Civil Actions Under China's Anti-Monopoly Law - Five Major Cases, Five Major Lessons (Part II)

This is the second in a two-part series of updates focussing on the topic of civil action rights under the AML.

In Part I (available here) we looked at the basis for AML civil actions, before turning to examine five of the more notable cases concluded so far - commonly referred to as the GAQSIQ case, the China Mobile case, the Shanda case, the Baidu case and the Beijing Netcom case.

In this Part II, we seek to identify the major themes that can be drawn from these cases, and related lessons that should be heeded by companies operating in (or selling into) China.

Lesson 1

CIVIL ACTIONS MAY DRIVE AML ENFORCEMENT FOR SOME TIME TO COME

When the AML commenced, it was expected that the State Administration of Industry and Commerce (SAIC) and National Development & Reform Commission (NDRC) would lead the way in conduct rule enforcement. There was a widespread assumption that the civil action regime would develop slowly, while the SAIC and NDRC's experience enforcing pre-AML antitrust laws would allow it to forge ahead with investigations and prosecutions.

However, to date the primary AML-related activities of these bodies have been the organisation of staff-training forums, and preparation of enforcement guidelines and implementation rules. With no clear timeline for finalisation of these documents, and indications that both the SAIC and NDRC lack sufficient resources to engage in anything more than ad hoc 'cherry picking' enforcement efforts, it appears many individuals and business operators who believe they are the victims of monopolistic conduct may conclude that civil actions represent the best forum to pursue claims.

In this context, and with the prospect of a "double damages" incentive increasing the volume of cases in this area, it is not unreasonable to expect that the most significant developments under the AML's conduct rules in 2010 will stem from civil actions.

Companies seeking to mitigate AML-related risks should therefore pay close attention to any competition-related concerns raised by their customers and trading partners (as well as competitors) to ensure these do not escalate into substantive civil action claims.

Lesson 2

PLAINTIFFS MUST SATISFY HIGH EVIDENTIARY THRESHOLDS

Several of the cases mentioned in this series of updates failed (at least in part) because the relevant plaintiffs were not able to prove that a defendant held a dominant market position.

In the Baidu case, for example, the plaintiff (Renren) invoked Article 19 of the AML - which provides for a presumption of dominance to be drawn for business operators that possess a market share exceeding 50 percent.

The court accepted the plaintiff's submission that the relevant market impacted by the conduct of the defendant (Baidu) was China's search engine service market. Applying market definition principles articulated in the AML and the Guidelines for the Definition of Relevant Market issued by China's Anti-Monopoly Commission in May 2009, the court noted that Renren's market definition was supported by the fact that no other type of web service was closely substitutable for search engine services, and cultural and language factors specific to China supported identification of a China-wide geographic market.

However, Renren submitted just two documents in support of its submission that Baidu's share of this market exceeded 50 percent. One document was a report from the China Securities Journal, and the other was a news article from Baidu's own website. The court held that these reports did not discharge the plaintiff's burden, for reasons that included a lack of supporting evidence for the market share levels attributed to Baidu in the articles and a lack of clarity regarding how they were calculated.

Similarly, in the Shanda case, the plaintiff noted that a website operated by the defendant (Shanda) stated that its share of the online literature market in China was over 80 percent. However, the court ruled that these were only advertisements or only reflected promotions and were not sufficient to prove the defendant's dominant market position without other evidence.

Cases such as these demonstrate the importance of providing detailed evidence to support any claim that a defendant enjoys a dominant market position. In this context, it is appropriate to have regard to Article 18 of the AML, which lists several factors that must be taken into account when an assessment is made on this issue - thereby providing a roadmap for parties seeking to gather information to substantiate a dominance claim.

The Shanda case also suggests that Chinese courts will be (appropriately) cautious in relying on news reports and parties' own statements about market dominance, especially when the statements are made in a context that can be considered marketing or "puffery."

Lesson 3

LONG DELAYS WILL INCREASE TRIAL UNCERTAINTIES

Approximately fourteen months elapsed between acceptance of the Beijing Netcom case by the Chaoyang District People's Court on 1 August 2008 and the decision by the Beijing No. 2 Intermediate People's Court on 24 December 2009. Similar timeframes have applied for other cases, and the prospects for speedy resolution of most AML-related claims will remain low given the tendency of China's judiciary to consult widely (including by holding workshops with relevant scholars and government officials) before making a decision.

Of course, long delays in the hearing of antitrust cases is not a phenomenon that is confined to China. However, delays in the context of AML-related cases has unique implications for litigants at the present time.

This is because China's courts are guided in their interpretation of the AML by the implementation rules and associated guidance documents published by the SAIC and NDRC. At present, these bodies have only published a handful of draft guidance documents in relation to the conduct rules, and it is expected that we will see these drafts and further relevant measures finalised throughout 2010.

Accordingly, present and forthcoming cases may well be decided with reference to regulatory guidance that is yet to surface. This increases the level of uncertainty for all parties involved in AML-related civil actions in China, and may encourage stalling tactics by litigants who anticipate the future release of guidance documents that may assist their case.

Lesson 4

THREATENING AML LITIGATION MAY BE A NEGOTIATION TACTIC

To date, none of the major cases that have been brought under the AML have involved foreign companies. However, it is understood that several large multinationals have been threatened with lawsuits for alleged breaches of the AML in circumstances that suggest these threats are being invoked as a negotiation 'leveraging' tool.

It is understandable that multinationals (and prominent domestic Chinese companies) will be wary of submitting to court hearings regarding AML-related claims, even in circumstances where they are confident they have not acted in an unlawful anti-competitive manner. At this stage there exists significant uncertainties regarding how the law will be applied, particularly given the lack of finalised implementation rules and guidance documents pertaining to the AML conduct rules, and the relative inexperience (and independence) of China's judiciary when it comes to hearing antitrust matters.

It is likely China Mobile took these factors into account when it settled the lawsuit bought by the plaintiff Zhou in the China Mobile case. In the absence of further detail about the lawsuit being publicly available, it is difficult to assess the merits of Zhou's claims against China Mobile - but it is clear that the alleged abuse conduct is not typical of the types of discriminatory pricing claims usually litigated in courts in other jurisdictions.

Accordingly, companies will need to be wary of the threat of AML-related lawsuits being used as a negotiation tactic to force changes to existing and proposed trading arrangements. The commercial imperatives of a relevant deal in such cases will need to be weighed against the risks involved with allowing AML-related lawsuits to be heard by the courts, particularly as a defeat could also lead to a regulatory investigation and a fine of up to 10 percent of business turnover - and potentially significant brand damage and flow-on claims.

Lesson 5

AML CLAIMS CAN RESULT IN SIGNIFICANT BRAND DAMAGE

Most business operators recognise that the consequences of failing to comply with competition laws can go beyond financial penalties and mandated changes to business practices. Because these laws are at least partially designed to protect the interests of consumers, companies that violate competition laws may be seen as trampling on consumer rights and thereby suffer enormous brand damage.

This is particularly true in China, where AML-related cases have been receiving significant media exposure, and companies involved in such cases have been the subject of strident criticism on the internet and other public discussion forums. While this has been most evident in the field of merger review, with the primary example being public hostility to Coca-Cola in the lead-up to Mofcom's rejection of their bid for China's Huiyuan Juice Group, it is also increasingly apparent in the context of AML-related civil actions.

For example, China's media have reported significant online discussion of the China Mobile case, with many 'netizens' expressing support for Zhou's claim and the general premise that some pricing policies of China's leading telecommunications provider were unfair and an abuse of its market dominance. Similar scenarios are understood to have arisen in the context of the Baidu case and the Beijing Netcom case.

It can be expected that the level of public attention will be even greater in cases concerning the conduct of foreign multinationals. Accordingly, foreign companies need to be wary of the fact that any goodwill they may have been able to generate through positive engagement with Chinese society risks being rapidly eradicated by the stigma of AML-related claims (particularly those founded on allegations of 'dominance') - even if they are successful in defending those claims.

Conclusion

Since the AML came into force, an increasing number of AML cases have been filed in various Chinese courts. While many of the early cases did little to develop the jurisprudence, recent decisions have begun to shed light on the scope of the AML's conduct rules, and the evidentiary standards that must be satisfied to substantiate claims in this area.

To date, there are no known cases finding that any organisation or company has violated the AML, and it seems no foreign companies have been involved in AML litigation. This is encouraging, as it indicates that China's courts are imposing appropriate evidentiary standards for the establishment of AML-related claims, and that foreign multinationals are not being unfairly singled out for 'test cases'. Nonetheless, it will be prudent for all businesses operating in China to reduce their exposure to litigation by conducting compliance training, auditing potential compliance risks and judiciously handling relevant complaints or concerns raised by customers, trading partners and competitors.

Contact Us

Hannah Ha, Partner

T: +852 2843 4378

E: hannah.ha@mayerbrownjsm.com

John M. Hickin, Partner

T: +852 2843 2576

E: john.hickin@mayerbrownjsm.com

Gerry O'Brien, Senior Associate

T: +852 2843 4355

E: gerry.obrien@mayerbrownjsm.com