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## **Baidu Case Regarding Abuse of Market Dominance**

On December 18, 2009, the Beijing First Intermediate People's Court (the **Court**) announced openly in favor of Baidu, Inc. ("**Baidu**") in a private antitrust lawsuit filed by Tangshan Renren Information Service Company ("**Renren**"). This article will analyze this decision according to the relevant provisions of China's antitrust laws and rules.

### **The Facts**

Renren is a consulting service provider for medical information and an operator of a website. As the plaintiff, Renren claimed that because of its reduction of payment to Baidu for the auction-based rankings, Baidu had blocked its website from Baidu's unpaid search results, thus causing traffic loss and revenues reduction. Renren claimed that Baidu enforced Renren to increase the payment by abusing its market dominant position in Chinese search engine market, which constituted a contravention to China's Anti-Monopoly Law (the **AML**). Renren sought damages of about RMB 1.1m and an injunction for the termination of the blocking measure.

Baidu admitted that it had blocked Renren's website. However, Baidu argued that the blocking measure was a legitimately automatic action under its published policy because Renren had used a robot to automatically post junk posts on various online forums and websites and sent out spam messages (so-called "junk links") to boost its ranking in Baidu's search results. Baidu also argued that the measure had nothing to do with the payment for the auction-based ranking, and the only thing would be affected is the ranking of unpaid search results. Furthermore, Baidu argued that what had been claimed by Renren concerning market dominance was absent of merits. Since the search engine service provided by Baidu is free for the public, Baidu argued that such service market did not fall into the scope of the relevant market under the AML. As such, Baidu requested the Court to dismiss the legal action brought by Renren.

### **Judgment Analysis**

Compared to the judgment of *Sursen v. Shanda (Shanda)* rendered by Shanghai First Intermediate People's Court on October 23, 2009, the Baidu judgment provided a more detailed interpretation and analysis on the following aspects: (1) definition of the relevant market; (2) market dominance determination; and (3) the assessment of an abuse of market dominance and analysis of its legitimate reasons.



(1) **Definition of the relevant market**

The Court found that the alleged ‘Chinese search engine services market’ constituted a ‘relevant market’ under the AML as follows:

- **Relevant product market**: the Court held that “search engine services have unique characteristics such as instant searching and location and providing mass of information for internet users, which can not be substituted by other types of internet application services. In other words, there is no close demand substitution between search engine services, and other internet application services, network news services and instant communication services and etc., which is necessary to determine a relevant market. Thus, search engine services itself can constitute an independent relevant product market.”
- **Relevant geographic market**: the Court found that: “due to the cultural background and language preferences of the internet users, Chinese internet users usually use search engine service sourced within China. That is to say, that the similar services providers inside China are close competitors.’ Therefore, the Court held that the relevant geographic market in this case should be defined to mainland China.
- Finally, Baidu denied that search engine services market did not constitute a relevant market under the AML, because they were offered to end users free of charge and the AML does not regulate such free services. However, the Court held an opposite opinion that “this kind of free-of-charge services differs from other nonprofit services because Baidu could make profit or potential profit by absorbing internet users and marketing via advertisement.

(2) **Market dominance determination**

Renren attempted to rely on the presumption of market dominance of Baidu in ‘Chinese search engine services market’ as set out in article 19(1) of the AML, that is, a dominant market position may be presumed, if Baidu’s market share in the relevant market accounts for more than 50 percent.

To prove Baidu’s market share exceeded 50 percent, Renren had submitted the followings:

- An article ‘*Baidu possesses 2/3 market share of Chinese search engine market*’ published by *China Securities Journal*, September 17, 2008, Page 4, which stated that according to a survey by certain consulting company, Baidu held a 65.8 percent market share ahead in China; and



- An article ‘*the Number of Q3 clients of Baidu is exceeding 2 hundred thousand and the amount of paid-search increases steady*’ published on Baidu’s own website on October 23, 2008, which stated that Baidu’s market share in Chinese search engine market was over 70 percent.

Despite the above evidence, the Court held that Renren failed to prove Baidu’s market share exceeding half of the ‘Chinese search engine services market’, for the reasons as followings:

- It was not clear whether the scope of relevant market referring to alleged ‘market share’ in above two articles was as same as the relevant market defined in this case. The determination of the scope of relevant market directly affects the calculation of the market share, therefore, the Court was unable to decide that market share in above two articles are calculated for relevant market with the same scope.
- The alleged relevant market in this case is Chinese search engine services market. However, Renren submitted only two pieces of news about market position of Baidu. Neither economic analysis, explanation of the method of calculating the market share, nor any underlying data within either article could confirm the Court that the calculation of market share derived from an objective and reasonable analysis.

To sum up, in the process of establishing the defendant’s market dominance, the Court set out a high standard on the plaintiff’s burden of proof. Instead of merely relying on the reported market share in news or advertisements, the claimant should provide evidence of specifically setting out the basis of the analysis to prove market dominance of the defendant.

In addition, the Court held that “it would also consider the various factors under the article 18 of the AML to assess dominance, such as the company’s market share, competition level, ability to control sales channels and raw material markets.’ This high evidentiary burden indicates the court’s caution when establishing market dominance under the AML in absence of any findings by the antitrust enforcement agencies.

### (3) **The assessment of an abuse of dominance and analysis of its legitimate reasons**

Article 17 of the AML stipulated that certain commercial conducts on a justified ground would not constitute an abuse of market dominance. However, in one hand, the AML does not provide any explanation of what constitutes a ‘justified reason’, while in the other hand, neither relevant



implementing rule nor guidance is issued regarding this point. Nonetheless, this decision set out an example for understanding and implementing the ‘justified reason’.

In the first place ,the Court emphasized that “the AML does not prohibit the dominant market position due to company’s self-development, but only conduct of a company with market dominance, which has negative influence to the market structure and competition order. If the conduct is on justified ground, as well as does not harm the market competition order, it does not constitute an abuse under the AML.”

Then, the Court held that Baidu had the following justified reasons to block the plaintiff’s website:

- Generally, the Court determined that the reason for Baidu’s blocking was because of a large number of junk links contained in Renren’s website. The blocking measure was automatically set out as a punishment according to the relevant policy published by Baidu, where the search engine detected those junk links.
- Secondly, Baidu had announced its relevant policy and corresponding punishment via notice on its own website prior to Renren’s legal action.
- Thirdly, the policy and the punishment were enforced against all websites that contained junk links, not solely against Renren’s one.
- Finally, the Court also emphasized that Baidu’s approach was to ensure the accuracy and integrity of the search results for the benefit of search engine users.

In essence, the Court’s analysis focused on whether Baidu’s measures were ‘coercive’ or ‘discriminatory’ to the plaintiff.

The Court also held that Renren had failed to prove Baidu’s blocking was due to its reduction of the payment to Baidu for the auction-based rankings. Therefore, the Court could not accept Renren’s presumption that the decreasing ranking of unpaid search results was because of the reduction of the payment for auction-based rankings.

### **Conclusion**

Since the AML came into force on August 1, 2008, a number of private antitrust actions have been filed with the competent courts. For example, on October 23, 2009, Shanghai First



Intermediate Court in the first instance held that it was unable to determine the defendant *Shanda Interactive Entertainment* had compelled web writers via its market dominance, thus, dismissed the claims of the plaintiff *Beijing Sursen*. On October 26, 2009, *China Mobile* settled a lawsuit concerning abuse of market dominance filed by a customer. After *China mobile* had promised to relieve the monthly fee and paid RMB1, 000 in the name of ‘award’, the plaintiff withdrew the legal action.

The Baidu case is distinguished from the above civil cases as follows:

- The court for the first time conducted a substantive analysis of certain important issues, including the definition of the relevant market, the presumption and determination of a market dominant position, the finding of an abuse and the assessment of its legitimate reason;
- Instead of relying on vague ‘ public interest’ or ‘consumer protection’ arguments, the Baidu case involved commercial and economic analysis; and
- The court required a high evidentiary standard with respect to AML private cases.

In a word, with the continuous improvement of the AML, as well as the expected publication of the relevant judicial interpretations, the private antitrust litigation in China will face significant development. Hence, it should be advisable for those companies with considerable market share (e.g. more than 50 percent) in a certain market to keep close eye on such aspect.

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