

Private Antitrust Enforcement Review of Recent Cases on Abuse of Market Dominance

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1. Background

The Anti-Monopoly Law (the “AML”) of the People’s Republic of China (the “PRC”) has entered into force for more than one and a half years. Dubbed China’s “economic constitution”, the AML is the country’s first comprehensive competition law. After nearly 13 years of preparation and discussion, the AML was finally passed on 30 August 2007, and became effective on 1 August 2008. China’s antitrust enforcement agencies are showing their determinations and authorities to supervise and investigate monopoly behaviors. The State Administration for Industry and Commerce (the “SAIC”) and the National Development and Reform Commission (the “NDRC”), are responsible for the public enforcement against the monopoly agreement and abuse of market dominance. Local bureaus of NDRC in Guangxi province have taken the first action against a cartel among local rice noodle producers in early 2010. Thirty-three rice noodle producers collaborated and jointly increased the price of rice noodle in the local market. The concerted conduct was investigated by local bureaus of NDRC and was found as constituting a price cartel². However, at the time of writing, there is no any other public information on any investigation against cartel members or any market dominant company in addition to the above rice noodle case. The SAIC and NDRC have released a series of draft implementing regulations to seek public comments in 2009. Apart from two procedure rules with respect to AML enforcement³, issued by the SAIC on 5 June 2009, currently the SAIC and NDRC are still revising and updating the draft regulations⁴. Meanwhile, the Supreme People’s Court is also preparing a judicial interpretation on hearing and handling procedures with respect to civil antitrust litigations⁵. Despite lack of sufficient rules (either procedural or substantive) and established decisions as mentioned above, several private actions on abuse of dominant market positions were in the limelight last year. According to public reports, by the end of 2009, the PRC courts have rendered three judgments for antitrust cases. Coincidentally, all three plaintiffs failed in these cases (one case pending appeal) against giant companies. The court decisions provide certain guidance on how the AML will be enforced in the judicial system and will have significant impact on the current antitrust practice and the draft implementing rules. In this article, the author will summarize key points of these cases and analyze the court’s views of the crucial concepts under the AML such as “dominant market position” and “abuse of dominant market position”. The author will also discuss some procedural issues, e.g., qualifications of the plaintiff and burden of proof.

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² See: http://www.ndrc.gov.cn/xwfb/t20100330_338105.htm (in Chinese).

³ One is Procedural Rules for Administration for Industry and Commerce to Investigate and Dispose of Cases Involving Monopoly Agreement and Abuse of Dominant Market Position; the other is Procedural Rules of Administration for Industry and Commerce on Prohibition against the Abuse of Administrative Powers to Eliminate or Restrict Competition. See: http://www.saic.gov.cn/zcfc/xzgzjgfwj/fgs/200908/t20090805_69632.html (in Chinese).

⁴ The draft regulations are available on the website of the SAIC (www.saic.gov.cn) and NDRC (www.ndrc.gov.cn).

⁵ See: *Intellectual Property Protection by Chinese Courts in 2009* III.(1), the Supreme People’s Court of the PRC, available at http://220.181.27.220:8080/pub/zscq/znss/201004/t20100426_4545.html

2. Cases Summary

i. Shusheng v. Shanda⁶

Beijing Shusheng Electronic Technique Co., Ltd. (“Shusheng”) is an online Internet publisher. Shanghai Shanda Internet Development Co., Ltd. (“Shanda”) is listed on Nasdaq and one of the largest Internet companies in China in terms of market value. Shusheng commissioned two authors to write a sequel to a novel series originally published on www.qidian.com, a website operated by Shanda. However, the authors of the sequel later changed their mind and refused to write the sequel. Shusheng alleged that Shanda had abused its dominant market position in Internet literature market to intimidate the authors into pulling out of the sequel. The action was filed with Shanghai No. 1 Intermediate People’s Court in April 2009. The court of first instance ruled against Shusheng on October 23, 2009. Then Shusheng appealed to Shanghai Higher People’s Court which dismissed the appeal on December 25, 2009.

ii. Renren v. Baidu⁷

Tangshan Renren Information Service Co., Ltd. (“Renren”) is an operator of a medical information website. Baidu Online Network Technology (Beijing) Co., Ltd. (“Baidu”) operates the largest Chinese online search portal. Renren claimed that the number of page views of its website had significantly dropped due to Baidu’s manipulation since it reduced expense on Baidu’s paid listing. Therefore, Renren filed an action on the ground that Baidu abused its dominant market position by deliberately blocking Renren’s website in the search results. The action was filed with Beijing No. 1 Intermediate People’s Court on December 25, 2008 and the court rendered a judgment and dismissed the action on December 28, 2009. Renren appealed to Beijing Higher People’s Court, the trial is still in process.

iii. Li v. Beijing Netcom⁸

Li Fangping (“Li”) is a user of the fixed-line telephone service provided by the Beijing branch of China Netcom (Group) Co., Ltd., (“Beijing Netcom”), one of the three major telecommunications companies in China. Li claimed that he was unable to obtain the post-paid telephone service since he had no Beijing *Hukou* (*Hukou* is an official household registration which officially records and identifies a person as a resident of a geographic area within China containing information such as the name of the person, family address, date of birth, and the names of family members.), while such service was available to customers with Beijing *Hukou*. Li argued that Beijing Netcom had treated its customers discriminatorily based on its dominant market position, thereby constituting an abuse. The action was filed with Beijing No. 2 Intermediate People’s Court on August 1, 2008, and a decision, made on December 18, 2009, dismissed the action. So far no further information is available on Li’s appeal.

⁶ Civil Judgment (2009) Hu Gao Min San (Zhi) Zhong Zi No.135, Shanghai Higher People’s Court.

⁷ Civil Judgment (2009) Yi Zhong Min Chu Zi 845, Beijing No.1 Intermediate People’s court (available at http://blog.sina.com.cn/s/blog_4730054c0100ghhs.html); see press news at <http://bj1zy.chinacourt.org/public/detail.php?id=675> (in Chinese).

⁸ Civil Judgement (2008) Er Zhong Min Chu Zi No.17385, Beijing No.2 Intermediate People’s Court.

3. Key Points and Implications of the Cases

i. Qualifications of Plaintiffs

In the present cases, the plaintiffs include costumers as well as a competitor of the defendants. In *Shusheng v. Shanda* case, Shusheng is a qualified plaintiff launching a civil lawsuit against its competitor (Shanda), while in cases of *Renren v. Baidu* and *Li v. Beijing Netcom*, individual consumer and corporate customer are plaintiffs claiming damages against their service providers.

The AML only contains one article (Article 50) in relation to the civil litigation which implies that any person suffering losses from the monopoly activity is eligible to bring a lawsuit against such anti-competitive behavior. Before these cases, some commentators had questioned this clause and suggested setting certain restrictions or pre-conditions for acceptance of civil antitrust cases, for example, only cases followed by a decision of infringement of the AML by the anti-monopoly agencies can be accepted⁹. Acceptance of the present cases implies that there should be no additional requirement on qualifications of the plaintiffs other than the basic criteria provided under the general civil procedure rules stipulated in the PRC Civil Procedure Law.

Another notable point is that in *Li v. Beijing Netcom* case, the court ruled that a customer claiming damages based on infringement of the AML of a company holding a dominant market position is a qualified plaintiff. According to the court, such ruling was made on the basis of Article 1 of the AML, which defines the purpose of the AML is to “prevent and deter monopoly conducts, ensure fair market competition, increase economic operation efficiency, protect consumer interests and social public interest, and facilitate the healthy development of the socialist market economy”. This further indicates that an indirect purchaser of the product might also initiate a lawsuit against the producer as well as the direct purchaser.

ii. Burden of Proof

Under the PRC Civil Procedure Law, the burden of proof is generally upon the party who claims. Normally, the plaintiff shall bear the burden of proof for its alleged facts and claims while the defendant shall bear the relevant burden of proof if the defendant denies the plaintiff's allegation. The claims will be rejected if the plaintiff cannot present sufficient evidence supporting its allegation. However, in certain exceptional circumstances, the principle of “the reversed burden of proof” is applicable. This means, the defendant rather than the plaintiff has the obligation to provide evidence which can overturn the plaintiff's allegation. Such exceptional cases include damages action arising from the environmental pollution, tort action against the manufacturer of the defective product, etc. However, there are no rules or judicial interpretation as to whether the civil antitrust litigation shall apply the special rules concerning the burden of proof.

The decisions of current cases make it clear that the plaintiff of antitrust cases shall comply with the normal civil procedure rules, i.e. the burden of proof is upon the plaintiff. In the *Renren v. Baidu* case, the court concluded that Renren shall provide evidence that Baidu holds a dominant market position. Similarly, the plaintiff in the other two cases were also required to prove key facts such as the scope of relevant markets, market share of the defendants in such markets, and anti-competitive behaviors of the defendants.

⁹See Chen Jianxun, *Observation on Certain Issues concerning Civil Antitrust Litigations Lodged by Consumers*, <http://51zy.cn/548064399.html> (in Chinese)

From the judgments of the present cases, the courts seem to adopt strict rules concerning effectiveness and merit of the evidence. For example, the plaintiffs were required to provide the court with objective and comprehensive evidence to prove the dominant position of the defendants. The court ruled in *Renren v. Baidu* case that media reports and Baidu's own report claiming Baidu has the largest share in China's online search market were not sufficient, since no calculation method and supporting statistics were provided. Actually, the current rules favoring defendants were made primarily on the ground that the plaintiffs failed to provide sufficient and objective evidence to prove defendants' dominant positions even these companies claimed themselves having over 50% market share.

Since much of the key evidence necessary for proving antitrust damages is usually held by the defendant or by third parties, it is often unknown in sufficient detail to the plaintiff. The plaintiffs, particularly individuals and small-medium enterprises who are the victims of the breach of competition law by big-name offenders, usually have limited ability to acquire information of the market, and other key evidence. Without improvement of victim's access to relevant evidence, the current practice of “burden of proof” may act as a disincentive to stand-alone antitrust litigations.

iii. Substantive Review of Facts

The courts basically followed the same method in finding the key facts in each of the three cases, i.e. whether the abuse of dominant market position exists. The courts' analyses can be divided into the following three steps: (1) identification of the relevant market concerning the dispute; (2) identification of a dominant position in the concerned relevant market; and (3) identification of the abusive behavior.

(1) Identification of a relevant market

In identifying a relevant market, the decision for *Li v. Beijing Netcom* expressly indicated that the court followed the “Guidelines of the Anti-Monopoly Committee of the State Council on Defining Relevant Markets” (“Market Defining Guidelines”) issued by the Anti-monopoly Commission under the State Council. Without specific reference, the Market Defining Guidelines were also applied in *Renren v. Baidu* case and *Shusheng v. Shanda* case.

In *Li v. Beijing Netcom*, the court stated that according to the guidelines, a relevant market shall mean the product scope or geographical scope within which an operator participates in competition during a certain period of time with respect to a specific product or service. The court further pointed out that from the consumers' point of view, higher substitutability between products gives rise to intense competition, thus, it is more likely that such products fall within the same relevant market. The court's view of market definition is in line with the current practice adopted by the Ministry of Commerce when it reviews merger control cases.

(2) Identification of dominant market positions

In *Shusheng v. Shanda* case, the court clarified that identification of a market dominant position of Shanda shall be supported by factors showing that Shanda was capable of exercising market influence. The factors proving market dominance may include a higher market share and pricing power. The plaintiff shall also prove authenticity and objectivity of the factors leading to market dominance. In this case, the court ruled that the promotional materials regarding Shanda's market share, even from the Shanda, are not convincing evidence to conclude that Shanda holds a dominant position.

In *Renren v. Baidu* case, the court took a similar approach. The court expressly indicated that when making presumptions of undertakings' dominant market positions according to Article 19 of the AML, the plaintiff shall provide sufficient evidence to support calculation or testifying methods of the defendant's market share. The plaintiff shall provide the court with specific calculation basis and sources of fundamental statistics to ensure scientific and objective identification of the market share.

(3) Identification of abuse of dominance

In accordance with the results of all cases, the most crucial criteria in identifying abuse of dominant market position is whether the defendants' conducts have "justifiable causes" as stipulated in Article 17 of the AML. If the defendant's conducts have justifiable causes and do not result in any damage of market competition order, such conducts shall not be identified as abusive even if the defendant holds a market dominant position.

In all three cases, the defendants argued that they have appropriate reasons to take the restrictive measures against the plaintiffs. In *Renren v. Baidu* case, Baidu stated that it intentionally reduced Renren's listing order in the search results in order to filter false page views made by Renren through the so-called "junk links". Baidu insisted that by doing so it intended to safeguard objective search results for Internet users. The court found for Baidu and concluded that Baidu's punitive measures against Renren have legitimate reasons. Likewise, in cases of *Shusheng v. Shanda* and *Li v. Beijing Netcom*, the courts also recognized defendants' explanations of "justifiable reason". In particular, Beijing Netcom argued that the "pre-paid" and "post-paid" telephone services were made available to different customers (the former for people without Beijing resident permits and the latter only for Beijing resident permit holders or non-resident permit holders with guarantee) for the purpose of maintaining a normal operation to prevent any potential credit risks associated with people without official Beijing household registration.

It seems that the scope of "justifiable causes" has no specific limit, even "control of credit risks" can be regarded as a justifiable reason. It is obvious that the courts have extensive discretionary power over identification of justifiable causes. Due to lack of detailed criteria under existing laws and established precedents, whether a reason is justifiable or not should be assessed on a case-by-case basis.

4. Observation and Conclusion

These cases are the first batch of civil antitrust litigations which have been heard and decided by the courts. Although all the plaintiffs failed to prove existence of defendants' dominant market positions and thus obtained unfavorable judgments, such pioneering cases have put to test the AML and efficiency of the juridical system on private enforcement of the AML. The courts' decisions clarified certain procedural issues such as qualifications of plaintiffs and burden of proof as discussed above. Also, the courts' decisions demonstrate that the enforcement approach taken by judicial bodies is generally consistent with the current practice of the anti-monopoly enforcement agencies. On the one hand, due to lack of detailed rules and precedents, the courts show a cautious and reluctant attitude in identifying the dominant market position. On the other hand, the court is innovative and flexible in dealing with certain practical issues, such as determination of "justifiable reasons" of restrictive measures imposed by the alleged dominant market player.

According to these decisions, it would be time-consuming and even costly for the plaintiff to present a successful stand-alone civil action against the competition infringer. Unlike in some western jurisdictions where discovery or disclosure process is available, under China's current judicial system, the individuals or small or medium-sized companies have no sufficient sources to collect evidence and thus may face great uncertainty in proving anti-competitive behaviors of the completion law violators without a pre-decision of such infringement by an anti-monopoly enforcement agency. Therefore, it would be logical that the follow-on antitrust cases might be more common in the future should there be any competition infringement findings rendered by the anti-monopoly enforcement agencies.

The court's practice might also influence the development of public enforcement of the competition law. The draft implementing rules of the SAIC and the NDRC regulating anti-monopoly agreements and abuse of market dominance are expected to be finalized and published in 2010. Also, the judicial interpretation on civil antitrust litigation is reportedly under discussion and may also be adopted soon. Taking all these developments together, we would expect a more efficient and transparent civil antitrust regime in the near future.