A plaintiff can use information publicly released by a defendant as evidence of its dominance in an abuse of dominance action; and iii) The court may have a preliminary finding of market dominance on the basis of market structure and the competition conditions, if the defendants are public utility enterprises or other undertakings that are legally authorised to be in a monopoly position.

The Judicial Interpretation, according to Monaghan, is a "clear signal that the authorities are in favour of encouraging private action, not least because the Supreme People's Court's guidelines seek to make things easier for the plaintiff in a number of respects," he says. Andy Huang, an associate at Hogan Lovells in Beijing, concurs that "given the clearer legal guidance, we expect to see more private enforcement of antitrust law in the coming years". He also points out that since the beginning of this year, the State Council and its departments have released policies to encourage private investment in industries that have long been dominated or monopolised by SOEs, such as energy, transportation,

"(THE JUDICIAL INTERPRETATION IS A) CLEAR SIGNAL THAT THE AUTHORITIES ARE IN FAVOUR OF ENCOURAGING PRIVATE ACTION, NOT LEAST BECAUSE THE SUPREME PEOPLE'S COURT'S GUIDELINES SEEK TO MAKE THINGS EASIER FOR THE PLAINTIFF IN A NUMBER OF RESPECTS."

PHILIP MONAGHAN, Mayer Brown JSM

"[司法解释]清楚地表明,政府开始鼓励私人诉讼,主要原因就是最高院的指引旨在从许多方面为原告提供便利。"

— Philip Monaghan律师,美亚博国际法律事务所

通过以下方式影响垄断民事纠纷案件的解决:1)鼓励更多消费者或小型企业根据《反垄断法》提起私人诉讼,因为根据《司法解释》,基层人民法院也可以管辖第一审垄断民事纠纷案件;以及2)减轻原告的举证责任——这将鼓励更多私人诉讼的产生。就后者而言,《司法解释》规定:1)原告不对横向垄断协议具有排除、限制竞争的效果承担举证责任;2)原告可以以被告对外发布的信息作为证明其具有市场支配地位的证据;且3)被诉垄断行为属于公用企业或者其他依法具有独占地位的经营者滥用市场支配地位的,人民法院可以根据市场结构和竞争状况的具体情况,初步认定被告在相关市场内具有支配地位。

Monaghan认为,《司法解释》"清楚地表明,政府开始鼓励私人诉讼,主要原因就是最高院的指引旨在从许多方面为原告提供便利"。霍金路伟律师事务所北京代表处的黄律师也持同样观点,他说:"由于具备了更清晰的法律指引,我们将会在未来几年中看到更多有关《反垄断法》的私人诉讼案件。"他同时指出,自今年年初起,国务院及其各部委已公布了数项政策,鼓励私人投资那些长期受国有企业支配或垄断的行业,其中包括能源、交通、通信、教育、保险和银行业。他说:"根据《反垄断法》发起的私人诉讼将可能成为打破目前国家控制上述行业局面的日渐有效的方式。"

案件精选

近期,发生了多宗影响巨大的反垄断诉讼案和反垄断调查,表明公司和监管机构正在努力推进反垄断法的实施。比如,去年11月,发改委披露其正在对国有电信运营商中国联通和中国电信涉嫌垄断行为进行调查。这两家电信运营商共占约三分之二市场份额,他们因被指向竞争对手收取高价但没有同时优化网络速度而接受调查。

据路透社11月16日报道,发改委公布其正对一档著名的中国午间电视新闻节目进行调查。这一调查行为在中国这样一个通常由共产党高级官员领导大型国有企业的国家是一项大胆的举措。长久以来,监管机构行事谨慎,一直跟随在已跻身全球最大公司行列同时又与中国最高权力层密切相关的国企身后亦步亦趋,但上述动作向亿万观众显示了监管机构如今坚决

As Henry Chen, a Shanghai-based partner at MWE China Law Offices points out, "one of the most important weapons for an antitrust lawyer is economic and rule of reason analysis."ALB China offers a unique insight into the role of economists for competition practitioners, through a commentary by Professor Bryane Michael, who is currently a visiting fellow at the University of Hong Kong's Centre for Comparative and Public Law. He has previously advised on Anti-competition Law in Russia for the EU, and in the developing world for the Organisation for Economic Co-operation and Development (OECD), and the World Bank since 1995. He has done his doctoral work in Economics from Oxford and Harvard.

ECONOMISTS: A LAWYER'S BEST FRIEND?

BRYANE MICHAEL,
University of Hong Kong

Few lawyers receive training in econometrics and advanced statistics. And why should they? Negotiating contracts, bringing suits against parties who violate the law, and interpreting the way new laws affect Hong Kong's companies do not usually require heavy statistical analysis. Yet, in-house counsel with experience in the U.S. and/or EU knows that statistics provides a key method of helping to detect and file civil actions against the anti-competitive behaviour of commercial rivals. As Professor Rubinfeld of the New York University Law School notes: "To obtain a financial recovery in a private action, the plaintiff must prove three distinct elements: (1) An antitrust violation; (2) Antitrust injury; and (3) Damages – a measure of the extent of the injury." Hong Kong's law firms and in-house counsel will find that economists can help them with each of these points.

Consider the case of a hotel owner in Kowloon wishing to show that other hotels in the area are keeping their prices too low in order to drive him out of business. Without an economist, that owner would need to obtain written proof that these hotel managers had met and come to an agreement. He would need copies of emails or preferably one of the hotel owners to "squeal" on the others in their collusive agreement. With statistics though, the hotel owner's legal counsel could more easily obtain information useful to start litigation. Such information might include correlations between room prices, discounts below estimated marginal costs, and expected losses taken by rival hotels in the area. Such information would certainly convince a judge to order further material investigation.

Three key statistical tests prove to be useful in this kind of litigation. Lead counsel should know about these tests when working with economists on particular competition law-related cases. The hypothesis test (or test of similarity) can show – with a certain level of certainty – that one hotel owner's prices, occupancy rates and other factors – are not like the other hotel owners'. For example, an economist can tell you with a 99.999 percent level of probability that hotels in a district advertise prices below their expected marginal costs. Economic methods can actually remove the distorting effects of factors like seasonal demand, how well the stock market is doing, the prices of inputs like labour, and so forth. The regression analysis can tell legal counsel how much the prices, quantity offered, amount of innovation, product quality, and so forth has changed in response to changes in factors like the number of other hotels in the area, the size of these hotels (the amount of assets they hold), and so forth. Such regression analysis can show (with a certain level of confidence) that the profits of our hypothetical hotel owner have changed because of the actions of the other hotel owners. Economists can also do cost-benefit analysis – showing the profits our hypothetical hotel owner has lost because of collusion by neighbouring rival hotels. Such analysis can "take out" the effects of a weakening economy, changes in hotel regulations, and other factors.

Economists can provide law firms and in-house counsel with information useful in three venues. They detect anti-competitive behaviour – showing with a level of probability – when rivals are engaged in anti-competitive behaviour. They show such behaviour – which can be useful when asking regulators and judges for more in-depth investigatory work. They prove (in some jurisdictions) which anti-competitive behaviour occurs. We cannot directly observe secret meetings in which trading partners agree to manipulate prices, quantities, and so forth. But we can observe their effects. In some instances, a 99.999999 percent statistical probability of engaging in anti-competitive behaviour is enough for regulators or judges to provide injunctive relief, assess fines, and provide other remedies. In this way, an economist can be a lawyer's best friend while enforcing Hong Kong's new Competition Law.

telecommunications, education, insurance, and banking. "Private enforcement of the AML may be an increasingly effective means to break up the existing state control in those sectors," he says.

KEY CASES

Recently, there have been a handful of high-profile antitrust cases and investigations showcasing companies and regulatory agencies pushing AML boundaries. For example, in November last year, the NDRC revealed that it was investigating alleged monopolistic activities by state-controlled telecom operators China Unicom and China Telecom. The two, which have roughly two-thirds market share, were being probed for supposedly charging rivals higher fees for broadband

打击垄断行为的决心。美国普衡律师事务所北京办事处合伙人David Livdahl在接受路透社采访时说：“中国政府希望通过公布这一案件证明他们打击垄断行为的决心。此案涉及的罚款占到企业年营业收入10%之多。”

该项调查与《反垄断法》第17.6条相关。该条规定，禁止具有市场支配地位的经营者在没有正当理由的情况下，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇。2011年12月2日，中国电信向发改委提交了一份整改方案，并申请中止调查。但是，由于监管机构未表示其是否接受申请，因此发改委的调查可能仍在进行中。

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正如上海元达律师事务所上海办事处合伙人陈立彤律师所指出的那样，“反垄断律师最重要的武器之一便是经济分析和合理规则分析。”下面，将就经济学家对反垄断及反不正当竞争业务从业人员的影响问题，ALB中国与读者分享一下香港大学比较法及公共研究中心的Bryane Michael在这方面的独到见解。Bryane自1995年起为欧盟提供俄罗斯反不正当竞争法方面的咨询，并为经合组织和世界银行提供发展中国家反不正当竞争法方面的咨询。他在牛津和哈佛的完成了经济学博士课程。

经济学家，律师最好的朋友？

接受过经济学和高级统计学方面专业训练的律师可谓凤毛麟角。那么律师为什么需要这方面的专业知识呢？在合同谈判，针对违法的当事方提起诉讼以及解释新法对香港公司的影响时，并不需要大量统计分析。但是，拥有美国和/或欧盟执业经验的公司法务都知道，统计学是帮助律师发现并提起针对商业竞争对手的不正当竞争行为民事诉讼的关键方法。纽约大学法学院的Rubinfeld教授指出：“为使当事人从私人诉讼中获得经济赔偿，原告必须证明以下三个要件：(1)被告违反了反垄断法；(2)违法行为造成了损害；以及(3)损害赔偿金，即量化损害程度。”香港的律师和公司法务会发现，经济学家会帮助他们证明上述三个要件。

设想有一名九龙的酒店业主希望证明该地区其他酒店试图以过低的价格将他排挤出当地酒店业。如果没有经济学家的帮助，该业主便需要取得书面证据，证明其他酒店已达成具有上述目的的协议。九龙的这名酒店业主必须取得相关电子邮件，或最好有一名其他酒店业主“告发”该共谋协议中的其他当事方。但通过统计学分析，该酒店业主的律师便可更容易地取得有助于诉讼的信息。这些信息可能包括房价、低于预计边际成本的折扣和该区域酒店竞争对手预期承担的损失之间的关系。这些信息足以说服法官下令对此进一步实质性调查。

有三项关键性的统计测试证明对此类诉讼有所帮助。牵头律师在与竞争法相关的特定案件与经济学家合作时，必须对这些测试有所了解。假定测试（或相似性测试）可以比较确定地证明一家酒店的房价、入住率及其他要素与其他酒店的房价、入住率及其他要素有所不同。比如：经济学家能以99.999%的准确率告诉您，某地区酒店通过广告宣传的价格低于其预计边际成本。经济学方法可切实消除诸如以下因素的偏差影响：季节性需求、股市表现和劳动力等成本。回归分析可以告诉律师（该地区的）房价、房间数量、创新度、产品质量等因素是如何随着该区域其他酒店的数量及规模（该酒店所持有的资产数量）等因素的变化而变化的。这些回归分析可以比较有把握地证明我们所设想的那个酒店业主的利润已由于其他酒店业主的行为发生变化。经济学家还能够进行成本效益分析，以显示我们所设想的那个酒店业主已由于周边酒店竞争对手的共谋行为而遭受损失。这些分析“剔除了”经济衰退、酒店行业法律法规的变更及其他因素的影响。

经济学家可在上述三个方面向律师和公司法务提供有用的信息。经济学家在竞争对手参与不正当竞争行为时能发现该不正当竞争行为，并证明其发生的概率。经济学家指出存在不正当竞争行为，可有助于要求监管机构和法官进行更多深入调查。经济学家（在某些司法管辖区）证明发生了哪些不正当竞争行为。我们无法直接目击交易共谋各方达成价格和数量操纵协议的秘密会议。但是，我们可以觉察出由此产生的结果。在某些情况下，如果某当事方有99.999999%的统计概率参与不正当竞争行为，便足以使监管机构或法官签发针对该方的禁令救济，对其施以罚款并向原告提供其他救济。由此可见，在执行香港新的《竞争法》过程中，经济学家可以是律师的挚友。

access without optimising network speed.

Reuters reported on Nov. 16 that the NDRC disclosed its investigation on a popular Chinese noon television news show. It was a bold step in a country where senior Communist Party officials run the biggest SOEs. The move, broadcast to an audience of tens of millions, signaled a new assertiveness by regulators that had largely remained in the shadows, treading gingerly around state enterprises that are among the biggest companies in the world, and connected to China's highest echelons of power. "By announcing this case so publicly, the PRC regulators are showing that they are serious. We are talking about a fine worth 10 percent of annual business revenues," said David Livdahl, a Beijing-based partner at

该项调查的重要意义在于，它表明《反垄断法》同样适用于国有企业。该案发生之前，法律从业人员和学者之间一直存在着有关国有企业是否免于遵守反垄断和反不公平竞争法律的争论，因为国有企业与政府关系太过密切。但是，发改委对中国联通和中国电信果断实施调查的行为明确表明，国有企业也适用《反垄断法》。Monaghan说："《司法解释》，就其使得公用企业或者其他依法具有独占地位的经营者具有支配地位这一假设成为可能而言，也使还在进行的有关反垄断法是否适用于国有企业的任何争论暂告一个段落。"

另一宗展现中国反不正当竞争现状的重大复

REUTERS/Bobby Yip

Paul Hastings to Reuters.

The investigation concerned with Article 17.6 of the AML says that enterprises with a dominant market position may not apply without justification, differential prices or other discriminatory transaction terms with their trading parties. On Dec.2, 2011, China Telecom submitted a correction plan to the NDRC, and applied for a suspension of the investigation. However, the NDRC investigation may still be ongoing since the regulator has not indicated whether it has accepted the application.

The significance of this investigation is that it revealed the AML applies to SOEs. Until this case, there was debate among legal practitioners and scholars whether SOEs were exempted from the competition rules – because they were so close to the government. However, since the NDRC bared its teeth, and went after China Unicom and China Telecom, it was evident that the SOEs were under the jurisdiction of the AML. "The Judicial Interpretation also puts to rest any remaining controversy surrounding the application of the AML to SOEs in so far as it provides for the possibility of a presumption of dominance in the case of public utilities and companies with a statutory monopoly," says Monaghan.

Another prominent and complex case promising to sculpt China's competition landscape is that of Qihoo 360 v Tencent. On April 18, in the Guangdong High People's Court, Qihoo claimed that Tencent Holdings - China's largest internet company - abused the dominance of its messenger product QQ in the instant communications market by forcing consumers to choose between QQ and Qihoo products in November 2010, and bundling QQ safety software with QQ IM software without valid reasons. The plaintiff filed the current case against the defendant under Article 17.6 of the AML, and is seeking 150 million yuan ($23.8 million) as compensation. "In previous abuse of dominance actions, the courts almost always ruled against the plaintiffs on the ground that they failed to establish that the defendants were

杂案件便是奇虎360诉腾讯案。4月18日,奇虎向广东省高级人民法院起诉,控告中国最大的互联网公司腾讯控股有限公司滥用其QQ即时通讯软件(QQ)在即时通讯工具市场中的支配地位,于2010年11月强迫消费者在QQ和奇虎产品中作出选择,并在QQ即时通讯软件中捆绑搭售QQ安全软件,且未提供合理理由。原告根据《反垄断法》第17条起诉被告,请求法院判令被告赔偿原告人民币1.5亿元(约合2380万美元)。"在以往有关滥用市场支配地位的诉讼中,法院往往以原告未能证明被告具有市场支配地位为由,作出不利于原告的判决,"在此宗标志性案件中担任奇虎代理律师的宁律师说。"本案中,我的团队帮助奇虎确定各类数据来源,而奇虎也聘请了经济学家进行经济分析,以确定相关市场以及腾讯具有市场支配地位的事实。"法院尚未对此案件作出判决,许多业内观察人士希望法院尽快作出判决。北京正见永申律师事务所合伙人何菁律师对许多律师的观点作出了如下总结:"我们希望此案的结果可以为未来中国的反垄断法司法实践提供重要先例和程序参考。在判决中将问题明朗化将有助于完善司法体制并为未来修订《反垄断法》提供有益帮助。"

瑞邦诉强生案是首宗对外界公布的与纵向协议相关的反垄断案件。在该案中,作为强生手术产品的北京经销商,瑞邦永和贸易有限公司指控强生设定对第三方的最低转售价格。法院以原告未能证明强生拥有市场支

The Chinese translation of this story was prepared by Synmax Translation ** 鑫马翻译提供中文译文 **

"THERE ARE MANY SPECIAL TERMS AND CONCEPTS AS ANTI-MONOPOLY LAW IS A SPECIAL LEGAL PRACTICE AREA."

HENRY CHEN, MWE China Law Offices

dominant," says Ning, who represented Qihoo in this landmark matter. "In this case, my team helped Qihoo to identify various sources of data - Qihoo also engaged economists to develop economic analysis - to establish the relevant market, and that Tencent is dominant." No ruling has been handed down yet by the court, and many industry watchers are hoping for a judgment. He Jing, a partner at ZY Partners sums up what many lawyers expressed: "We hope the outcome of the case could leave a useful example, procedurally and practically, to significantly enrich China's anti-monopoly legal practices. Making the problems clear in a judgment would be beneficial for the improvement of the judicial system, and for future amendments to the AML."

The Ruibang v Johnson & Johnson matter is the first published AML case relating to the vertical agreement. Here, Johnson & Johnson's (J&J) distributor of surgical products in Beijing, Ruibang Yonghe Technology and Trade accused J&J of fixing the minimum resale price to third parties. The plaintiff's vertical agreement claim was denied on the ground that it failed to prove that J&J had market power, and the resale price maintenance is anti-competitive. "This relatively high requirement of standard of proof in relation to vertical agreements appears to echo the SPC's Judicial Interpretation in this regard, even though the decision was rendered before the Judicial Interpretation was officially enacted," notes Ning.

SURGING AHEAD

There truly is a palpable sense among Chinese competition practitioners that litigations in their field will increase. As the Ruibang v J&J case sets precedent as the first published monopoly agreement case, lawyers believe that they will see monopoly agreement actions will rise in the future. "We will see diversified types of antitrust litigation, including cases where the government agencies are challenged before the courts for administrative monopoly or antitrust enforcement decisions," says Huang of Hogan Lovells. Ning highlights that most current actions are tort actions, and because the Judicial Interpretation has specified that companies can file AML private actions to determine the validity of a contract or contractual clause, she expects "this could be employed by companies who feel they are bound by anti-competitive agreements".

"To date, the success rate of plaintiffs in AML private action cases has been very low. Things will start to get interesting however when companies with significant resources behind them start using the AML provisions as a sword in private action," says Monaghan. "Giants like Baidu or China Mobile, they've been on the receiving end of cases to date, but once companies with comparable or at least significant resources begin to take cases to court, plaintiff success rates can be expected to improve markedly."

"由于反垄断法属于一个特殊的法律实务领域，因此存在许多特别条款和概念。"

— 陈立彤律师，上海元达律师事务所

配地位，亦未能证明维持转售价格抑制竞争为理由，驳回了原告关于纵向协议的请求。宁律师认为："虽然法院是在《司法解释》正式出台前作出这一决定的，但这一对纵向协议的较高证明标准在这方面看似是与最高院的《司法解释》相呼应的。"

破浪前行

中国反垄断及反不正当竞争业务从业者均已切实感觉到这一领域的诉讼案件将不断增多。作为首宗对外界公布的有关垄断协议的案件，瑞邦诉强生案为垄断协议案提供了先例，而律师们也相信未来将发生更多垄断协议诉讼案。霍金路伟律师事务所的黄律师评论道："我们会看到各类反垄断诉讼案，其中包括政府机关因其行政垄断或反垄断执法决定而在法院被起诉的案件。"宁律师强调，目前大部分诉讼是侵权诉讼，并且由于《司法解释》已明确规定公司可根据反垄断法提起私人诉讼以确定合同或合同条款的有效性，因此她希望"认为自己受不正当竞争协议约束的公司可利用该规定"。

Monaghan表示："截至目前，在反垄断私人诉讼案中，原告胜诉的比例仍相当低。"但是，当实力雄厚的公司开始应用《反垄断法》规定作为其私人诉讼的利剑时，事情将变得有趣起来。虽然诸如百度或中国移动等行业巨头至今仍是诉讼的被告方，一旦实力上与之旗鼓相当或拥有充沛资源的公司开始向法院提起反垄断诉讼，可以期待原告的胜诉率会明显提高。

专事反垄断业务者的机遇

随着反垄断和反不正当竞争纠纷日益增多，中国的法律市场又将如何发展？反垄断尚属一个较新的业务领域，《反垄断法》仅实施了三年，而诉讼却相对较为成熟。律师们认为，竞争法是十分专业、复杂并具有较高技术性的法律。宁律师认为："竞争法所采用的方法十分独特，与任何其他部门法均有所不同。"上海元达律师事务所上海办事处合伙人陈立彤律师指出，反垄断诉讼律师必须同时具备诉讼和反垄断法方面的专业能力。他说："由于反垄断法属于一个特殊的法律实务领域，因此存在许多特别条款和概念。"

反垄断及反不正当竞争业务通常分为两类，即合并申报（监管方面）业务和诉讼业务。黄律师说："从事这方面业务的律师往往需要具备多个不同领域的法律专业知识，才能服务好客户。"律师们认为，律师事务所通常将合并申报和反垄断诉讼分别让专门的反垄断/反不正当竞争业务团队和诉讼业务团队承办。反垄断诉讼要求竞争业务专家同时具备技术和监管方面的专业知识以及诉讼律师的战略性思维模式。因此，将两个业务领域结合在一起，由两个领域的律师共同处理同一案件是目前最常见的模式。在反垄断诉讼中，律师必须具备特定的行业知识、对商业和

OPPORTUNITY FOR SPECIALISATION

So with competition disputes seemingly on an upward trajectory, how is this shaping the legal market in China? Antitrust is still a relatively new practice area –with the law being only a tender three-years-old – while litigation is quite mature in comparison. Lawyers comment that competition law is highly specialised, complex, and technical. "Its methodologies are unique, unlike any other practice," affirms Ning. Henry Chen, a Shanghai-based partner at MWE China Law Offices notes that antitrust litigation lawyers require specialties in both litigation and antitrust. "There are many special terms and concepts as Anti-Monopoly Law is a special legal practice area," he says.

Competition practices are typically split into two – merger filings (the regulatory aspect) and litigation. "Quite often, they require separate sets of legal expertise to serve the clients," says Huang. According to the lawyers, law firms tend to allocate merger filings and antitrust litigation work to specialised competition and litigation teams, respectively. Antitrust litigations would require the technical and regulatory expertise of a competition specialist, and the strategic thinking of a litigator. So for the time being, it appears that the most common approach is to marry the two practice areas together, with specialists from each camp working side by side on a case. Antitrust litigations demand lawyers' specific industry knowledge, business and economic sense, problem-solving abilities, and knowledge and understanding of the regimes, and precedents in other major jurisdictions. "These knowledge and skills are not readily found in any litigator," says Ning. "For these reasons, my experience is that as the practice (antitrust litigation) is still at a fledgling stage, in order to find the best solutions, it is more efficient to combine the expertise of antitrust specialists with that of the IP litigators."

In China, antitrust litigations are heard by the IP courts. According to Ning, because Antitrust Law is closely related to anti-unfair competition law and IP rights issues, the SPC decided that antitrust cases should be heard by the IP courts. Other sources believe that the IP court assignation partially had to do with sufficient resourcing. Monaghan of Mayer Brown JSM suggests that the technicalities and complexities of both competition law and IP law are similar, thus having the IP courts hear antitrust cases made sense: "When choosing the IP Tribunals, the SPC was likely motivated by the somewhat technical nature of antitrust law and the fact that it requires an analytical approach which arguably IP judges would be well placed to provide. Of course, there is the fact too that these two areas of law are now generally recognised as pursuing the same fundamental goals of enhancing consumer welfare and promoting innovation."

Ning provides an example of how the King & Wood Mallesons team cooperated on the Qihoo 360 v Tencent case: "It was handled by our attorneys from both the antitrust and the IP litigation groups. The antitrust lawyers were mainly responsible for developing all possible claims and arguments, very often digging into and referring to precedents from other jurisdictions. The litigators, based on their experiences, chimed in to advise on the most practical strategy, from perspectives such as the readiness and availability of evidence, and the level of receptiveness of judges."

The development of antitrust litigation as a specialised practice area for law firms is slowly evolving.But some feel it is still a few years away. "The market is still not large enough to support this specialty practice," says Huang. He does acknowledge, however, that antitrust litigation is definitely one of the growth areas of legal practice. Ning says: "In the long run, as the practice matures, dedicated antitrust litigators could be real assets for companies seeking such services."

ROAD AHEAD

Based on the quietness of activity from the SAIC and NDRC, and the issuance of the Judicial Interpretation by the SPC, it is fair to say that antitrust litigations are on the rise, and are encouraged by the government.

In a recent article published by Clifford Chance, the firm's Beijing-based lawyers say: "It remains to be seen whether the new rules will increase the tide of private litigation in China. This seems to be the SPC's intent with its focus on the rules of evidence, and the apparent relaxation of the evidentiary burden on plaintiffs." The forecast is bright for competition specialists in China who are taking on more and more litigations. Already, we are witnessing the first troupe of dedicated antitrust litigators carving out their niche in a developing market. ALB

经济的敏感、解决问题的能力，并了解其他主要司法管辖区的体制和程序。宁律师说："诉讼律师往往并不直接具备这些知识和技能。因此，我的经验是，由于[反垄断诉讼]业务尚处于发展初期，所以为寻求最佳解决方案，将反垄断法律问题专家的专业知识与知识产权诉讼律师的专业知识结合起来是一种更为有效的方式。"

在中国，反垄断诉讼由知识产权庭审理。据宁律师说，由于《反垄断法》与《反不正当竞争法》和知识产权问题紧密相关，因此最高院决定应由知识产权庭审理反垄断案件。也有其他人士认为，让知识产权庭来审理反垄断案件的部分原因是知识产权庭这方面的资源比较充足。美亚博律师事务所的Monaghan认为，竞争法和知识产权法在技术性及复杂程度方面有相似之处，因此由知识产权庭审理反垄断案件是合理的。他说："反垄断法具有相当的技术性，也需要用到审理知识产权案件的法官特别擅长的分析方法，这些可能是促使最高院选择知识产权庭来审理反垄断案件的原因。当然，人们现在通常认为这两个部门法追求的是同一个基本目标，即增强消费者权益保护以及促进创新。"

宁律师以金杜团队如何相互协作承办奇虎诉腾讯案为实例，说到："该案由本所反垄断和知识产权诉讼团队的律师共同承办。反垄断律师主要负责准备所有可能的诉讼主张和论据，这项工作经常通过研究和借鉴其他司法管辖区的案例来完成。诉讼律师则基于其经验，从是否已备妥和获得证据以及法官对证据的采信度等角度出发，提出最具实际操作意义的诉讼战略。"

反垄断诉讼正渐渐成为律师事务所的专门业务领域，但一些人觉得这一过程仍需数年方可完成。黄律师称："目前的市场规模尚不足以支撑这一专门的业务领域。"但是，他承认，反垄断诉讼确实是一块正在发展中的法律业务。宁律师称："从长远角度看，随着反垄断司法实践的逐步成熟，专业反垄断诉讼律师对寻求该领域服务的公司而言或将成为真正的资产。"

前路漫漫

由于工商总局和发改委在反垄断事务方面鲜有作为，加之最高院发布的《司法解释》，我们有理由认为反垄断诉讼的浪潮正在形成，政府也对此持鼓励态度。

在近期高伟绅律师事务所发表的一篇文章中，该所北京办事处的一名律师称："《司法解释》的颁布是否将涌动中国的私人诉讼浪潮仍有待观察。而最高院的目的似乎正在于此，其关注的焦点在于证据规则以及显著减轻原告的举证责任。"这些给正在承办越来越多诉讼案件的中国竞争业务方面的专业人士带来光明的前景。我们已经看到，首批专注于反垄断诉讼业务的律师正在这个不断发展的市场中创造属于自己的独特商机。ALB