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Litigation Under China's Anti-Monopoly Law

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I. INTRODUCTION

Although China's Anti-monopoly Law (the "AML"), which entered into effect on August 1, 2008, is primarily enforceable by the three designated enforcement agencies,[2] it also provides for civil liability. Article 50 provides:

> If an undertaking engages in monopoly conduct and causes losses to others, it shall bear civil liability in accordance with law.

This barebones sentence provides the basis for civil litigation but provides little guidance on standing, causation, or evidentiary rules. A plaintiff must prove that (i) one or more defendants engaged in monopoly conduct, actionable under the AML, (ii) the plaintiff suffered losses, and (iii) such losses were caused by the defendant's conduct. Monopoly conduct may consist of engaging in a monopoly agreement or concerted action under Chapter II, abuse of a market dominant position or unilateral conduct under Chapter III, or abuse by an administrative authority or organization with administrative functions under Chapter V claims. Defendants are "undertakings," defined in Article 12 as "any natural person, legal person or other organization that engages in the manufacture and transaction of commodities or provision of services."

II. THE FIRST CASES

As of May 31, 2010, it has been reported that some ten cases under the AML had been submitted to and accepted by the people's courts.[3] The intermediate level court is generally the court of first instance and cases are heard by the intellectual property chambers of such courts pursuant to instructions from the Supreme People's Court reflecting the overlap between intellectual property and anti-monopoly cases.[4] Some competition cases have also been brought

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[2] Ministry of Commerce for merger review and foreign trade, State Administration for Industry & Commerce for monopoly agreements (cartels), other than price-fixing and for abuse of dominance, and National Development and Reform Commission for price-fixing. However, the Anti-monopoly Commission under the State Council, which has overall responsibility for policymaking and coordination, consists of 14 government departments. Thus, the three enforcement agencies generally need to coordinate with the other relevant government department(s), when contemplating an enforcement action. The three financial regulatory commissions (for banking, securities and insurance) are reportedly drafting their own regulations on merger review, *see* http://www.cs.cn/bxtd/02/201001/t20100108_2313022.htm (viewed Jan. 14, 2010).

[3] Zhong Lü Wang, *Courts at All Levels Throughout the Country Have Handled 10 Anti-monopoly Civil Cases*, *available at* http://www.148com.com/html/8/474472.html (viewed Oct. 27, 2010). This tally is not definitive. For example, the first AML case brought in Gansu Province, Lanzhou Duanjiatan Xingda Gasoline Station v. China National Petroleum Corporation Lanzhou Sales Company, does not seem to have been included, *see* http://news.ifeng.com/mainland/detail_2010_05/15/1520703_0.shtml (viewed Oct. 27, 2010).

[4] Supreme People's Court Notice Concerning Earnest Study and Implementation of the AML, Oct. 28, 2008, part 2, *available at* http://ip.people.com.cn/GB/136718/136724/136776/8245509.html (viewed Oct. 27, 2010).

under older statutes like the Anti-Unfair Competition Law (1993), which has a longer history and somewhat more settled history of jurisprudence.

The number of cases under the AML is not large given the large market shares held by companies, particularly state-owned enterprises ("SOEs"), in a number of industries and the role of quasi-governmental industry associations in coordinating pricing and policy among competitors. This is even though the Supreme People's Court has instructed courts to accept and try cases so long as the requirements of the Civil Procedure Law and the AML are met.[5] The small number appears to reflect the reluctance of SOEs and other large companies to engage in litigation, the hesitance of courts to accept cases involving a complex and abstract statute prior to the issuance of authoritative guidance from the Supreme People's Court,[6] and general unfamiliarity with the AML.[7] The cases that have been heard are nevertheless both instructive and offer grounds to anticipate an expansion of AML jurisprudence in years to come as parties and the courts become more familiar with the AML.

Of the ten reported cases, nine involved allegations of abuse of market dominance, including three involving discriminatory pricing, four involving restrictions on the freedom to trade, and only one involving a monopoly agreement. With respect to industry sectors, about half of the cases involved the Internet. Most defendants have been domestically-invested rather than foreign-invested (greater than or equal to 25 percent foreign investment) enterprises ("FIEs"), although some cases have been brought against FIEs. The domestically-invested defendants include SOEs as well as private companies. About one-third have been settled before a judgment was reached.

Of the ten cases, six were brought in Beijing (two on transfer from Zhejiang), two in Chongqing, one in Shanghai, and one other in Zhejiang. Thus, nine of the ten cases accepted by the courts were brought in three of China's four municipalities directly under the control of the central government (Tianjin being the only one exception). The courts in these jurisdictions may be more inclined to accept cases because of their greater capability and understanding of the AML. By contrast, the courts in only one of Mainland China's 27 provinces and autonomous regions accepted cases under the AML, and two of those three cases were transferred to Beijing.[8]

III. THE FIRST CASES: PRICE-FIXING BY AN INDUSTRY ASSOCIATION IN A REGULATED INDUSTRY

The first case brought under the AML involved insurance and was filed on August 1, 2008, the very day on which the AML took effect. The Falin Law Firm in Chongqing, represented by attorney Liu Fangrong, filed suit against the Insurance Association of Chongqing.

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[5] *Id.*, part 2, referring to Art. 108 of the Civil Procedure Law which specifies the criteria for acceptance of a civil case: (1) the plaintiff is a citizen, legal person or other organization with a direct interest in the matter, (2) the application is clear, (3) there is a concrete litigation plea with facts and rationale, and (4) the case is within the scope and jurisdiction of the court. Prof. Zhang Guangliang has addressed the standing issue in Zhang Guangliang, *Probing into Plaintiff Liability for Civil Antitrust Litigation*, (3) CHINA PATENT & TRADEMARKS 19-25 (2008).

[6] The Supreme People's Court has so far issued only one notice on the handling of anti-monopoly cases, i.e., the general instruction cited in n. 3. It is known that the Court is preparing additional notices, addressing in particular the relationship between intellectual property law and the AML.

[7] China's courts lack full autonomy as they are subordinate to the political-legal work committees of the Communist Party at each level of government in which courts are established.

[8] *But see* the Gansu case cited in n. 2.

Mr. Liu argued that the Association, the local Chongqing counterpart of the quasi-governmental Insurance Association of China, whose membership is mandatory for all insurers licensed to operate in Chongqing, imposed above-market insurance premiums by enforcing price-setting arrangements for motor vehicle insurance.[9] The plaintiff requested nominal damages of 1 yuan, fees and costs of 1,000 yuan, and a court order to stop the practice. The case was accepted just four days later, on August 5, 2008, by the Yuzhong District People's Court in Chongqing, which subsequently transferred it to the jurisdiction of the Chongqing No. 5 Intermediate People's Court.[10] The defendant raised several defenses, including that as an industry association it was not a for-profit undertaking subject to the monopoly agreement provisions of the AML, the insurance policy in question was issued prior to the effectiveness of the AML, and the public interest served by financial products warranted protection from the AML. Most importantly, the defendant showed that it had approved a modification of its policy by August 11, 2008, which went into effect on September 9, 2008. The plaintiff subsequently applied to withdraw its complaint and the No. 5 Intermediate People's Court consequently dismissed the case in December 2008.[11]

Although withdrawal of the complaint might indicate that litigation was of no avail; in fact, the case succeeded in forcing the insurance industry to alter its conduct. The erstwhile defendant altered its policies and instructed its member companies to specify that insurers had the right to set their own policies with the China Insurance Regulatory Commission for the record.[12] Of broader significance, the nationwide Insurance Association of China convened discussions of the AML and its impact on the insurance industry, resulting in exhortations to members to avoid discussions of price, reasonable profit, discounts, credit provisions, market allocation, and related issues in meetings in insurance associations.[13]

This author has since been present at a meeting attended by representatives of national-level industry associations who sought guidance on how to conduct their associations' affairs as the AML required a drastic alteration in their accustomed way of doing business. Instead of encouraging and even instructing member companies to set prices and enforce industry practices in other respects that tend to restrict competition, industry associations would henceforth be cognizant of their obligation under the AML operate with a lighter hand and allow member companies to engage in more open competition. Industry participants note, however, that even within the property and casualty insurance industry the various provincial-level insurance industry associations continue to impose commission caps and other pricing restrictions.

IV. THE FIRST CASES: ABUSE OF DOMINANCE AND THE BURDEN OF PROOF

Several cases have been brought in different industries, particularly involving concentrated industries like the Internet and telecommunications, alleging abuse of dominance. Such cases could be subjects of administrative investigation by the relevant enforcement agency, i.e., the State Administration for Industry & Commerce, but that agency has not yet been

[9] Such price-fixing arrangements were normal in the insurance industry throughout China, *see* http://cq.auto.99.com/a/20080815/000399.htm (viewed Mar. 12, 2009).

[10] *See* http://www.110.com/ziliao/article-150680.html (viewed Oct. 27, 2010).

[11] *Id.*

[12] *See* http://www.9ask.cn/blog/user/liufangrong/archives/2008/57234.html (viewed Oct. 27, 2010).

[13] Challenges Facing Our Insurance Associations Following Enactment of the AML, *available at* http://www.3wins.com/news-center/newslist.asp?id=123025 (viewed Oct. 27, 2010).

aggressive in this regard. This is, in part, because relevant regulations have yet to be promulgated but also because some undertakings with large market shares are SOEs or otherwise enjoy political favor even if they would not necessarily be deemed "administrative monopolies" under Article 8 of the AML.

On August 1, 2008, again the day on which the AML entered into effect, Li Fangfang filed suit in the Chaoyang District People's Court in Beijing against China Netcom alleging discriminatory pricing imposed by virtue of the defendant's dominant market position. Li, whose resident permit was not from Beijing, alleged that he was required under the defendant's form contract to pre-pay charges or post a guaranty for fixed-line telephone services solely because of his residency status even though he was otherwise similarly situated.

The case was transferred to the Beijing No. 2 Intermediate People's Court for adjudication. The defendant responded that the plaintiff did not meet the qualifications under the AML and, moreover, the contract was executed prior to August 1, 2008 and thus the AML was inapplicable. More significantly, the court held that the plaintiff failed to meet its burden of proof with legally admissible evidence that the defendant enjoyed a market dominant position, even though there were only three undertakings in the industry at the time and publicly available information showed that the defendant's market share, alone or in conjunction with the other undertakings, exceeded the threshold for a finding of market dominance under Article 19 of the AML.[14]

In a similar case in the Beijing No. 1 Intermediate People's Court, Tangshan Renren Company alleged that Baidu, China's leading internet search firm, abused its market dominant position to block the plaintiff's website. The plaintiff demanded recovery of economic losses totaling RMB1,106,060 (about U.S.$160,000). Baidu responded that the block was automatically triggered by bad links and search engines on the defendant's website and, here too, that the plaintiff failed to meet its burden of proof that Baidu had a market dominant position, in this instance because Baidu's service was free of charge and thus search engines did not constitute a product market under the AML. The court found that internet search engines did indeed constitute a product market for purposes of the AML, but here too found that the plaintiff failed to provide legally admissible proof that the defendant enjoyed a market dominant position, even though it was widely reported that Baidu enjoyed a market share in excess of 50 percent or even 60 percent at the time.[15]

V. CONCLUSION

This analysis of several early cases brought under the AML shows that civil litigation is already beginning to impact business behavior. Notwithstanding the absence of administrative

[14] 50 percent market share by one undertaking, 2/3 market share by two undertakings or 3/4 market share by three undertakings. This case is described in First Finance Daily, April 1, 2010, *available at* http://it.people.com.cn/GB/1068/42899/7603568.html and http://news.jcrb.com/jxsw/200912/t20091218_294367.html (each viewed Oct. 27, 2010); The issue of whether the courts have power independent of the enforcement agencies to determine the existence of a monopoly is discussed in Prof. Zhang Guangliang, *Jurisdiction of Anti-monopoly Civil Litigation and Judicial Determination of Monopoly*, (4) CHINA PATENT & TRADEMARKS 23-31 (2009).

[15] This case is analyzed in Li Yaowei, *Discussing the Class Litigation System Implemented in Private Litigation under the AML*, Chongqing Gong Shang Daxue Xuebao: Social Science Class (2010 No. 1), *available at* http://www.apcyber-law.com/details.asp?ID=3682 (viewed Oct. 27,2010).

enforcement, quasi-governmental industry associations even in regulated industries like insurance can be compelled to adjust their practices to conform to competition requirements.

The *China Netcom* and *Baidu* cases show that it is difficult for an individual or a small company to meet the legal burden of proof, but it seems likely that better resourced plaintiffs will be able to meet such burden where the facts support the claim, particularly if the Supreme People's Court issues more detailed guidance that does not lead to a restriction on access to the courts. The cases also show that the defendants in civil litigation at present are more likely to be domestically-invested companies because they are more likely to enjoy market dominant positions or to be members of local industry associations. The pending guidance on the relation between intellectual property laws and the AML may, however, expose FIEs, which enjoy intellectual property rights in China to a higher litigation risk.