

## First Two Court Cases Applying China's Anti-Monopoly Law

Since China's Anti-Monopoly Law (the "AML") came into effect in August 2008, a number of private plaintiffs have filed AML lawsuits before the Chinese courts. Two of these cases were resolved on October 23, 2009. These cases may shed light on the role private actions play in the enforcement of AML in China and may influence the guidelines regarding AML-related civil lawsuits, which are being drafted by China's Supreme People's Court.

### Shanghai Court Issued First Judgment Applying China's AML

On October 23, 2009, the Shanghai No. 1 Intermediate People's Court rejected an abuse-of-dominance case filed by Sursen Electronic Technology Co., Ltd. ("Sursen"), the operator of a website offering digital books, against Shanda Interactive Entertainment Ltd. ("Shanda") and Shanghai Xuanting Entertainment Co., Ltd. ("Xuanting"). This decision appears to be the first judgment applying the AML, specifically Article 17(4) of the AML, which prohibits an undertaking with a dominant market position from "limiting a counterparty to trading only with it or with an undertaking designated by it without any justification."

The case involved a book Sursen published online in 2008. Shanda had previously hired author Zhu Zhihong to write an online serial novel titled "Star Change," to which Shanda's partner Xuanting holds the copyright. "Star Change" was one of the most popular online novels in China in 2008. Two other authors subsequently wrote "Star Change – the Sequel" using similar pen names and the same characters, scenes, and other details. Beginning in May 2008, Sursen's website, du8.com, carried "Star Change – the Sequel," which also gained widespread popularity.

Shanda and Xuanting accused the sequel's authors and Sursen of violating Xuanting's copyright. The sequel's authors issued a public apology on January 1, 2009, and promised to cease writing the sequel.

Sursen, however, filed suit under the AML, alleging that Shanda had abused its dominant market position in the "Chinese online literature market" by stopping the two Chinese authors from publishing their sequel and by falsely claiming copyright infringement. The case went to trial on June 17, 2009.

On October 23, 2009, the Shanghai No. 1 Intermediate People's Court issued an opinion rejecting Sursen's abuse-of-dominance claims, for two primary reasons:

First, the court held that there was not sufficient evidence that Shanda had a dominant position in the market for Chinese online literature. Sursen did not provide sufficient evidence to count Shanda's position in online gaming (for which Shanda is better known) toward its position in online literature. In addition, while the court acknowledged that Shanda's official website claimed a market share of more than 80% in China's online literature market (higher than the 50% threshold for a presumption of single firm dominance under Article 19 of the AML), the court did not accept this as evidence of dominance. The court noted that: (i) the statement was likely made for marketing purposes and was not a properly calculated market share; and (ii) the plaintiff had previously claimed that its website was the largest website for electronic books.

Second, the court held that the plaintiff had failed to establish that Shanda and Xuanting had acted improperly in forcing the sequel's authors to cease publication. Instead, the court held that the defendants' actions were justified by the defendants' desire to protect their intellectual property rights.

The decision is notable for the court's willingness to analyze market shares and for its willingness, at least on these facts, to treat the assertion and protection of intellectual property rights as a permissible justification for challenged action.

### **China Mobile Settles Subscriber Lawsuit**

Also on October 23, 2009, China Mobile settled a private abuse-of-dominance lawsuit brought by Mr. Zhou Ze, a Beijing lawyer who is a subscriber to China Mobile's services. In the settlement, which was mediated by Beijing No. 2 Intermediate People's Court, China Mobile agreed to pay 1,000 renminbi (approx. €8) without admitting wrongdoing. China Mobile reportedly claimed that its payment was only an acknowledgement of its gratitude for Mr. Zhou's suggestion on improving their services.

Mr. Zhou argued China Mobile held a dominant position, possessing a 70% share of the domestic mobile telecoms market, and that it abused its dominance by charging subscribers who do not participate in pay-as-you-go schemes a 50 renminbi (approx. €5) monthly rental fee. The case was accepted on March 30, 2009 by Beijing Dongcheng District Court and transferred to Beijing No. 2 Intermediate People's Court on June 5, 2009. Trials were held on September 7, 2009 and October 19, 2009, respectively.

Mr. Zhou claimed China Mobile violated Article 17(5) and Article 17(6) of the AML, which prohibit an undertaking with a dominant market position from "conducting tie-in sales of commodities or imposing other unreasonable trading conditions to transactions without any justification" and from "applying differential prices or other transaction terms among their trading counterparties who are on an equal footing without

any justification.” Relevant provisions in China’s Price Law and Consumer Protection Law were also invoked. Mr. Zhou asked the Court to order China Mobile to stop charging him the monthly rental fee and to reimburse him for the rental fee charged in the past two years (approx. €19).

China Mobile denied that it holds a dominant position or that it imposed unreasonable trading conditions or engaged in discriminatory pricing. To support its arguments, China Mobile submitted to the court circulars and rules issued by the Ministry of Industry and Information Technology (and its predecessor) dated from 1994 to 2002.

After two trials, the court mediated a settlement and issued its decision on October 23, 2009 accepting Mr. Zhou’s dismissal application. A similar case filed in 2008 by another Beijing Lawyer, Mr. Li Fangping, charging Beijing Netcom with price discrimination, is still pending before the same court.

The fact that the China Mobile case was concluded with a settlement might indicate the Chinese courts’ reluctance to find allegedly dominant companies liable without any decisions from the administrative enforcement authorities.

## **Conclusion**

The Shanghai court’s decision and China Mobile’s settlement are notable in that they appear to be the first two decisions in abuse-of-dominance cases under the AML. Both cases were private enforcement actions. The Chinese antitrust enforcement agencies responsible for this area, the State Administration for Industry and Commerce and the National Development and Reform Commission, have not yet announced any decisions or publicly launched any investigations under the AML, although a number of complaints have been filed.

These developments suggest that private actions in the Chinese courts may play a greater role in the development of Chinese antitrust law than in some European jurisdictions, where private antitrust litigation is relatively uncommon. On the other hand, as noted, both courts refrained from imposing liability on allegedly dominant companies, a restraint that may reflect a cautious approach to abuse-of-dominance cases in the absence of guidance from the Chinese enforcement agencies. Developments on other pending AML-related cases and the guidelines regarding AML-related civil lawsuits will be closely watched.

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