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## I. INTRODUCTION

Since the introduction of the Anti-Monopoly Law ("AML") in 2008 outside observers and investors in China have been carefully studying its provisions and monitoring cases considered by the regulators and courts. To date, it has been the merger control provisions that have attracted the most attention, with a significant number of cases (140 to date) reviewed by China's Ministry of Commerce ("MOFCOM") and several highly publicized instances of conditional approval of global transactions as well as the decision to block Coca-Cola's proposed acquisition of Huiyuan Juice. By comparison, regulators have been slow to take action in relation to the abuse of dominance provisions under the AML, with no formal investigations having yet taken place and delays in settling the draft implementation rules. However, the regulatory void has been filled, to some degree, by the decisions made by the Chinese courts in a number of high profile dominance cases. In this article we review the legislative progress to date, the enforcement structure, and select abuse of dominance cases. We conclude with a number of recommendations for firms operating or considering investing in China and some predictions about likely future developments in this area.

## II. AML ABUSE OF DOMINANCE: IN A NUTSHELL

Under the AML an abuse of dominant market position occurs where a party has a dominant position in any relevant market and engages in activities considered an abuse.[2] Activities considered an abuse of dominance trace closely to abusive behaviors detailed under the antitrust regime in the European Union and the United States.[3] They include conduct such as exclusive dealing, predatory pricing, tying, refusal to deal, and price discrimination. Such activities will be prohibited unless the firm acted with "justifiable cause."[4] Indicative factors that would constitute a dominant market position include the firm's market share, the firm's capacity to control the market, financial and technical capabilities of the firm, degree of dependence from other firms, and degree of difficulty for new competitors to enter the market.[5]

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[2] Article 17 of the AML.

[3] See and compare EC Article 81(1) and Sherman Act Section 1 with Anitimonopoly Law of the PRC Article 13, and EC Article 82 and Sherman Act Section 2 with Antimonopoly Law of PRC Chapter 3.

[4] *Supra* note 2.

[5] *Id.* Article 18.

One of the other notable features of the abuse of dominance regime under the AML is the presumption of dominance where a firm's market share is greater than 50 percent, two firms' joint market share is greater than 67 percent or three firms' combined market share is greater than 75 percent.[6]

In April and June 2009 and May 2010, the State Administration for Industry and Commerce ("SAIC") published several draft rules drawing attention to the abuse of dominance provisions in the AML. Together, the draft rules tackled both procedural and substantive issues in respect of the abuse of dominance provisions under the AML. Procedurally, these included delineating more detailed investigative powers of the SAIC, guidance on how to apply for a defense once an investigation has been initiated, and related penalties.

Substantively, the provisions released in April provide more comprehensive definitions for key terms such as dominant market position[7] and elaborate on the factors for determining market dominance.[8] They also provide a method for rebutting the presumption of dominance.[9] This defense is available where it can be shown that there are low barriers to market entry and the firm has no ability to control the price or quantity of commodities in the relevant market. The latest draft released in May of this year included more detailed criteria for identifying a "justifiable cause"[10] and expanded conduct considered to be an abuse of dominance (i.e. bundling, imposing unreasonable conditions on contracts, unreasonable restrictions on where commodities are sold/to whom, and imposing trading conditions irrelevant to trading objectives).[11] However as of yet there have been no finalized provisions released.

## III. THE ENFORCEMENT STRUCTURE

Abuse of dominance comes under the jurisdiction of both the SAIC and the National Development and Reform Commission ("NDRC"). Whereas NDRC handles price-related violations in respect of monopoly agreements and abuse of dominance conduct, SAIC has authority over non-price related violations of the same provisions. These powers are in addition to the NDRC's power to regulate the pricing of all goods under the *Price Law* and SAIC's responsibility to enforce the *Anti Unfair Competition Law* ("AUCL").

If measured by the number of cases investigated to date by the two competition enforcement authorities, the NDRC has been the more active regulator having focused its efforts on cartel activity. Interestingly, in conducting its investigations, the NDRC has relied upon the *Price Law* rather than the AML**.** We can speculate that the NDRC's reticence in taking action under the AML may be because it is more familiar with the *Price Law* (since it has been in effect since 1998) and because of its exclusive jurisdiction under the *Price Law*. In any event, while the NDRC has been focusing on taking action against price cartels, the NDRC and SAIC have yet to invoke their powers to investigate any abuse of dominance cases.

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[6] *Id.* Article 19.
[7] Article 3 Regulations Prohibiting Abuses of Dominant Market Position 1 April 2009 issued by SAIC.
[8] *Id.* Article 5.
[9] *Id.* Article 7.
[10] Article 8 Regulations Prohibiting Abuses of Dominant Market Position 5 May 2010 issued by SAIC.
[11] *Id.* Article 6.

There are varying views as to the delay in the regulators pursuing abuse of dominance investigations under the AML. First, there may be uncertainty as to how jurisdiction should be divided between NDRC and SAIC since abuse of dominance cases will likely contain both price and non-price elements. Naturally, this leads to queries as to which competition authority should take prime investigation responsibility. There is also concern about two regulatory bodies working on the same or similar cases but applying separately developed methodologies. If there is divergence in the application of key terms, for example "relevant market," "dominant position," or "justifiable cause," this could produce a different result in two cases with similar facts.

Another issue concerning the administration of the AML relates to the treatment of China's state owned enterprises ("SOEs"). SOEs have market dominance in many sectors of the Chinese economy, but it remains unclear how the provisions of the AML will be applied to them. While the AML specifically deals with SOEs, the relevant provision (Article 7) has been drafted intentionally vaguely in order to provide officials with discretion in the way in which the AML is applied to SOEs. Comments to date by Chinese officials suggest that they view SOEs as clearly being caught by the AML, but the lack of any direct enforcement action suggests that how the AML will be applied is yet to be determined.

While there have been no formal investigations of any kind, to date, news reports suggest that SAIC is considering investigating a dispute between Tencent Technology (Shenzhen) Limited ("Tencent"), an internet service provider operating a well known instant messaging system known as "QQ," and Beijing Qihoo Technology Limited, which supplies security software having its well known "360 line of security software" (including software which protects user's privacy on the internet and anti-virus software) ("Qihoo 360").

The dispute arose when Tencent announced its decision on November 3, 2010 to make the use of QQ instant messaging service incompatible with the use of Qihoo 360's privacy or anti-virus software. Tencent also requested that users use Tencent's security software or other antivirus software in place of the "360 line of security software."

The parties have made a number of complaints to SAIC, including the following:

- A complaint filed by Li Changqing (a Beijing-based lawyer) requested that SAIC should commence an AML investigation against Tencent due to its abuse of dominance by restricting QQ users or "forcing" QQ users to uninstall Qihoo 360's software without a valid reason;
- A complaint filed by Yao Kefeng (a Beijing based lawyer) and Wang Fengchang (a CEO of a Chinese legal website) to SAIC requested an AML investigation against Tencent and suggested a fine of RMB1.244 billion; and
- A complaint filed by Kingsoft Corporation Limited ("Kingsoft"), a leading software developer, distributor, and service provider in China, listed on the Hong Kong Stock Exchange, has also submitted its application to SAIC claiming that 360 abuses its dominant position through restricting competing products from entering into the market.

While the position and likely reaction of SAIC is not yet clear, the case demonstrates that SAIC will not be able to continue delaying taking any formal investigations, particularly given the willingness of Chinese firms to make complaints to SAIC.

## IV. PRIVATE CASES

Despite the regulatory uncertainty, the Chinese public has nevertheless begun testing the abuse of dominance provisions through a number of private actions before the Chinese courts. There have been ten cases brought to date, and those that have been heard and decided by the courts offer some insights into the emerging approach being taken and the way in which future cases are also likely to be dealt with.

### *A. Li v Beijing Netcom*

On the day that the AML came into force, Mr. Li Fangping brought a case against China Netcom Beijing Branch ("China Netcom"), alleging that China Netcom forced Mr. Li to prepay his landline service bills because he was not a Beijing citizen. Mr. Li was not eligible for preferential treatment given to customers who could pay by call as he did not hold a Beijing residence permit. Mr. Li claimed China Netcom was able to engage in such conduct as a result of its dominance and that in doing so it had abused its dominant position. The case failed as a result of insufficient evidence being provided concerning China Netcom's dominant position. The court also agreed with China Netcom that its discriminatory treatment of non-Beijing residents was justifiable as they had no local address and were therefore considered riskier customers. The judgment at first instance was handed down by the Beijing First Intermediate People's Court on December 18, 2009, whose decision was appealed but affirmed in the Beijing Higher People's Court on June 9, 2010.

### *B. Shusheng v Shanda*

This case demonstrates the high evidentiary burden facing private claimants. The claim was brought in Shanghai No. 1 Intermediate People's Court in April 2009 by Beijing Shusheng Electronic Technology ("Shusheng"), an online digital book website operator, against Shanda Interactive Entertainment Limited ("Shanda") and Shanghai Xuanting Entertainment Information Technology ("Xuanting"). The plaintiffs alleged that Shanda and Xuanting had abused its dominance in the "online literature" market by demanding two authors cease writing a sequel due for publication on the plaintiff's website. Shanda and Xuanting argued that they were enforcing their intellectual property rights as they had published the original series (notably both authors would later give evidence in court acknowledging their violation of copyright laws).

After failing at first instance, Shusheng unsuccessfully appealed to the Shanghai Higher People's Court in October 2009. The case failed again as the plaintiff could not show evidence of the defendants' dominance in the online literature market. The courts considered market share figures from Shanda's own promotional material to be unacceptable as a basis for calculating its actual market share.

The court also held that even if Shusheng had succeeded in proving market dominance, the facts of the case did not amount to an abuse as Shanda and Xuanting were upholding legitimate intellectual property rights. This constituted a "justifiable cause." Curiously, the court failed to reference Article 55 of the AML in deciding the case, which clearly states its provisions do not govern conduct that seeks to protect legitimate intellectual property rights.

### *C. Renren v Baidu*

This case has the most detailed judgment to date and offers the greatest insight into how abuse of dominance cases will be heard. Renren Information Services Company ("Renren"), a medical consulting website, brought an action against the popular Chinese search engine Baidu

in Beijing First Intermediate People's Court on January 6, 2009. Renren's claim was that Baidu was abusing its market dominance by limiting access to the Renren website in retaliation to its reduced spending on Baidu's bid-for-ranking system. That is, Baidu's business model enabled higher-paying customers to be ranked higher when searched for (and thus have more prominence) than those who paid less. Although Baidu admitted that it had conducted its business in such a way, Baidu explained it did so out of concern of the number of junk links (irrelevant links inserted to give a website more hits) in the Renren website .

The issues raised in this case centered around whether a free internet search engine could be considered a "relevant market" and whether there was enough evidence to support a claim that Baidu had market dominance. The case failed on the grounds that there was a lack of evidence proving that Baidu had a dominant market position. The court agreed that a free internet search engine service can be termed a relevant market as the payment it receives from advertising is closely related to the service it provides. However, in order to prove dominant market position there needs to be empirical evidence with regard to indicative factors enumerated in the AML, which Renren failed to provide.

The court went further to note that even if Renren had been able to prove that Baidu had market dominance, there would have been no abuse. Baidu's conduct had justifiable cause as its actions were applied to all websites equally and were designed to protect the reliability and integrity of its results. This case is currently on appeal in Beijing Higher People's Court.

## V. EMERGING TRENDS

The cases that have been decided to date provide some comfort to investors and firms operating in China, but also suggest that a prudent approach should be taken, particularly if the regulatory void is not filled in the near future.

These cases decided have confirmed that customers as well as competitors can bring actions under Article 50 of the AML, which allows for civil claims where damage arises from "monopolistic conduct." Furthermore, the *prima facie* evidentiary burden for private cases has been set relatively low. Despite evidence for dominant position being completely deficient, and the absence of evidence of any real abuse having occurred, the cases described above were all accepted and heard before the Intermediate People Courts.

However, the courts have followed a rigorous approach following their acceptance of cases. In the above cases, the courts adopted a comprehensive three-step process. The court required the plaintiff to define the relevant market, establish the defendant's dominant position in that market, and prove that there had been abuse (in the absence of a justifiable cause).

*Relevant market:* In *Baidu* and *Shanda* the courts relied on the *Guidelines Defining Relevant Markets* released in May 2009. The test currently being used by the courts is to define the product scope and geographical scope within which an operator competes during a certain period of time with respect to a certain product or service. In the cases the courts have heard to date, identifying the relevant market has not presented a significant challenge. However, as cases diversify it will be interesting to see how the approach adopted by the courts develops.

*Dominant position*: According to the court in *Baidu*, plaintiffs must refer to the indicative factors listed in the AML to prove an opponent's market dominance. In addition, there needs to be empirical evidence supporting any assertions relating to the alleged market dominance. This means evidence must be provided in respect of an opponent's market share, the competitive

conditions, the ability to control up or downstream markets, financial strength, and dependency of other firms on an opponent's firm.

Of note is that this burden makes private cases difficult to prove, unless the defendant companies are listed, as plaintiffs have little or no access to opponents' financial statements and other related documents. Renren, for example, in an attempt to invoke the Article 19 presumption (dominance is presumed where the firm has more than 50 percent market share) used two news reports (one of which was from Baidu's own website) as this was all that was publicly accessible. However, the court rejected that evidence was rejected because it did not relate to the relevant market as defined by the court.

*Abuse of dominant position*: The courts' general proposition has been that if there are no negative effects to competition in the relevant market, or any negative impact is countered by a justifiable cause, then any such conduct will not be considered abusive. Interestingly no reference was made in any of these cases to the conduct listed as abuses in Article 17 of the AML. Baidu, Netcom, and Shanda were all able to successfully argue this aspect. Drawing on cases to date, it can be said that conduct that protects the integrity of a firm's service (*Baidu*), legitimate property (*Shanda*), and credit risk (*Netcom*) are justified. The Guidelines released in May 2010 also assist. For example, it would seem a justifiable cause could come in the form of commercial customs or ordinary operating activities.[12] Courts may also refer to how harmful conduct is to consumers' interests or how conduct will affect economic efficiency and public interests.[13] As it stands, however, there is very broad scope for what a court could term a justifiable cause. How the courts will define such broad terms as "commercial customs" and "ordinary operating activities" is still uncertain, leaving the courts with ultimate discretion to refrain from assigning liability to alleviate a dominant market players position.

It is likely that the number of cases before the courts will continue to increase, particularly given the courts' willingness to accept cases and the tacit approval from the authorities for them to do so. Furthermore, draft measures have already been prepared that will create even greater incentives for private actions. In particular, in July 2009 the Supreme People's Court released for comment, on a selective basis, a set of draft provisions on AML related civil actions. Those draft provisions detail procedures for the filing and handling of monopoly related cases and include scope for joint, group, or representative actions. Notably, the draft provisions propose that damages could be awarded of up to twice the actual amount of loss suffered by a claimant, which would provide an additional incentive for parties to litigate.

## VI. CONCLUSION

Given the substantial market share and important role played by SOEs in the Chinese economy, the way in which the abuse of dominance provisions of the AML are administered and enforced is one of the most important factors in the development of competition law in China. Of perhaps greater interest to international firms and investors are how the provisions will be applied, particularly in sectors where foreign firms have been particularly successful (such as the automotive sector). What the cases handled by Chinese courts suggest so far is that these firms

[12] *Id.* Article 8(1).
[13] *Id.* Article 8(2)(3).

are at risk of having abuse of dominance cases brought against them, incurring the related additional time and expenses of dealing with such cases. However, at the same time, the burden of proving such cases remains high, and so these firms may struggle to rely on the AML to break into new markets in which SOEs have high market shares. What is clear is that firms should continue to monitor developments and be prepared for formal investigations by the authorities, which are set to commence in 2011.