



# Private anti-monopoly litigation taking shape in China

IS YOUR BUSINESS PREPARED?

Following the promulgation of the PRC Anti Monopoly Law (AML) (which came into effect in August 2008), individuals and small to medium-sized enterprises (SMEs) have been testing how robustly the new law will be enforced. A number of private actions against business giants have been brought under article 50 of the AML. Although no judgments have yet been rendered, the fact that the Chinese courts have allowed a number of these complaints to be filed indicates that the plaintiffs have at least established a prima facie case. Further observation is needed to understand exactly how article 50 of the AML will operate to protect against anti-competitive monopolistic conduct and to what extent therefore it may impact on business practices.

## Introduction of article 50 of the AML

Before the introduction of the AML, private actions against monopolistic conduct could only be brought on limited grounds, such as unconscionability of contracts, violation of mandatory provisions in the Contract Law, or violation of the Anti-unfair Competition Law.

Article 50 of the AML entitles individual persons and entities to bring private actions for damages against entities that engage in monopolistic conduct contrary to the AML.

The term 'monopolistic conduct', as defined in article 3 of the AML, includes monopoly agreements, abuse of a dominant market position, and concentrations between undertakings that have, or may have, the effect of eliminating or restricting competition. Of these three types of monopolistic conduct, the conduct most often alleged as the basis for the private actions to date, has been abuse of a dominant market position, which is prescribed by article 17 of the AML, and includes:

- setting an unfairly high selling price or low buying price;
- predatory pricing, without justification;
- refusal to deal, without justification;
- requiring a party to deal exclusively, without justification;
- tying and discriminatory treatment without justification; and
- other abusive behaviour as determined by the AML enforcement agencies.

The recent cases brought under the AML indicate that the scope of monopolistic conduct that may constitute an abuse of a dominant market position may be broadly interpreted by the courts to include activities that are not specifically stipulated under article 17 of the AML. Article 17(7) provides a 'catch all' for other abusive exploitations of dominant market position as determined by the regulator.

## Substantive conditions for actions under article 50 of the AML

According to article 50 of the AML and the relevant provisions of the PRC Civil Procedural Law, an individual person or entity has the right to request an undertaking to bear civil liability if the following conditions are met:

- i the individual person or entity suffers loss;
- ii the undertaking engages in monopolistic conduct in violation of the AML; and
- iii the individual person or entity suffers loss because of such monopolistic conduct.

Condition (i) requires that only those who have suffered actual loss have the right to sue. Generally speaking, recent litigation in this area is essentially a form of public interest advocacy, including the cases against China Netcom Beijing Branch for discriminatory treatment, and Sinopec Beijing Oil Products Company for excessive pricing. Each of these cases was initiated by local lawyers in their capacity as customers of the respective defendants, with the clear intention of testing the boundaries of the AML in regulating the behaviour

of business giants and state-owned enterprises (SOEs). It is worth noting that public interest groups do not have standing to sue in China.

In order to establish condition (ii), the plaintiff needs to establish both that the defendant is qualified as an ‘undertaking’ under the AML and the defendant’s conduct falls within one of the three types of monopolistic conduct prohibited under the AML. Under the AML, a rebuttable presumption of dominance arises where an undertaking has 50 per cent market share. In some of the current cases, the plaintiff filed evidence to establish that the defendant has more than 50 per cent market share in order to demonstrate that it has a dominant market position. In other cases, it appears that the plaintiff simply relied on the presumption without filing specific evidence on the point. It is not clear whether, or to what extent, the relevant courts will rely on these presumptions as evidence of dominance.

The table below shows the alleged monopolistic conduct in each of the recent cases.

| Defendant  | Alleged monopolistic conduct  |
|--|---|
| Baidu  | Limiting the number of links to the plaintiff’s website shown in search results because the plaintiff opted to take up a cheaper search ranking service offered by the defendant.   |
| Shanda Interactive Entertainment   | Procuring a third party to terminate its business relationship with a competitor.   |
| China Mobile Group Beijing Company Limited (Beijing Mobile) and China Mobile | Charging monthly rental fees (in addition to regular charges) to its existing customers, while such fees are waived for new customers.  |
| Sinopec Beijing Oil Products Company   | Charging unfair excessive prices.   |
| China Netcom Beijing Branch  | Prejudicial treatment of non-permanent residents who apply for installation of fixed-line phones, (i) requiring them to provide a Beijing resident as guarantor, or to pay telephone bills in advance; and (ii) not allowing them to enjoy certain favourable packages and discounts. |
| Chongqing Insurance Association  | Fixing the price in auto insurance premiums through a ‘self-disciplinary agreement’ reached at an industry meeting organised by the Chongqing Insurance Association in 2006.  |

Condition (iii) requires causation to be established. The satisfaction of condition (iii) is subject to the ‘but for’ test, ie, but for the monopolistic conduct of the defendant, the plaintiff would not have suffered loss. In most of the recent cases the causation element is obvious, except in the case involving interference with a business relationship in the Shanda Interactive Entertainment case. The plaintiff faces the difficulty of having to prove the causation between the termination of a business relationship by its transaction counterparty and the abuse of dominant market position by its competitor.

### Procedural issues in litigation under the AML

Article 50 of the AML entitles individual persons and entities to sue and claim compensation. It is worth noting that China Netcom is asserting in its defence that an individual subscriber does not have standing to sue under the AML and should instead rely on consumer protection law to seek an appropriate remedy.

Considering the complexity of both the procedural and substantive issues in cases under the AML and the close relationship between competition cases and intellectual property cases, the Supreme People’s Court issued a notice regarding the implementation of the AML in July 2008, which provides that competition-related disputes and certain forms of unfair competition activities are subject to the jurisdiction of the intellectual property division of the People’s Courts. The notice also suggests that these courts should organise special panels to hear cases under the AML. Pursuant to the notice, the Shanghai No. 2 Intermediate People’s Court appointed a special panel of judges (with intellectual property and administrative law backgrounds) in December 2008 to hear competition cases under the AML. The Intermediate People’s Court of Chengdu established a Collegial Bench for competition cases under its Intellectual Property Division in April 2009. This notice also allows standalone actions to be brought before courts, ie, private suits can be brought by individuals and entities without any prior administrative determination of an AML infringement by the relevant regulator. Recent cases accepted by the PRC courts further affirm that the PRC courts have been ready to hear standalone actions.

Claims under article 50 of the AML are claims in tort. As a general rule, such claims are to be brought to

the court located in the place where the defendant is domiciled. Alternatively, they can be brought in the court located where the monopolistic conduct occurred, or is occurring. If the defendant is a foreign company, the claim may be brought in the court located where the relevant contract was made or performed; where the subject matter of the dispute is located; where the property is situated; where the tort occurs; or where the defendant's representative office is located.

The remedies available in cases under the AML include damages and injunctions. Preliminary injunction is, generally speaking, very difficult to obtain in cases under the AML since, under Chinese law, preliminary injunction is only available for special emergency cases (where the plaintiff's livelihood is jeopardised, or where the plaintiff is an enterprise, the plaintiff will face bankruptcy, absent the preliminary injunction) and certain intellectual property infringement cases.

## Conclusions

The availability of a standalone private suit to enforce the AML demonstrates the PRC's efforts to protect competition. The number of private suits initiated in this area is expected to increase. On the one hand, these suits inhibit the abuse of a dominant market position (including those held by many state-owned enterprises), on the other hand, the enforcement priorities of the regulator remain unclear. There is a clear appetite to use private suits under the AML in a *quasi* public interest advocacy role. Multinational companies, as well as leading Chinese companies (both private and state-owned), are clearly in the spotlight and should take AML enforcement seriously, carefully reviewing their business practices in the PRC to ensure compliance.

The AML sets out basic rules for determining monopolistic conduct. More detailed AML implementation rules have been published for public consultation by the three AML enforcement agencies – the Ministry of Commerce, the State Administration for Industry and Commerce and the National Development and Reform Commission. In some of the cases, the plaintiff argued that some activities (such as interference with third party contracts) that are not specifically listed in the AML could also constitute an abuse of a dominant market position, in violation of article 17 of the AML.

It is too soon to tell how the AML, along with the AML implementing rules (which are currently being developed both by the relevant administrative authorities and the courts), will be interpreted and implemented in litigation going forward.

The PRC courts recognise the complexity and importance of competition cases under the AML and are gathering experts and organising special panels to hear such cases. The Supreme People's Court is expected to issue a judicial interpretation to clarify enforcement procedures under the AML by the end of 2009.

For further information please contact

Michael Han  
Partner  
T +8610 6535 4525  
E michael.han@freshfields.com

Nicholas French  
Partner  
T +44 20 7832 7723  
E nicholas.french@freshfields.com

Connie Carnabuci  
Partner  
T +852 2846 3300  
E connie.carnabuci@freshfields.com

Peter Yuen  
Partner  
T +852 2913 2665  
E peter.yuen@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to [www.freshfields.com/support/legalnotice](http://www.freshfields.com/support/legalnotice). Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.