



Recent developments in civil litigation under China's Anti-monopoly Law

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Introduction

Civil litigation is a key tool for businesses as they seek to protect their interests and remain competitive. So it is unsurprising that the right to launch a civil antitrust action has been exercised with increasing regularity since it became available to businesses in China on August 1, 2008 under China's first comprehensive antitrust law, the Anti-monopoly Law ('*AML*').

Over the past four years, private antitrust litigation in China has undergone some interesting developments. As the *AML* entered into effect, numerous cases were filed in the years that followed, but the majority of cases were unsuccessful. The first half of 2012 has seen an unprecedented number of antitrust cases being filed in courts, leading to a revival of interest in this area of law among the media and the public. This trend coincided with the publication of important guidance by the Supreme People's Court ('*SPC*'), which sets out the fundamental principles (on issues such as standing) of antitrust litigation, and which contains a number of measures intended to facilitate a greater number of successful actions.

Courts are also becoming increasingly sophisticated in their reasoning (as seen in a recent antitrust challenge against Johnson & Johnson alleging unlawful resale price maintenance) and the use of expert witness evidence (for example in the *Qihoo v Tencent* abuse of dominance case). At the same time, appetite for bringing private antitrust actions also appear to be on the increase, with the first half of 2012 recording the highest number of cases filed to date since the *AML* came into effect.

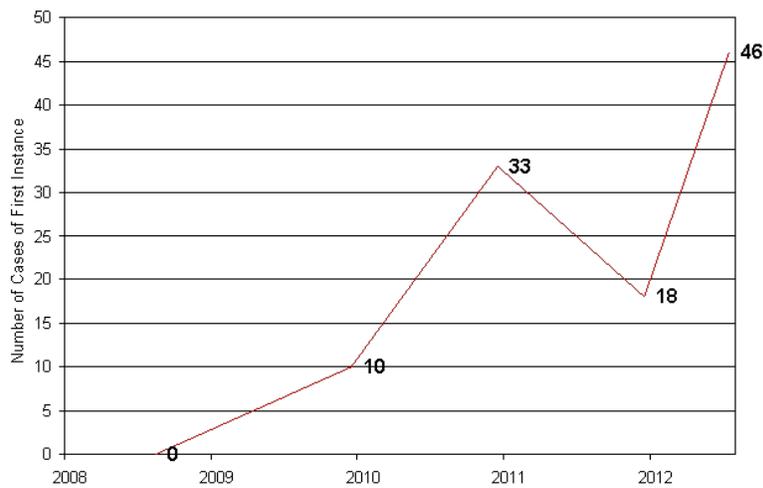
This article summarizes the key developments in the fast-moving Chinese antitrust litigation landscape.

Background Statistics on Antitrust Litigation in China

At a recent seminar in Beijing,¹ Mr. Jin Kesheng, Vice President of the Intellectual Property Tribunal under the Supreme People's Court, provided statistics outlining the number of civil actions accepted by the courts of first instance under the *AML* to date. As can be seen from the graph in Figure 1, the number of civil claims under the *AML* has followed an upwards trajectory over the last four years, with a noticeable decline in 2011 followed by a surge in activity in the first half of 2012.

¹ Speech by Mr Jin Kesheng, Vice President of the Intellectual Property Tribunal under the Supreme People's Court, at the 'International Seminar on Antitrust Law in the Internet Industry', Peking University, October 20, 2012

Figure 1: Civil antitrust litigation cases, 3Q2008-1H2012



Source: Speech by Mr. Jin Kesheng, International Seminar on Antitrust Law in the Internet Industry

In addition to the statistics, the SPC also provided some feedback on the qualitative aspects of the cases filed to date. In a press release published on May 8, 2012, the SPC noted that the quality of many of the initial cases brought before the courts has been low, which has resulted in a ‘relatively low success rate’ for plaintiffs. This view was repeated by Mr. Jin Kesheng at the recent seminar at Peking University, in which he noted that many early cases were tentative efforts brought by legal practitioners seeking to explore the procedure and boundaries of private antitrust litigation and to attract public attention. The number of such “test cases” has decreased in the subsequent years and, more recently, higher-quality cases that raise substantial competition issues are now regularly being brought before the courts.

Interestingly, and according to the SPC, many of the cases concern abuse of dominance rather than anti-competitive agreements.

The legal basis and procedure for civil claims

The legal basis for private antitrust actions lies in Article 50 of the AML. Article 50 provides that where a business operator’s ‘monopolistic conduct’ ‘causes a loss’ to another business operator, the infringing operator shall ‘assume civil liability’ and thus may be sued in a civil action. This right was expressly affirmed by the SPC, in October 2007, by the inclusion in its published list of approved causes of

civil action² of the rights to pursue claims against anti-competitive agreements, or abuse of dominance.

The legal basis for private antitrust actions has been supplemented by a number of procedural and substantive guidance issued by the SPC. As China's highest court, the SPC oversees the lower courts and its guidance binds all courts below it. A brief description of the relevant SPC guidance in relation to private antitrust actions is set out below.

In the days leading up to the effective date of the AML, on July 27, 2008, the SPC issued a notice, 'On the study and implementation of the Anti-monopoly law of the People's Republic of China' ('*SPC AML Implementation Notice*'). This notice assigns jurisdiction of AML civil cases to the IP Tribunals and provides that parties must meet the standard set under Article 108 of the Civil Procedure Law (which governs, amongst others, who may be adjoined to a civil case) to be adjoined to a civil case under the AML. This is an important decision, given that IP Tribunals are generally regarded as the most advanced and sophisticated courts in China, as IP judges are generally all legally trained and have had substantial experience in dealing with foreign-related and complex disputes.

In May 2012, the Supreme People's Court published a long-awaited judicial interpretation, the 'Provisions of the Supreme People's Court On Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising Out of Monopolistic Conduct' ('*Judicial Interpretation*'), that has further refined and delineated the procedure for actions under the AML and provided some helpful mechanisms designed to assist plaintiffs in making antitrust claims.

The Judicial Interpretation reaffirms the rights of natural persons, legal entities and organizations, to file civil claims under the AML.³ It confirms that AML actions may be filed as either a stand-alone claim or as a follow-on action.⁴ The Judicial Interpretation also clearly specifies that the Intermediate People's Courts (being the second level courts) are to be the courts of first instance in civil antitrust cases, although the SPC retains discretion to grant jurisdiction to the Basic People's Courts on a case-by-case basis.⁵ Geographical jurisdiction is in line with the Civil Procedure Law.⁶ This means that in the case of a claim of abuse of dominance, the

² Supreme Court Decision on the Causes of Civil Actions, 4th February 2008

³ Judicial Interpretation No.5 of 2012, Provisions of the Supreme People's Court On Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising Out of Monopolistic Conduct, Article 1

⁴ Id. Article 2

⁵ Id. Article 3

⁶ Id. Article 4

case must be filed in the jurisdiction where the defendant is domiciled;⁷ where a case involves a contractual agreement, jurisdiction would lie in the place where the contract was performed.⁸

Under the Judicial Interpretation, in actions pertaining to anti-competitive agreements, where the conduct concerned constitutes a hardcore infringement as prohibited under Article 13(1-5) of the AML, the burden of establishing that the agreement in question did not have any anti-competitive effect is reversed from the plaintiff to the defendant.⁹

In dominance cases, the plaintiff bears the burden of proof in proving that the defendant is dominant and that the behavior was abusive,¹⁰ but the defendant bears a burden to prove that their behavior was fair if they mount a defense.¹¹ The Judicial Interpretation also helpfully provides facilitative measures for plaintiffs by expressing permitting plaintiffs to adduce evidence of public statements made by allegedly dominant companies to substantiate the finding that they are in fact dominant. While evidence of this nature may be rebutted by the defendant company alleged to hold a position of dominance, this would nevertheless likely go some way to assisting plaintiffs in passing one of the fundamental hurdles in establishing dominance.

Furthermore, parties may introduce expert witnesses to provide opinions on evidence in court,¹² or to provide written evidence in the form of market surveys or other reports.¹³

The Judicial Interpretation brings clarity to a number of fundamental procedural aspects of private claims under the AML. The relaxation of the burden of proof on the plaintiff and the strengthening of the procedural rules for case handling may lead to an increase in the consistency and frequency with which plaintiffs are able to enforce their rights under the AML within the judicial system.

⁷ Civil Procedure Law Article 22

⁸ Id. Article 24

⁹ Judicial Interpretation Article 7

¹⁰ Id. Article 8

¹¹ Ibid.

¹² Id. Article 12

¹³ Id. Article 13

Recent Highlights in Private Antitrust Litigation

In recent months, several interesting cases have featured in the Chinese courts that bring to light current practices as applied by litigants in resolving their disputes.

Qihoo v Tencent - Abuse of Dominance in the High-Tech Industry

As noted above, the majority of civil cases under the AML concern abuse of dominance claims. Of these cases, the most high-profile case is that of *Qihoo v Tencent*, which was filed by Qihoo 360 against Tencent in Guangdong in October 2011.

Following Tencent's entry into the PC security software sector, Qihoo 360 released two stand-alone software applications that were targeted at QQ, Tencent's flagship instant messaging application. These two applications, '360 Privacy Protector' and 'Koukou Bodyguard', alerted users that QQ was 'scanning' private user files and enabled users to alter certain functionality of QQ. Tencent responded by blocking all users of Qihoo 360's products from using QQ by issuing a public statement stating that its QQ instant messaging product would be unavailable on all devices that installed Qihoo 360's security software, and requested that its users uninstall Qihoo 360's software on the basis that it disrupted certain features of QQ.

Qihoo 360 is claiming damages of RMB 150 million on the basis that Tencent has allegedly abused its position of dominance in the market of online instant communications services by:

- Forcing consumers to choose between QQ and Qihoo's 360 antivirus software, alleging that this amounted to prohibited abusive exclusive dealing; and
- Abusively "bundling" Tencent's QQ safety software with Tencent's QQ instant messaging product without justification.

In April, 2012, the first public hearing of this case was held in the Guangdong Higher People's Court in which it considered a number of key issues, which were: market definition, whether Tencent held a position of dominance, and whether Tencent's conduct constituted an abuse of its dominance and liability.

Both parties instructed experts to give evidence, with Qihoo 360 adducing economic evidence by engaging a British economist, and Tencent adducing evidence given by industry experts on the impact of Tencent's conduct on the development and outlook of the Internet sector.

The court held over the hearing, and a judgment is expected to be rendered in the near future. This case is interesting in that it is the first in which a plaintiff has introduced evidence from an expert witness.

Antitrust counterclaim against Microsoft

Another interesting case was recently reported to involve Microsoft by way of a counterclaim. The plaintiff's Hong Kong headquarters had been negotiating with Microsoft to allow it to use an existing Microsoft software license in its mainland China operations. These negotiations failed. In 2010, Microsoft asked the local PRC authorities to investigate the plaintiff's mainland China offices, which were found to be using illegal copies of Microsoft's software. The plaintiff was fined. Microsoft then launched a civil action in the local courts in Nansha, seeking damages of RMB 5mn and for the plaintiff to purchase a set number of copies of the software in question.

In November 2012, the plaintiff filed a counter suit in the Nansha district people's court, accusing Microsoft of abuse of dominance on the grounds that:

- It forced the plaintiff to purchase copies of Microsoft software, thereby squeezing out competitor software companies; and
- The higher cost of Microsoft software in mainland China as compared to Hong Kong constitutes price discrimination.

As the Nansha court, a Basic People's Court, does not have the jurisdiction to adjudicate on anti-monopoly cases, it will convene a full court to consider the application of the countersuit and, if it finds that the countersuit is established, will transfer the case to the Guangzhou Intermediate People's Court.

First antitrust litigation in relation to an anti-competitive vertical agreement

In the first case concerning a vertical agreement to reach court in China, the AML claim against Johnson & Johnson, concerning its distribution arrangements in China, was initially reported in February 2012. The plaintiff, Ruibang Yonghe

Technology and Trade Co. Ltd. (*Ruibang*), had been Johnson & Johnson's distributor of surgical products in the Beijing region for more than 15 years.

The distribution agreement contained a term that imposed on Ruibang a minimum resale price of the surgical suture products. The dispute arose when Johnson & Johnson removed Ruibang's distribution rights for certain hospitals after it discovered that Ruibang had charged its hospital customers prices lower than those stipulated under the agreement. Ruibang claimed that the agreement violated the AML as it contained a minimum resale price term, which is expressly listed as an example of a prohibited "monopoly agreement" under the AML. Ruibang sought RMB 14.4 million in damages against Johnson & Johnson.

On May 18, 2012, the Shanghai Intermediate People's Court delivered its judgment finding in favor of Johnson & Johnson. The Court found that Ruibang failed to establish that the agreement in question had given rise to an anticompetitive effect. The Court's approach, while not binding on subsequent court judgments (given China operates a civil law system) nor on the PRC antitrust regulators, suggests that the Court would not find an infringement for resale price maintenance on a *per se* basis, but would, instead, require evidence that the agreement had given rise to an anti-competitive effect.

Importantly, the Court also set out a non-exhaustive list of relevant factors to be considered in determining whether an agreement that contained a resale price maintenance clause contravened the AML. These included the market share of the product subject to the pricing restrictions, the state of competition in both the upstream and the downstream markets, and the effect of the clause on the volume of the product supplied and on price.

Although Ruibang did not succeed in making its claim, it is the first court case in China concerning vertical arrangements, which are very common in China and continue to be a mainstay of multinationals' strategies in ensuring a wide distribution of their products. The case also demonstrates Chinese courts' growing sophistication in handling antitrust disputes as the judges demonstrate an understanding of the factors that are likely to be of relevance in considering the impact on competition when examining a vertical arrangement.

What next for civil antitrust litigation in China?

Private antitrust litigation in China has begun to flourish in recent times, as demonstrated by the increase in the number of cases filed in the courts so far in

2012. Courts and litigants alike have begun to demonstrate a greater degree of sophistication in analyzing antitrust claims, and parties are now beginning to explore the use of expert evidence in advancing their cases. No doubt the publication of the Judicial Interpretation will encourage this trend, if it has not already done so. Taking all these factors in their totality, it is expected that the growing trend in AML litigation will continue.

With the newly strengthened and clarified guidelines set down in the Judicial Interpretation, combined with the increasing awareness of businesses of their rights under the AML, it is likely that this increase in the quantity and quality of private antitrust litigation in China is set to continue.