Antitrust litigation in China – an increasing tide?

Introduction

The Supreme People's Court (**SPC**) published its long-awaited *Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts* (**Antitrust Litigation Rules**) on 3 May 2012.[1] The Antitrust Litigation Rules are a judicial interpretation for civil procedure in cases involving antitrust litigation in China, and provide guidance on inter alia standing, jurisdiction, rights of action, burden of proof, evidence, liability and limitations. The Antitrust Litigation Rules came into force on 1 June 2012.

The Antitrust Litigation Rules coincide with a steady increase in private enforcement of the Anti-Monopoly Law (**AML**) – the most recent cases include the on-going *Qihoo 360 vs. Tencent* abuse of dominance case heard in Guangdong, and the recent *Ruibang vs. Johnson & Johnson* resale price maintenance (**RPM**) case heard in Shanghai. According to recent statistics published by the SPC, since August 2008 when the AML came into force, China's courts have accepted 61 AML-related actions (with a little of over 50 actions concluded as at end 2011). Not all the court judgments in these cases are readily available in the public domain. The available information shows that the majority of the actions relate to abuse of dominance claims, a handful are cartel cases, and the courts recently heard the first case involving a vertical agreement.[2] The majority of these cases have either been dismissed by the courts for lack of evidence or have resulted in settlement for relatively insignificant sums of money.

The Antitrust Litigation Rules are expected to spur private litigation involving antitrust disputes. They clarify a number of procedural matters but do not address certain procedural issues that the earlier draft judicial interpretation sought to cover such as the use of the decisions of China's antitrust enforcement authorities as evidence of unlawful conduct, calculation of damages, and passing on defence. Below we summarise and discuss the salient provisions of the Antitrust Litigation Rules, and consider how this may impact future cases.

Antitrust Litigation Rules

Burden of proof: The Antitrust Litigation Rules focus on rules of evidence with 7 of its 16 Articles dedicated to evidence alone. This is not altogether surprising given the number of unsuccessful AML-related cases in the courts to date. Commenting on unsuccessful private actions under the AML in China's courts, He Zhonglin, Chief Judge of the Intellectual Property Court of the People's Court, noted that the root of the problem lay with the challenges faced by plaintiffs in adducing sufficient evidence to establish a case.[3]

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1 The SPC published a draft judicial interpretation on 25 April 2011 and consulted widely until June 2011.

2 Examples of abuse of dominance cases include Li Fangping vs China Netcom; Tangshan Renren vs. Baidu; Zhou Ze vs. China Mobile; and Sursen vs. Shanda. An example of a cartel case includes Liu Fangrong vs. Chongqing Insurance Association, which was subsequently withdrawn. The Ruibang vs. Johnson & Johnson was the first case involving a vertical agreement (RPM).

3 See, http://www.competitionlaw.cn/show.aspx?id=5760&cid=35.

As before, the plaintiff bears the burden of proving that the defendant has engaged in anti-competitive conduct, which has resulted in loss. However, the Antitrust Litigation Rules shift the burden of proof to the defendant to show that the disputed conduct does not have the effect of eliminating or restricting competition in the relevant market if the conduct in question involves a "hard core" violation of the AML (i.e. price fixing, sales or output restrictions, market sharing, restricting development of new technology and joint boycotts).

In abuse of dominance cases, the plaintiff must still show that the defendant is dominant, and that the defendant has abused its dominant position in the relevant market. This necessarily means that the plaintiff must adduce relevant and sufficient evidence before the courts to substantiate its claims on the precise scope of the relevant market, dominance and abuse:

- Going-forward, the plaintiff will be able to rely on publicly available information such as third party reports or the plaintiff's statements on its website or marketing materials concerning its market position to establish the defendant's dominance – unless the defendant adduces sufficient evidence to the contrary. This approach differs from the evidence rules in some prior judgments.[4]
- The plaintiff will still need to satisfy the courts that its definition of the relevant market is appropriate and that any third party reports or statements relied upon are indicative of dominance in that market. Courts and antitrust enforcement authorities in other jurisdictions generally require complex and detailed evidence to be produced by a plaintiff to establish the relevant market and the defendant's dominance in that market, supported by any necessary expert economic evidence.
- The Antitrust Litigation Rules do not alter the plaintiff's obligation to establish that a particular conduct is abusive but provides that it is for the defendant to show justification within the meaning of the AML.

In cases involving public utilities or enterprises with statutory monopoly status under other laws, the Antitrust Litigation Rules establish a rebuttable presumption that such companies are dominant – unless the defendant adduces sufficient evidence to the contrary. The Antitrust Litigation Rules indicate that the courts must still define the relevant market and consider market conditions in determining whether the particular enterprise is dominant, and the plaintiff must adduce at least some evidence that points to that enterprise's dominance.

A few recent cases provide further insight on the court's approach to evidence and the evidence that litigants can be expected to adduce in the future. In Tangshan *Renren vs. Baidu*, the court dismissed Renren's claim that Baidu had abused its dominance in Internet search by downgrading Internet search results to Renren's website for, inter alia, lack of evidence.[5] In dismissing Renren's claim that Baidu was dominant in China's Internet search market, the court held that statements made by Baidu on its website and market shares attributed to Baidu in third party reports were insufficient to substantiate the dominance claims. The evidence adduced was unclear as to how the relevant market was defined, how market share attributed to Baidu was calculated, or the methodology used to assess Baidu's market share.[6] Today, the Antitrust Litigation Rules would enable a plaintiff to rely on third party reports and the defendant's own statements to show dominance. The

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4 This constrasts with one of the first AML-related private actions in China, the Tangshan Renren vs. Baidu case. In dismissing the relevance of Baidu's own statements about its market share and position, the court held that only statements made in court i.e. during litigation could be regarded as an admission. The court also seemed to imply that a plaintiff could not rely on an admission, including in court, if this relates to a core element of its case – in this instance establishing dominance.

5 Renren claimed that Baidu's conduct followed Renren's decision to reduce advertising fees paid to Baidu to increase Renren's ranking in search results. The case was heard in the Beijing First Intermediate People's Court. In December 2009, the court dismissed Renren's action. Renren appealed the court's judgment to the High Court. The High Court affirmed the judgment of the court of first instance in July 2010.

6 The court also dismissed Baidu's contention that the relevant market was global and determined that it was China-wide. The court seemed to base its ruling on the fact that Baidu competed mainly with Chinese companies for Chinese customers. The judgment suggests the courts may readily define the relevant market as national in AML-related cases unless a litigant can show competitive constraints from competitors outside China.

plaintiff will still need to show, at a minimum, that the "market" or "market share" presented in the third party reports or statements is necessarily the same as (or similar to) the relevant market eventually defined by the court.

Similarly, on 18 May 2012, the Shanghai Intermediate People's Court dismissed a distributor's claim, Ruibang, against Johnson & Johnson (J&J) for damages for lack of evidence. Ruibang claimed that J&J imposed an unlawful minimum RPM clause in a distribution agreement. The court dismissed the case on the grounds that Ruibang had adduced insufficient evidence to prove that the clause had the effect of eliminating or restricting competition in the relevant market and that it amounted to unlawful pricing within the meaning of the AML. In dismissing Ruibang's claim, the court found that J&J had successfully shown that there were a number of alternative suppliers in the market and that there was insufficient evidence to establish that the plaintiff had suffered loss, or that the claimed loss arose from the alleged RPM provision. The case shows that it is for the plaintiff to show that the defendant has engaged in anti-competitive conduct, and that the plaintiff has suffered loss as a result of the anti-competitive conduct.

In October 2011, Qihoo 360 brought an action in the High People's Court of Guangdong Province for damages against Tencent claiming that Tencent had abused its dominance by engaging in, inter alia, bundling practices in Instant Messaging.[7] On 18 April 2012, the Guangdong High People's Court held a public hearing. The evidence before the courts included expert economic evidence, third party reports, and both Qihoo 360 and Tencent called expert witnesses (including an economist and two academics) to testify before the court. Although the Guangdong People's High Court has yet to deliver its judgment in this case, the evidence (expert and otherwise) in the case from the plaintiff and the defendant is perhaps the most extensive of any AML proceedings to date before the courts. This is not altogether surprising given the public and highly contentious nature of the spat between the two companies. Judgment is keenly awaited given the additional guidance it may provide on the courts' approach to evidence, expert witnesses, burden of proof, and on how the courts might interpret anti-competitive conduct under the AML – in this case conduct in a dynamic market.

The Antitrust Litigation Rules are noticeably silent with respect to the standard of proof required in antitrust litigation. The references to Civil Procedure, and judicial interpretations on actions involving tort and contractual disputes suggest that the Rules of Evidence in Civil Litigation issued by the SPC in 2001 would apply, unless otherwise provided under the Antitrust Litigation Rules.

The SPC's expectation appears to be that the Antitrust Litigation Rules will encourage more plaintiffs to bring private actions in the courts, establishing private litigation as an alternative to public enforcement of the AML. So far, the reported 50 or so cases heard by China's courts have generally faltered on lack of evidence.

Expert evidence: Parties may seek a court's approval for expert evidence to be presented during hearings. Parties may also apply to the court to appoint individuals or consultants to conduct market research or economic analysis on specified issues. However, it is unclear who would bear the costs for such third party opinions or reports. The *Qihoo 360 vs. Tencent* case appears to involve the first foray into the use of substantive economic expert evidence. The Guangdong High People's Court conducted a pilot implementation of the expert witness system by hearing an economist and academics (presenting as industry experts).

Stand alone and follow on rights of action: The Antitrust Litigation Rules allow for both stand alone and follow on rights of action. A plaintiff may bring an action directly before the courts ("stand alone"), or after a competition authority has adopted its decision concerning particular anti-competitive conduct ("follow on"). However, the Antitrust Litigation Rules do not address potential inconsistencies in decisional practice between competent courts, as well as between the courts and the antitrust authorities. Adding to the procedural uncertainty, it is unclear whether the antitrust authorities are expected to stay proceedings (or vice versa) if an action regarding the same or similar conduct is brought before the courts.

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7 The case in the Guangdong court is not the only litigation involving the two companies. Tencent separately sued Qihoo 360 under the Anti-unfair competition law.

Standing to sue: The Antitrust Litigation Rules allow for the following categories of plaintiffs to sue: natural persons, legal persons and other entities who have suffered any loss as a result of anti-competitive conduct; and natural persons, legal persons and other entities involved in any disputes over the breach of the AML on the basis of any contract or any trade association's rules. It is unclear whether both direct and indirect purchasers of goods or services from a defendant may sue in the courts. In certain jurisdictions indirect purchasers may be entitled to sue or claim relief resulting from anti-competitive conduct – such as where a product whose price is allegedly unlawfully fixed is purchased and then on-sold between manufacturer, distributor and consumer.

Jurisdiction of courts: The Antitrust Litigation Rules state that the following courts have jurisdiction to hear antitrust cases: Intermediate People's Courts of provincial capital cities, capital cities of autonomous regions, municipalities directly under the Central Government, municipalities with independent planning status and Intermediate People's Courts designated by the SPC. The SPC's approval is required if a plaintiff wishes a case to be heard before a Basic Level People's Court. To date, the majority of the relatively few AML-related cases have been heard in Beijing and Shanghai's respective Intermediate People's Court. Having heard most of the AML cases, these courts could prove relatively more sophisticated than other courts in terms of law and procedure under the AML, and may be inclined to interpret the plaintiff's burden of proof more strictly. China's judges have so far shown caution in the absence of robust analyses and evidence in support on market definition, dominance, abuse, and generally, anti-competitive effects.

Joint actions: The Antitrust Litigation Rules provide for the possibility of combining cases against "the same monopolistic act". A competent court may join cases where two or more plaintiffs bring actions to either the same court or to different courts against the same anti-competitive conduct. This provision allows courts to join cases involving the same defendant(s). It also appears to allow the courts to join cases involving different defendant(s) but ostensibly the same anti-competitive conduct. The Antitrust Litigation Rules do not specify the factors that the courts may consider when determining whether to join cases. In particular, they do not provide guidance as to how the courts are to interpret "the same monopolistic act" – notably the particular questions of law or fact that must exist for joinder. Unlike in some other jurisdictions, class actions are not recognised in China. Nonetheless, China's Civil Procedure Law enables plaintiffs to submit "joint complaints" if they have a common cause of action or if their action belongs to the same "category" subject to the court's consent.

Remedies: The courts may order the following remedies: injunction, damages or other declaratory orders (including orders to declare that provisions in a contract or articles of an industry association are void). In China, it is not common for a court to order high amounts of damages (compared to courts in other jurisdictions such as in Europe and in the United States). The courts also generally adopt a fairly high threshold regarding the evidence needed to prove a causal link between the alleged loss and alleged anti-competitive conduct. In *Ruibang vs. Johnson & Johnson*, for example, the court dismissed Ruibang's claim given, in part, the absence of a causal link between the loss suffered and that such loss did not stem from any elimination or restriction of competition resulting from the alleged unlawful RPM provision.

In calculating damages, the court will seek to quantify the actual financial loss suffered by the plaintiff. It may also include, upon the plaintiff's application, reasonable expenses and costs incurred during the investigation and steps taken to prevent the anti-competitive conduct. The Antitrust Litigation Rules do not specify the scope of such "expenses and costs", in particular whether this includes legal and expert fees. In practice, lawyers' fees are generally not recoverable in a civil action. It is unclear whether this would be the same in actions involving antitrust disputes given the time-consuming and complex nature of the evidence that is normally required to establish a case.

Statute of limitations: The limitation period for claims for damages is two years – starting from the date when the plaintiff knew or ought to have known of the infringement of its rights and interests. The limitation period stops when the alleged conduct is reported to the competent antitrust authority. If an antitrust authority refuses to accept a case, closes its file or terminates an investigation, the limitation period is reset from the date on which the plaintiff knows or should have known the authority's decision (to refuse, close or terminate a case). If anti-competitive conduct has continued for more than two years, and the defendant raises expiry of the limitation period as a defence, damages would be calculated for the period up to two years before the date on which the plaintiff brings the action. In China, there is no statutory obligation for antitrust authorities to publish decisions – although some decisions are made public through short press statements or through the media. It may prove difficult to establish when the plaintiff "knew or ought to have known" about the existence of a decision. The

provisions on the statute of limitations only refer to actions for claims in damages. This suggests that the statute of limitations does not apply to actions seeking injunction or other declaratory orders – presumably this assumes that the disputed conduct is ongoing.

Conclusion

The Antitrust Litigation Rules are welcome for plaintiffs at a time when the majority of private actions involving antitrust disputes in the courts have generally been unsuccessful.

Far from providing predictability on the conduct of private litigation in the courts, the Antitrust Litigation Rules leave considerable discretion to individual courts in terms of case management and generally approach to antitrust litigation in each case. This raises the prospect of diverging outcomes in relation to the same anti-competitive conduct or in cases involving the same defendant(s) facing legal disputes in different courts with respect to the same conduct. The possibility for the joinder of cases may reduce the incidence of conflicting results. This would not, however, address potential conflicts between private action through the courts and public enforcement of the AML.

Against this background, judgment in the pending *Qihoo 360 vs. Tencent* court case is eagerly awaited given the additional light it may shed on private actions involving antitrust disputes in China. The case's relevance for future abuse of dominance cases will, of course, depend on the court's findings and approach to evidence adduced on market definition, dominance and abuse as well as justification.

It remains to be seen whether the Antitrust Litigation Rules will increase the tide of private litigation in China. This seems to be the SPC's intent with its focus on the rules of evidence and the apparent relaxation of the evidentiary burden on plaintiffs.

Contacts

Patrick Zheng
T: + 86 10 6535 4998
E: patrick.zheng@cliffordchance.com

Ninette Dodoo
T: +86 106535 2256
E: ninette.dodoo@cliffordchance.com

Angie Ng
T: +852 2826 3403
E: angie.ng@cliffordchance.com

Bing Yu
T: +86 21 2320 7372
E:bing.yu@cliffordchance.com

Yong Bai
T: +86 10 6535 2286
E: yong.bai@cliffordchance.com