

How Private Antitrust Litigation May Proceed In China

Law360, New York (January 05, 2010, 4:37 PM ET) -- On Dec. 18, 2009, the Beijing No. 1 Intermediate People's Court issued a ruling in favor of Baidu Inc. — a popular Chinese Internet search engine company — in one of the first abuse-of-dominance private actions filed in China.

The court's opinion, which, in an unusual step, was read publicly by the presiding judge, provides insight regarding how private antitrust litigation might be conducted in China in the future.

In particular, the opinion addresses relevant market definition, the assessment of market dominance, and the evaluation of a claimed pro-competitive business justification for the alleged conduct.

Overall, the approach taken by the court on these issues appears to be generally consistent with that taken in the United States and other jurisdictions, which should be encouraging to antitrust attorneys who counsel clients with operations in China.

Background and Allegations

The plaintiff, Tangshan Renren Information Service Company Ltd. ("Renren"), operates an online medicine information portal called Quanmin Medicine Net ("Quanmin Web site").

Baidu provides an Internet search service. When a user initiates a Baidu search, the Baidu search engine uses two "ranking systems" to determine how the search results are presented.

First, a Website is assigned a "natural ranking" that is based on the extent to which the Web site's content matches the key word(s) entered and the number of related links the Web site contains.

Second, a Web site is assigned a "bid-page ranking" based on the fee that the Web site has paid to Baidu. Generally, Web sites are ordered according to their "natural ranking" on the left-hand-side of the search results page, each marked as a "Baidu Quick Webshot."

Web sites that participate in Baidu's "bid-page ranking" are listed either on the right-hand side of the search results page or on the left-hand side, co-mingled with the "natural ranking" search results, but marked as "Promotion."

Renren alleged that, starting in May 2008 after it decreased its "bid-page" payment to Baidu, Baidu blocked the Quanmin Web site in its search results, which led to a large decrease in visitation of the Quanmin Web site.

Renren alleged abuse of dominant market position under Article 17 of the Chinese Anti-Monopoly Law (AML) and claimed damages from economic loss in the amount of 1.108 million RMB (approximately \$162,000 USD). The case was accepted by the Beijing No. 1 Intermediate People's Court on Jan. 9, 2009, and went to trial on April 22, 2009.

AML Article 17 prohibits a dominant firm from engaging in certain types of activities. Renren specifically cited Article 17(4), which prohibits exclusive dealing.

Given the allegations described above, it is not clear why Renren choose this particular Article rather than, for example, Article 17(1) (charging "unfair high prices"), Article 17(3) (refusing to deal), or Article 17(6) (discriminatory treatment).

The court, however, did not have to reach this question because, as discussed below, it found Baidu not to be dominant and the alleged conduct to be justified.

Relevant Market Definition

In its detailed decision, the court started by laying out its conclusions regarding the appropriate relevant market.

The court relied on the market definition principles articulated in the AML and the Guidelines for the Definition of Relevant Market, which were issued by the Anti-Monopoly Commission of the State Council on May 24, 2009.

Defendant Baidu had argued that the AML should not apply to free services such as Internet search. The court rejected this argument because Baidu's ability to charge fees for "bid-page ranking" was contingent on its offering the Internet search service.

The court then defined both the product market and the geographic market, concluding that China's search engine service market was the appropriate relevant market because no other type of Internet service (e.g., news services or instant messenger services) is closely substitutable for search engine services and that the geographic market is limited to China as a result of cultural and language differences.

The conceptual approach to market definition in the AML and the guidelines, which the court endorsed, is broadly consistent with practices in the United States and other jurisdictions.

The court appeared focused on a search user's ability to substitute other services for Internet search. The service at issue in the case, however, was promotion of a Web site through its placement in Internet search results.

The court did not appear to investigate whether Renren had available to it closely substitutable methods for promoting its Web site. On the other hand, assuming a separate relevant market for "bid-page ranking," Baidu's share of search may be a good proxy for its share of this relevant market.

Assessing Dominance

On the issue of dominant market position, the court cited AML Article 18 (for a list of factors to consider when evaluating the existence of a dominant market position) and AML Article 19 (that indicates that a rebuttable presumption of dominance can be reached when a firm's market share exceeds 50 percent). The court explicitly stated that

The AML uses market share as the basis for a presumption of market dominance because it is more easily precisely calculated through economic analysis, compared with other factors such as competitive conditions or the undertaking's ability to control the downstream or raw material purchasing market. It is, consequently, more objective.

Thus, in civil antitrust litigation, when the plaintiff elects the presumption article, above, to prove that the defendant has a position of market dominance, the plaintiff ought to supply enough evidence to support its calculation and method of proof of the defendant's market share.

Renren had submitted two news articles as evidence of Baidu's market share in the search relevant market. The articles claimed Baidu's share of search to be 65.8 percent and over 70 percent, respectively.

The court concluded that the evidence provided by these two news articles was not sufficient to prove Baidu had a dominant position for two reasons.

First, it is not clear whether the "market" referred to by either of the two news articles matched exactly the relevant market defined by the court. Second, neither news article provided sufficient information regarding how the market share figures were calculated.

One article did not indicate at all how the market share was calculated, and the other, while citing a survey of computer users, did not provide the methods by which the survey was conducted, the data were collected, or the share calculated. Accordingly, the court was not convinced that the articles' market share calculations were based on "scientific and objective analysis."

This suggests that Chinese courts will demand scientific economic analyses of claims made in antitrust cases, just as United States courts do under the Daubert standard.

While the 50-percent threshold for a presumption of dominance is low by United States standards, this presumption can be rebutted under the AML by analyzing the factors listed under AML Article 18.

Pro-Competitive Business Justification for the Alleged Conduct

Although the court had already found that Renren had failed to prove that Baidu was dominant, it nevertheless proceeded to express its opinion that Baidu's alleged conduct did not constitute an abuse of dominant market position.

Baidu maintained that it had a pro-competitive justification for the alleged conduct because Renren had attempted to manipulate the "natural ranking" of its Quanmin Web site.

In particular, Baidu claimed (and Renren did not deny) that Renren had added unrelated links (“garbage links”) to the Quanmin Web site to cause Baidu’s search engine algorithm to assign a higher “natural rank” to the Web site. With the higher “natural ranking,” the Quanmin Web site would appear higher in the Baidu search results.

After Baidu’s detection system caught Renren’s maneuver of adding “garbage links,” Baidu responded by downgrading the “natural ranking” of the Quanmin Web site, resulting in Renren appearing with less frequency in Baidu search results.

Baidu said its action was a reasonable response to maintain the integrity of its search results. That is, its conduct was necessary to maintain the quality of its search engine product and thus was pro-competitive.

The court accepted this argument. It pointed out that, because Baidu’s policy of prohibiting the manipulation of search results by adding unrelated links is stated clearly on its Web site, it was reasonable to expect Renren to be aware of the policy.

Moreover, Baidu applied the policy to all Web sites, not just Quanmin. The court credited the evidence showing the existence of “garbage links” on the Quanmin Web site, and opined that:

The practice of using the anti-cheating mechanism mentioned above is to make the search results more accurate and reliable, thus protecting many search engine users’ welfare.

In addition, the existing evidence does not prove that defendant’s conduct mentioned above is discriminatory or threatening toward the plaintiff, so the defendant’s technical practice of decreasing Quanmin Medicine Net’s appearance in Baidu’s “natural ranking” search results in response to Quanmin’s extensive use of ‘garbage links’ is proper.

Renren’s ultimate complaint was that it received lower prominence in Baidu search results because it had reduced the “bid-page ranking” fee it paid Baidu.

However, the court found that (1) Baidu was justified in reducing the “bid-page ranking” for the Quanmin Web site since Renren had reduced the fee it paid; (2) there was no evidence that Baidu had reduced the “natural ranking” for the Quanmin Web site as a result of Renren decreasing the “bid-page ranking” fee it paid; and (3) as mentioned above, Baidu was justified in reducing the “natural ranking” of the Quanmin Web site in response to Renren’s addition of “garbage links.”

There have been concerns that pro-competitive business justifications for conduct by dominant firms would be given short shrift under China’s AML. However, in the Baidu case, the court went out of its way to express its view that Baidu’s claimed justification was valid. This suggests that pro-competitive justifications will be given a full hearing in China.

Damages

Although the court did not render an opinion on damages, the decision mentioned that Renren had submitted two pieces of evidence that we suspect Renren may have used to support its damages claim: (1) the number of visits to the Quanmin Web site on various dates after the alleged conduct started and (2) a comparison of the number of appearances of the Quanmin Web site in identical searches using Google China and Baidu after the alleged conduct started.

We surmise that Renren attempted to use a benchmark comparison (with Google China as the benchmark) to establish its damages. However, differences in the workings of the Baidu and Google China search engine algorithms for reasons unrelated to the alleged conduct may have made such a benchmark comparison unreliable.

In that case, a “differences-in-differences” comparison (i.e., analyzing changes in the Baidu-Google China comparison before and after the alleged conduct) would be needed.

In addition, a benchmark comparison may not have separated out the effects of the alleged conduct from the effects of Baidu’s justified reductions in the rankings of the Quanmin Web site.

Finally, the above evidence itself does not establish the causal links among rankings, Web site visitation, and Renren’s profits. Additional economic analysis would be needed to address these issues.

Conclusion

The court’s decision in the Baidu case is more detailed and transparent than the decision in the later-filed but earlier-decided abuse of dominance case Sursen Electronic Technology Co. Ltd. v. Shanda Interactive Entertainment Ltd. and Shanghai Xuanting Entertainment Co. Ltd. (this case was rejected by the Shanghai No. 1 Intermediate People’s Court on Oct. 23, 2009).

The Baidu decision provides insight as to how Chinese courts might apply antitrust principles and assess evidence in private antitrust litigation in the future. In the Baidu decision, the court appears to have been interested in rigorous economic analysis of the antitrust allegations.

In an interview conducted by the authoritative Chinese law publication Legal Daily after the decision was published, one of the judges on the Baidu court stated that “terms such as ‘used often’ and ‘highly reputed,’ which people use in daily life, are different concepts than the concept of ‘dominant market position’ in the AML. Evaluating dominant market position generally requires rigorous economic analysis.”

This suggests that private antitrust litigation will develop in China in a manner consistent with the United States and other jurisdictions, where economic analysis plays an important role.

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