

Beijing Courts Rule For Defendants in Two Abuse-of-Dominance Cases

Beijing courts recently ruled for defendants in two abuse-of-dominance cases filed under China's Anti-Monopoly Law (the "AML"):

- On December 18, 2009, Beijing's No. 1 Intermediate People's Court ruled for Baidu, a Chinese Internet search company, in a case brought by Tangshan Renren Information Services Co. ("Renren"), which operates a medical consulting services website. Renren claimed that Baidu used its dominant position to limit access to Renren's website in violation of the AML. The Court found that Renren failed to prove that Baidu held a dominant position. The court went on to comment that, in any case, Baidu's conduct was not discriminatory or coercive and that its conduct was legitimate.
- On December 24, 2009, Beijing's No. 2 Intermediate People's Court reportedly ruled for China Netcom's Beijing Branch in a case brought by Mr. Li Fangping over China Netcom's alleged discriminatory treatment of customers who are not permanent Beijing residents. Again, the court found that the plaintiff failed to meet its burden of showing that the defendant had a dominant position and commented that the defendant's conduct was legitimate.

The two new decisions follow an October 23, 2009 decision by Shanghai's No. 1 Intermediate People's Court in favor of defendants Shanda Interactive Entertainment Ltd. and Shanghai Xuanting Entertainment Co., Ltd ("Shanda").¹ These decisions illustrate the significant role played by private litigation in the development of Chinese antitrust law applicable to unilateral conduct. The Chinese antitrust enforcement agencies responsible for this area, the State Administration for Industry and Commerce ("SAIC") and the National Development and Reform Commission, have not yet announced any decisions or publicly launched any investigations under the AML,

¹ Our October 28, 2009 Alert Memorandum regarding this decision is available at http://www.cgsh.com/shanghai_court_issues_first_decision_applying_chinas_anti_monopoly_law/. The October 28, 2009 Alert Memorandum also covers a private abuse-of-dominance lawsuit settled by China Mobile.

although a number of complaints have been filed (for example, Renren reportedly filed a complaint against Baidu with SAIC on October 31, 2008).

I. Baidu Decision

Beijing's No. 1 Intermediate People's Court accepted Renren's lawsuit against Baidu on January 6, 2009. Renren accused Baidu of using its dominant position to limit access to Renren's website in retaliation for Renren's reduced spending on Baidu's bid-for-ranking system. Bid-for-ranking is a for-profit model of ranking Internet search results adopted by Internet search engine providers, in which payments by website operators affect the rankings of those websites in search results. This contrasts with "natural rankings," in which the algorithms used to rank search results do not take such payments into account. Renren alleged that after it lowered its spending on Baidu's bid-for-ranking system, daily visits to its website decreased significantly and that searches on Baidu yielded far fewer hits than searches on Google. The company claimed that Baidu has a dominant position in the market for Chinese search services and that Baidu's actions violated Article 17(4) of the AML, which prohibits an undertaking with a dominant market position from "without justifiable reason, restricting the other party to a transaction to trade only with itself or to trade only with other undertakings which it designates."

Baidu admitted that its search algorithm reduced the likelihood of Renren's website appearing in search results. Baidu argued that this result was unrelated to Renren's bid-for-ranking payments and was taken because Renren's website had a large number of "junk links." Baidu's "natural ranking" search algorithm gave higher rankings to websites with more links. In order to increase its "natural ranking," Renren deliberately included a large number of links that were irrelevant to its website's contents, *i.e.*, "junk links." Baidu's search engine detected these links and automatically reduced the search results of Renren's website in its "natural ranking" system. Baidu further argued that its rules regarding junk links were imposed to protect the integrity of Baidu's search results and that the penalties for breaching those rules were publicly available.

Baidu also argued that because it does not charge for its search services, these search services cannot constitute an antitrust market and that, even if search services were an antitrust market, the plaintiff failed to prove that Baidu had a dominant position under the AML.

The court rejected Baidu's market definition argument and held that there was a market for Chinese search engine services. The court noted that, although Baidu does not charge users for their searches, the free service is closely tied to other products or services for which Baidu does require payment. Baidu's overall business model is designed to generate profit, and it relies on attracting Internet users in order to capture

actual or potential business value, such as advertising revenue. The court found that search engine services constitute a separate antitrust market from Internet news services, instant communication services, and other Internet services. The court also held that China represents a relevant geographic market, based in particular on Internet users' cultural background and language preferences.

On the question whether Baidu held a dominant position, however, the court held that there was insufficient evidence of Baidu's dominance. The court took the view that whether a company has a dominant position should in principle be determined according to Article 18 AML, which takes into account several factors, such as market shares, the competitive landscape, and the ability to control upstream and downstream markets. A presumption of dominance may arise in accordance with Article 19 AML when market shares can be determined accurately. Article 19 AML provides that an undertaking may be presumed to be dominant if its market share is 50% or more. Here, plaintiff chose to invoke Article 19 and therefore had the burden of presenting sufficient evidence to establish the requisite market share. Renren submitted only two news reports (one is a report from the China Securities Journal and the other is from the "Company News" section of Baidu's website) to support its claim. The court held that these reports did not meet the plaintiff's burden, because it was unclear whether the shares referred to in the two articles were based on the same market definition as defined by the court and the two articles did not provide underlying data or describe the methodology used to calculate the market shares. Therefore, the court held that the press reports were insufficient to show that the alleged market shares were objectively and scientifically calculated.

In addition, the court noted that merely having a monopoly is not a violation of the AML. As long as a defendant's acts are justified and do not harm competition, the court will not find an abuse of a dominant position. The court noted that Baidu's rules were clear and applied to all websites equally, Baidu acted reasonably to protect the integrity and reliability of its search results, and its actions were neither discriminatory nor coercive.

II. CHINA NETCOM DECISION

Mr. Li Fangping filed this case in the Chaoyang District People's Court on August 1, 2008, the day that the AML came into force. This case was transferred to the Beijing's No. 2 Intermediate People's Court in October 2008.

China Netcom's Beijing branch required that Mr. Li, as a non-permanent resident of Beijing, either pay his fixed-line telephone phone service bills in advance or provide a guarantee. Mr. Li chose to pre-pay his telephone bills. As a pre-payment customer, Mr. Li was not entitled to enjoy certain discounts or preferential packages, which were offered by China Netcom only to pay-after-call customers. Mr. Li claimed that because

China Netcom held a dominant market position in Beijing and abused its dominance by discriminating against pre-payment customers, it violated Article 17(6) of the AML.

China Netcom reportedly argued that its requirement that non-Beijing residents provide a guarantee or prepay for their calls does not discriminate against non-permanent Beijing residents but is intended to avoid debt collection problems. Permanent Beijing residents with a history of overdue payments were also required to join the pre-payment plan, and non-permanent Beijing residents are eligible for the pay-after-call payment scheme if they own real estate in Beijing.

The court reportedly held that: (i) the plaintiff failed to prove that China Netcom Beijing branch held a dominant market position; (ii) the payment plans were not substantially different; and (iii) based on the claimed rationale, China Netcom has the right to limit the availability of the pay-after-call plan to certain customers. Mr. Li has indicated that he will appeal this decision.

III. CONCLUSION

As in the earlier Shanda case, the Beijing courts in the Baidu and China Netcom cases found that plaintiffs failed to present sufficient evidence of the defendants' dominance. While the plaintiffs in at least the Shanda and Baidu cases seem to have relied on flimsy evidence, it is unclear what evidence will be considered sufficient to show that a defendant holds a dominant position. It is also unclear how plaintiffs would be able to develop the necessary evidence in cases where reliable market share data are not publicly available, given the lack of discovery in Chinese litigation.

The Baidu decision is also notable for its comment regarding the legitimacy of Baidu's conduct, which suggests that, in at least some cases, actions by a dominant company will be evaluated under a "rule of reason" standard, and the defendant will not be found to have abused its dominant position if it can show that its actions were justified and, on balance, did not harm competition.

As noted, China's courts continue to remain in front of its administrative agencies in developing Chinese law regarding abuses of dominant positions under the AML. On the other hand, the fact that all Chinese courts that have adopted decisions in abuse-of-dominance cases have ruled for the defendants may suggest that the courts are taking a cautious approach until they receive some guidance from the enforcement agencies. In addition, as all decided cases involved Chinese defendants, it remains to be seen what approach will be followed with respect to cases involving foreign firms.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition under the "Practices" section of our website at <http://www.clearygottlieb.com>.

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