
# CHINESE ENFORCEMENT AGAINST ABUSES OF DOMINANCE RAMPS UP

Peter Wang, Yizhe Zhang & Sébastien Evrard
Jones Day

# Chinese Enforcement Against Abuses of Dominance Ramps Up

*Peter Wang, Yizhe Zhang & Sébastien Evrard (Jones Day)*

The first three years under the Chinese Anti-Monopoly Law ("AML") have been dominated by merger control decisions mainly involving foreign companies, and cartel investigations mainly involving domestic Chinese ones.

However, the spotlight recently has begun to shift towards the third major area of anticompetitive activities under the AML: abuses of dominant market position. Several prominent matters have been reported in late 2011, most notably an investigation by price regulator the National Development and Reform Commission ("NDRC") into price discrimination in the provision of broadband internet services by state monopoly telecom companies; another NDRC investigation into refusals to deal involving dominant distributors of an important pharmaceutical precursor, and; a civil AML lawsuit filed against leading search engine Baidu. The AML prohibits such conduct by firms with dominant market positions, subjecting them to penalties that include potential fines of between 1 and 10 percent of annual turnover.

This article focuses on the recent NDRC investigations to project future consequences for abuse of dominance cases brought under the AML.

## a. Broadband Internet Investigation

In November 2011, NDRC announced that it was investigating China Telecom and China Unicom, two of the country's major telecommunications operators, over suspected price discrimination in the broadband internet market. NDRC indicated that the two operators were using their dominant market position—together they reportedly have as much as 90 percent of the broadband market—to charge competitors higher fees for broadband access than those offered to non-competitors. NDRC alleged that this price discrimination resulted in harm to consumers, such as lower-quality interconnection between networks and internet access speeds that are only one-tenth of those available in the United States, the United Kingdom and Japan. NDRC also stated that "effective competition" in the market could lower prices nearly 40 percent over 5 years.

This case is particularly noteworthy because it is the first widely-reported case of Chinese antitrust regulators enforcing the AML against Chinese state-owned enterprises ("SOEs"). Yet SOEs have been the targets of AML cases in the past. In 2010, a tying case involving local SOE Hubei Salt Company resulted in an order by the Hubei Provincial DRC requiring the company to cease abusing its legal monopoly position in salt to harm consumer interests, apparently through activities including tying.[1] Moreover, several SOEs, including several state telecom companies, have been sued by private plaintiffs in AML litigation over the past three years.

The China Telecom and China Unicom investigation generated further interest because a senior NDRC official stated in an interview on state television that the 1 to 10 percent fine would be based on the revenues generated only from the companies' broadband access services businesses, rather than the companies' total revenues across all businesses.

In December, China Telecom and China Unicom were reported as announcing that they would raise their broadband speeds and would reduce broadband service charges substantially (that is, by 35 percent) over the next 5 years. The companies also stated that they have applied to NDRC to settle their investigations pursuant to commitments made by the companies to correct their practices. Under the AML, law enforcement authorities can decide to end anti-monopoly investigations if the companies in question promise to take concrete actions to correct their practices in a given period as approved by the authorities.

### b. Blood Control Medications

On November 14, 2011, NDRC announced fines of nearly RMB 7 million (USD 1.1 million) against two private pharmaceutical companies in Shandong Province for various abuses of dominant market position, reportedly including refusals to deal and the imposition of higher prices through threats to withhold supply. The case involved actions taken to increase the price of promethazine hydrochloride, a key raw material for a cheaply-priced and widely-used hypotensor, Compound Reserpine Tablets ("CRT"). CRT is categorized as a type of basic medicine in China, payment for which is fully covered by the national social insurance policy, so the decision noted that these increased costs were directly borne by society. The fines are notable for being the highest amounts imposed by NDRC (or any other antitrust enforcement agency) under the AML and the first imposed for anticompetitive conduct including abuse of dominant position.

According to reports, Shandong Weifang Shuntong Pharmaceutical Company ("Shuntong") and Shandong Weifang Huaxin Pharmaceutical Trading Company ("Huaxin") entered into exclusive distribution agreements with the only two producers of promethazine hydrochloride in China, by which those producers agreed not to sell promethazine hydrochloride to other distributors. (NDRC's investigation revealed that Shuntong and Huaxin were actually controlled by the same group of people.) After becoming the sole source of promethazine hydrochloride in China, the two companies then pressured most major CRT producers to increase prices for CRT from

---

[1] *See, e.g.,* http://jjs.ndrc.gov.cn/gzdt/t20101115_380421.htm.

RMB 1.3 per bottle to RMB 5-6 and to "rebate" to Shuntong and Huaxin RMB 1 per bottle of that price, under threat of ceasing all supply to the producers of promethazine hydrochloride. When rejected by the CRT producers, Shuntong and Huaxin increased the price of promethazine hydrochloride approximately fifteenfold, forcing many CRT producers to suspend production.

### c. The *Baidu* Case

Beyond administrative enforcement, the volume of AML litigation against large companies—mainly for abuse of dominance—continues to be substantial. Most such cases have been filed against domestic companies.

A recent case was filed in Beijing against Baidu, China's leading search engine, by its competitor Hudong.[2] Hudong accused Baidu of using its dominant market position to negatively impact search results related to its competitors. A public hearing was held in November but no public report of a judgment has been issued. Hudong had reportedly filed a complaint with SAIC earlier, requesting an investigation. This case is similar to earlier ones filed against Baidu for discrimination against competitors in search results, and most were resolved with findings that the plaintiffs had failed to establish Baidu's market dominance and/or that Baidu had apparent justification for its actions.

Separately, Baidu filed a complaint in a Beijing court against the CEO of Hudong for defamation relating to his public statements against Baidu. The Haidian court ordered Hudong and its CEO to publish a statement of apology and pay RMB 120,000 as compensation to Baidu.

### d. Some Observations

These cases illustrate a few points, mainly procedural, about the emerging trend of administrative investigations of abuses of dominance under the AML:

- The broadband internet case shows (consistent with other cases in the context of anticompetitive agreements) that NDRC will allow companies to utilize the commitment mechanism to end investigations by agreeing to alter their conduct and/or compensate complainants.

---

[2] *See, e.g.,* http://finance.sina.com.cn/chuangye/internet/20111102/092810738833.shtml; http://old.nbd.com.cn/newshtml/20111102/20111102105556973.html.

- NDRC's press releases are very brief and provide little visibility into the legal reasoning and evidentiary burden of proof in individual cases.

- It remains unclear what penalties will be imposed in practice for abuse of dominance and other AML conduct violations, although statements by NDRC officials seem to indicate that fines lower than 10 percent of annual turnover across all businesses may be imposed in some cases.

- Compared to litigation, NDRC enforcement appears to be more aggressive and faster for both investigation and decisions. The Hubei Salt Company case required only three months, while the pharmaceutical precursor case took roughly five months, and the broadband internet case appears to be well along the way toward resolution after approximately six months.

- Many NDRC investigations, including in the cartel area, appear to focus on products in which there is a substantial public interest, such as salt, foods, telecoms, and inputs for popular medicines.

- NDRC's decisions, in contrast to some published court decisions, do not appear to be as strict or detailed on issues such as market definition and findings of dominance.

- NDRC enforcement may originate from media reports (the Hubei salt case), customer complaints (the pharmaceutical case), and competitor/customer complaints (the China Telecom investigation).