The Dominance and Monopolies Review

Second Edition

Editor
Maurits Dolmans

Law Business Research Ltd
THE LAW REVIEWS

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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## CONTENTS

<table>
<thead>
<tr>
<th>Editor’s Preface</th>
<th>..........................................................vii</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Maurits Dolmans</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 1</th>
<th>AUSTRALIA.................................................................1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Ayman Guirguis, Richard Flitcroft and Jackie Mortensen</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 2</th>
<th>BELGIUM........................................................................22</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Damien M B Gerard</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 3</th>
<th>BRAZIL............................................................................40</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Ana Paula Martinez</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 4</th>
<th>CANADA............................................................................54</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Arlan Gates and Eva Warden</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 5</th>
<th>CHINA............................................................................71</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Zhan Hao, Wang Zhining, Annie Xue, Song Ying and Li Xiang</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 6</th>
<th>COSTA RICA....................................................................86</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Edgar Odio</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 7</th>
<th>EUROPEAN UNION................................................................97</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Thomas Graf and Henry Mostyn</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 8</th>
<th>FINLAND........................................................................117</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Anna Kuusniemi-Laine, Salla Mäntykangas-Saarinen and Juuli Broms</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 9</th>
<th>FRANCE ..........................................................................129</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Antoine Winckler, François Brunet and Frédéric de Bure</em></td>
</tr>
</tbody>
</table>
Contents

Chapter 10  GERMANY ................................................................. 146
             Stephan Barthelmess and Tilman Kuhn

Chapter 11  INDIA ................................................................. 162
             Anand S Pathak

Chapter 12  ITALY ................................................................. 179
             Matteo Beretta and Gianluca Faella

Chapter 13  JAPAN ................................................................. 198
             Kozo Kawai, Ryutaro Nakayama, Madoka Shimada
             and Takahiro Azuma

Chapter 14  MALAYSIA .......................................................... 213
             Tay Beng Chai and Lynette Yee Eun Ping

Chapter 15  NETHERLANDS .................................................... 224
             Erik Pijnacker Hordijk

Chapter 16  POLAND .............................................................. 242
             Jarosław Sroczyński and Łukasz Wieczorek

Chapter 17  PORTUGAL ........................................................... 257
             Nuno Ruiz

Chapter 18  ROMANIA ............................................................ 266
             Anca Buta Muşat and Răzvan Pele

Chapter 19  SPAIN ................................................................. 276
             Francisco Enrique González-Díaz and Ben Holles de Peyer

Chapter 20  SWEDEN .............................................................. 287
             Ulf Öberg, Andreas Reindl, Magnus Schmauch and Hiba Zeydi

Chapter 21  SWITZERLAND ...................................................... 315
             Nicolas Birkhäuser and Andreas D Blattmann
Chapter 22  TURKEY ..............................................................333
Gönenc Gürkaynak

Chapter 23  UNITED KINGDOM ...............................................345
Paul Gilbert

Chapter 24  UNITED STATES ..................................................363
Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon

Appendix 1  ABOUT THE AUTHORS .....................................379

Appendix 2  CONTRIBUTING LAW FIRMS’ CONTACT DETAILS...397
EDITOR’S PREFACE

Since the last (and indeed first) edition of this book, the law on monopolies and abuse of dominance has undergone evolutionary rather than revolutionary changes. Many of the sectors that regulators focused on in the past few years (most notably the digital economy, telecommunications and energy) unsurprisingly continue to be the subject of regulatory and judicial scrutiny. From the vantage point of 2014, the growing internationalisation of regulators’ antitrust priorities and focus has continued, with intensifying enforcement in China and India and emerging economies. Books such as The Dominance & Monopolies Review make common trends both more apparent and capable of being comparatively analysed.

This editorial picks out three developments. First, while authorities in different countries may select similar or even the same cases, the substantive analysis may still diverge, and insufficient attention appears to be given to comity. Second, internationalisation of antitrust enforcement has given rise to globalisation of lobbying efforts, which can feed a potentially dangerous politicisation of antitrust policy especially in large and visible cases. Antitrust enforcement should be based on cold facts and the rule of law. Third, to end on a positive note, the means of resolving these types of case is shifting: settlements with, and commitments to, antitrust regulators are used increasingly to obtain more rapid and practical results where parties show an interest in avoiding protracted litigation.

As some of the more significant abuse cases in the past year underline, the European Commission and the US Federal Trade Commission (FTC), as well as authorities such as those in India and China, have a tendency to focus on similar issues and even the same cases. The Google case is one example; the issue of standard essential patents (SEPs) is another. This should be no surprise in an increasingly global and interdependent economy, in particular in worldwide markets for new technology, and where antitrust authorities exchange information and cooperate in the International Competition Network and organisations such as the OECD.

Despite the parallel focus, there remain divergences in analysis. This was thrown into relief by the different conclusions reached by the various authorities and courts in their analysis of Google’s search business. In January 2013, after 19 months, the FTC
closed its investigation into Google’s business practices. As to the most important issues, including the complaint that Google had changed its search algorithm to demote rivals, and Google’s alleged practice of promoting its own vertical properties, the FTC found that Google’s practices improved its products and were pro-competitive.\(^1\) Indeed:

\begin{quote}
The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google’s rivals may have lost sales due to an improvement in Google’s product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of ‘competition on the merits’ and the competitive process that the law encourages.
\end{quote}

Also:

\begin{quote}
Google’s primary goal in introducing this content was to quickly answer, and better satisfy, its users’ search queries by providing directly relevant information.
\end{quote}

Given the huge political pressure on the FTC to bring a case, this was a courageous decision. Nor was the FTC alone, since courts in Germany and Brazil came to the same conclusion.\(^2\) The European Commission took a different approach: it agreed on the first point, concluding that:

\begin{quote}
the objective of the Commission is not to interfere in Google’s search algorithm.\(^3\)
\end{quote}

In contrast, however, it raised preliminary concerns with regard to the allegedly favourable display of links to Google’s specialised search services on the ground that these links might divert traffic from rivals,\(^4\) and it extracted commitments from Google (see below). Some other antitrust authorities seem poised to go even further, and appear

\begin{footnotesize}
\begin{enumerate}
\item Verband Deutscher Wetterdienstleister e.V. v. Google, Reference No. 408 HKO 36/13, Court of Hamburg, 11 April 2013; Buscape v. Google, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).
\end{enumerate}
\end{footnotesize}
determined to decide against Google on both points whatever the evidence. It is striking that leading antitrust authorities would come to such different conclusions, especially since the evidence of ‘diversion’ was thin, and the evidence that the goal is to improve search services is so clear. Where the FTC noted, for instance, that

"other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anti-competitive exclusion of rivals"

the EC or certain other authorities would counter simplistically that firms with a dominant position have a special responsibility and are not allowed to practise what non-dominant firms are free to do, ignoring the point that if non-dominant firms successfully engage in the same conduct, they cannot be found to leverage dominance, and *prima facie* seek to improve products or achieve efficiencies. Dominant firms should be allowed to do so too. Competition on product improvement is in the consumers’ interest.

As the *Google* case unfortunately illustrates, manipulation of public opinion is increasingly a factor in highly visible and large antitrust proceedings. The global level and intensity of lobbying by complainants in this case is unprecedented, with competitors using trade associations to advocate views with an appearance of objectivity. Publishers (with commercial goals that include objectives unrelated to the issues in the case, such as the quest for ancillary copyright for news snippets) are seen to use news fora they control to stir up public opinion and mobilise politicians. Lobbyists have long mustered support from US senators, but a new development is the lobbying of members of the European Parliament – including even its president – who may think that placating publishers or lobbyists helps them in elections. Parliamentarians are heard to speak out publicly with strong convictions, as if they have carefully evaluated the facts, the law, and the economic policies. But antitrust enforcement should be a cold-headed judicial or investigative process, with decisions based on facts, law and economics, not politics. If this politicisation continues (and if the European Courts do not curb it), it could muddy the boundary between consumer welfare and manipulated political goals, potentially turning important assessment tools such as marketing tests into opinion polls, and undermining the rule of law. That would not be in the consumer interest.

At the time of writing, at least, vice president Almunia has stood up against attempts to steer him away from confirming the *Google* commitments (see below). But in

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highly visible cases, there is a concern that populist, political or protectionist temptations will cloud the clarity of analysis that should be the norm in antitrust investigations. In some countries, there are even more worrying hints of unreliable procedures, lack of protection of confidential information, potentially arbitrary process and decision-making and inadequate substantive analysis. Apart from political opportunism and a populist streak in policy choices, some authorities appear tempted to free ride on others’ efforts and to outshine each other by extracting greater remedies than their colleagues whatever the merits of the case. There is in some cases also an apparent desire to protect local players against foreign firms, rather than focusing solely on consumer interest. These are dangerous developments. With the increasing proliferation of competition laws, greater attention to facts and the rule of law is required. The need for comity – and specifically greater respect for decisions by authorities in the country of origin of the defendant with respect to worldwide practices – is stronger than ever (provided of course that due process is followed, and national bias is avoided in the country of origin).

The Google case is interesting also in that it illustrates another trend – a positive one this time. To meet the EU concerns, Google offered commitments to resolve concerns and avoid long drawn-out proceedings and appeals. Having gone through three iterations, the commitments look likely to be adopted by the summer of 2014 (four years after the opening of formal proceedings). Standards is another area where settlements played a significant role. In early 2013, the US FTC announced that Motorola LLC had agreed to a Consent Order to address allegations that it had reneged on its FRAND obligations not to pursue injunctions against users of Motorola’s SEPs who were supposedly willing licensees. The European Commission followed suit in early 2014, accepting commitments offered by Samsung (patterned on Google’s agreement with the FTC). The commitments lay out how SEP holders might approach their obligations with regard to willing licensees so as to avoid being found to have violated antitrust rules (as will, it is hoped, the Court of Justice’s preliminary ruling in ZTE v. Huawei). The common approach taken by both the FTC and the European Commission signals (as

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vice president Almunia recently commented) a significant moment of convergence.\textsuperscript{10} It is expected that this convergence will be mirrored in jurisdictions such as India and China, where issues around essential patents have recently also become the subject of investigation and litigation.\textsuperscript{11}

The use of commitments and settlements in dominance and monopoly proceedings is to be welcomed, especially in dynamic markets, as it may lead to expeditious and efficient resolution of issues. In Europe, after the ‘procedural modernisation’ embodied in Regulation 1/2003,\textsuperscript{12} the Commission has so far settled two-thirds of its abuse cases by way of commitments.\textsuperscript{13} The advantages from the defendants’ perspective (at the cost of trustee oversight and a binding decision that can be enforced even if breaches are technical and have no negative impact on competition) are that fines are avoided; there is no factual finding of abuse that can be used as a basis for private damage claims; no legal precedent is established; firms are not embroiled in decade-long appeal proceedings; and parties avoid disputes about implementation of otherwise vague and generally worded remedy orders that can poison the relationship with the authorities. From the plaintiffs’ perspective, these points can be seen as disadvantages (especially the absence of precedent when new types of abuses are alleged), but this may be outweighed by the advantage that a solution is found relatively quickly. Consumers benefit as well.

This is not to say that settlements are always beneficial, as already mentioned in last year’s editorial. There is a risk of regulatory hold-up, where an antitrust authority extracts concessions in unprecedented cases, using the threat of excessive fines, long and expensive proceedings, extensive discovery, political decision-making, absence of adequate judicial review and expensive follow-up private damage claims as leverage. Not all commitments are truly ‘voluntary’ in this light. This does not apply to the same extent in the US, where parties have a more real choice of whether to use a negotiated procedure, in view of the role of the courts in infringement proceedings.

In the past 10 years, commitments have thus come to occupy an important and generally efficient position in the enforcement process in both the United States and, particularly, the EU. The process is, however, far from perfect. In Europe, the Commission has in practice reversed the sequence of the procedure prescribed by Regulation 1/2003: instead of first issuing a preliminary assessment and then negotiating commitments, it


\textsuperscript{11} In the recent case of Huawei v. InterDigital, Inc, and the NDRC’s ongoing investigations of Qualcomm and Interdigital, Inc in China, and, in India, the CCI’s investigation in Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ), 50/2013, 12 November 2013; and Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson, 76/2013, 16 January 2014.


\textsuperscript{13} Of the 43 cases the Commission has dealt with since 1/2003 came into effect, 28 were settled by way of commitments and 15 by way of prohibitions.
Editor's Preface

tends to do the reverse. This has meant that defendants do not know the Commission’s theory of harm in sufficient detail, and are more or less groping in the dark about how to address the Commission’s concerns (although they will generally know at a high level from State of Play meetings what the overall issues are). Without a focused theory of harm, not only is legal certainty and clarity eroded, but there is also a risk that the Commission may move beyond what is strictly required to remedy its concerns, and instead seek to achieve political goals. On balance, however, the practice of accepting commitments is to be welcomed as a practical and realistic way of addressing concerns in the interest of consumers in a timely manner while reducing the expense and risks of full enforcement. It is hoped that authorities elsewhere will emulate this example, without succumbing to the temptation of regulatory hold-up.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this second edition of The Dominance & Monopolies Review. I am personally grateful for the assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what evolutions or, indeed, revolutions, 2014 holds for the next edition of this book. Especially eagerly awaited are the European Court’s judgment in Intel (conditional pricing) and the European Commission decision in Gazprom, and the US authorities’ reviews of conditional pricing, and of the practices of patent assertion entities (PAEs) and privateers, which are directly relevant also for the EEA and other jurisdictions.

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP
London
June 2014
I  INTRODUCTION

Article 17 of the Chinese Anti-monopoly Law (AML) prohibits undertakings with a dominant position in the relevant market from abusing their market dominance. According to Article 17, subject to the rule of reason, undertakings are banned from conducting the following seven kinds of abusive activities:

a  selling commodities at unfairly high prices or buying commodities at unfairly low prices;

b  without justifiable reasons, selling commodities at prices below cost;

c  without justifiable reasons, refusing to enter into transactions with their trading counterparties;

d  without justifiable reasons, requiring trading counterparties to make transactions exclusively with themselves or with the undertakings designated by them;

e  without justifiable reasons, conducting tie-in sales of commodities or imposing other unreasonable trading conditions on transactions;

f  without justifiable reasons, applying differential prices and other transaction terms among trading counterparties on an equal footing; or

g  other acts of abuse of a dominant market position confirmed as such by the AML enforcement authorities under the State Council.

Public enforcement of the AML is carried out by three authorities: the Ministry of Commerce (MOFCOM), which is in charge of merger review; the National Development and Reform Commission (NDRC), which is responsible for combating price-related

---

1 Zhan Hao is the managing partner and Wang Zhining, Annie Xue, Song Ying and Li Xiang are associates at AnJie Law Firm.
anti-competitive activities; and the State Administration for Industry and Commerce (SAIC), which regulates non price-related anti-competitive activities.

In accordance with Article 17 of the AML, abusive activities involve both price and non-price-related anti-competitive activities. For example, ‘selling commodities at unfairly high prices’ is price-related, while ‘refusing to enter into transactions with trading counterparties’ is deemed non-price-related. NDRC (and its local branches) and SAIC (and its local branches) are the two agencies in charge of antitrust enforcement against abuse of market dominance.

NDRC, SAIC, and the Anti-Monopoly Commission of the State Council (the Commission) have released a series of regulations and guidelines in relation to enforcing Article 17 of the AML.

The Guide of the Anti-Monopoly Commission of the State Council for the Definition of the Relevant Market (the Relevant Market Definition Guide), which was released on 24 May 2009, provides the framework and methodologies to define the relevant product market and the geographic market.

To date, NDRC has released two rules. The first is the ‘Provisions of Anti-Price Monopoly’, which came into force on 1 February 2011. The value of this rule is that it lays out: (1) five kinds of price-related abusive activities, (2) the definition of abuse of dominance, (3) the factors that need to be considered when deciding whether an undertaking has a dominant position, and (4) the market shares under which an undertaking may be assumed to possess market dominance. The second is the ‘Provisions of Administrative Enforcement Procedures of Price Monopoly’, which came into force on the same date as the Provisions of Anti-Price Monopoly, and which provides for the procedures dealing with price-related antitrust cases.


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2 In accordance with Article 9 of the AML, The State Council shall establish an anti-monopoly commission in charge of organising, coordinating and guiding anti-monopoly work and performing the following duties:

a studying and drafting policies on competition;
b organising studies and assessment of the general competition condition on the market and publishing assessment reports;
c formulating and releasing anti-monopoly guidelines;
d coordinating administrative enforcement of the AML; and,
e other duties as prescribed by the State Council.
II YEAR IN REVIEW

NDRC, SAIC and the courts generally find it difficult to pursue investigations against abuse of market dominance cases. Two main reasons are usually cited to explain this standoff: first, it is usually hard for the authorities to define the relevant markets and prove the concerned undertakings’ dominant market position through economic approaches; second, it is usually hard to acquire evidence regarding abusive practices.3

Despite these difficulties, NDRC, SAIC and the courts have nonetheless dealt with some significant cases:

i Public enforcement

Cases pursued by NDRC

Investigation against Qualcomm (pending)

Qualcomm Inc (Qualcomm) is a multinational semiconductor company that designs, manufactures and markets digital wireless telecommunications products and services, and owns a large number of standard essential patents (SEP) in the telecommunications sector. On 25 November 2013, Qualcomm disclosed that it faces an antitrust investigation launched by China’s NDRC and that the company was not aware of any charge by NDRC that the company had violated the AML.4

On 9 February 2014, the Mobile China Alliance (MCA) of the China Communications Industry Association (CCIA) submitted a report to NDRC complaining about the threat of significant harms to China’s handset industry posed by Qualcomm’s business model. In this report, MCA accused Qualcomm of collecting excessive patent royalties, tying and discriminating against Chinese handset makers in violation of FRAND principles.5

On 3 April 2014, Qualcomm’s president, Derek Aberle, six vice presidents and one Chinese lawyer exchanged ideas with NDRC officials regarding the ongoing investigation.6

Investigation against IDC (pending)
On 19 January 2014, the Director General of the Department of Price Supervision of NDRC, Xu Kunlin, confirmed that InterDigital, Inc (IDC), an American wireless research and development company possessing a large number of telecommunication SEPs, is under NDRC’s antitrust scrutiny. Triggered by whistle-blowing, the investigation was commenced in June 2013 in response to the claims that IDC is suspected of excessive pricing and discriminatory licensing in China. It is alleged that licensing fees collected from Chinese handset makers are dozens or even one hundred times higher than those collected from leading foreign handset makers.7

On 3 January 2014, an IDC executive, accompanied by local and US outside counsel, met with NDRC officials to respond to NDRC’s investigation, to explain the company’s recent settlement agreement with the Chinese company concerned, and to discuss the way forward in resolving the NDRC investigation of IDC’s licensing conduct.8

IDC has submitted a letter of commitment to NDRC seeking suspension of the authority’s investigation under a procedure provided for under the AML. The case is still pending.

Cases pursued by SAIC
Investigation against Tetra Pak (pending)
In August 2013, SAIC launched an investigation against Tetra Pak, a Swedish food processing and packaging company, for abuse of market dominance.9

It is claimed that using its advantages in liquid beverage packaging equipment and maintenance services, Tetra Pak ties the sale of packaging materials to its equipment, and imposes differential treatment among business counterparties.

Responding to a misleading news report saying that the probe on the packaging giant had ceased, the SAIC spokesman has stated that the investigation is still ongoing.10

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Yiyuan Purified Water Case (Completed)

On 16 December 2013, Guangdong Administration for Industry and Commerce (GDAIC) issued a decision to penalise Yiyuan Purified Water Company (Yiyuan), an urban public water supply firm, for abuse of dominance through bundled sales. In this case, after elaborating on the other two sources of water supply and their characteristics, SAIC defined the relevant product market as the urban public water supply service. The geographic market was defined as the west district and the areas under two subdistrict offices of Dayawan District of Huizhou City. GDAIC, after examining the following factors, believed that Yiyuan has a dominant market position:

- the high market share of Yiyuan in the relevant market;
- the heavy reliance of other business operators on Yiyuan; and
- difficult market entry.

The abusive practices of Yiyuan included:

- requiring local property development companies to sign agreements that contain not only terms for temporary water supply service to construction sites, but also terms requiring the complainants to engage Yiyuan to work on the residential water meter projects;
- signing water supply engineering agreements without terms regarding residential water meter projects, but requiring development companies to sign a letter promising to come to agreements with Yiyuan for residential water meter projects in future, and acknowledging Yiyuan’s right to cut water supply in the event of a breach of the promise letter; and
- requiring the development companies to sign tie-in agreements with a designated third party when Yiyuan is not qualified to sign such agreements.

Moreover, GDAIC determined that Yiyuan’s bundled sales were not reasonably justified because:

- they are not a common business practice;
- they were against the counterparties’ wishes;
- they fell foul of local administrative rules; and
- there is no legal or policy basis for Yiyuan’s claim that the bundled sales were intended to enhance water safety.

Although handled by a local authority supervised by SAIC, the Yiyuan case marked the very first case in which the antitrust agency detailed the relevant market definition, the assessment of the dominant market position, the abusive practices and the scrutiny of the justifiable reasons.

The cases dealt with by NDRC and SAIC (and their local agencies) are summarised below:

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11 See the decision at www.saic.gov.cn/zwgk/gggs/jzzf/201401/t20140106_140960.html, last visited on 14 April 2014.


<table>
<thead>
<tr>
<th>Investigated party</th>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualcomm</td>
<td>Mobile phone chipset manufacturing and telecommunication SEP licensing</td>
<td>NDRC</td>
<td>Excessive pricing, tying, and discriminatory licensing</td>
<td>2013</td>
<td>Pending</td>
</tr>
<tr>
<td>IDC</td>
<td>Telecommunication SEP licensing</td>
<td>NDRC</td>
<td>Excessive pricing and discriminatory licensing</td>
<td>2013</td>
<td>Pending</td>
</tr>
<tr>
<td>Tetra Pak</td>
<td>Food processing and packaging</td>
<td>SAIC</td>
<td>Tying and discriminatory treatment</td>
<td>2013</td>
<td>Pending</td>
</tr>
<tr>
<td>Yiyuan</td>
<td>Water supply</td>
<td>SAIC (Guangdong AIC)</td>
<td>Bundling</td>
<td>2013</td>
<td>Completed</td>
</tr>
</tbody>
</table>

ii Private enforcement\(^{12}\)

**Huawei v. IDC**

On 5 December 2011, Huawei Technology Co. (Huawei) filed a lawsuit against IDC with the Shenzhen Intermediate People’s Court (the Shenzhen Court). Huawei accused IDC of requesting discriminatory royalty rates. Shenzhen Court upheld Huawei’s claim and concluded that IDC had abused its dominant position by tying SEPs and non-SEPs and charging discriminative royalty fees. IDC appealed this decision to the Guangdong High People’s Court (the Guangdong Court), and the appellate court affirmed the Shenzhen Court’s decision.

**Qihoo 360 v. Tencent**

In November 2011, Qihoo 360 Technology Co, Ltd (Qihoo 360) filed a lawsuit with the Guangdong Court under the AML against Tencent’s two subsidiaries, Tencent Technology (Shenzhen) Co, Ltd and Shenzhen Tencent Computer System Co, Ltd (jointly Tencent). Qihoo 360 charged Tencent with exclusive dealing by asking QQ users to either keep using QQ or uninstall the Qihoo 360 software, and by the tying of QQ Doctor and QQ Manager. Guangdong Court rejected Qihoo’s claim because it failed to prove Tencent’s market dominance.

Qihoo 360 has appealed to the Supreme People’s Court (the Supreme Court).

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\(^{12}\) For details, see Section VII, *infra*. 

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The cases dealt with by courts are listed below:

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Sector</th>
<th>Courts</th>
<th>Conduct</th>
<th>Case opened</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Huawei</td>
<td>IDC</td>
<td>Telecommunication SEP</td>
<td>Shenzhen Intermediate People's Court; Guangdong High People's Court</td>
<td>Charging discriminatory royalty rates</td>
<td>2011</td>
<td>Plaintiff won</td>
</tr>
<tr>
<td>Qihoo 360</td>
<td>Tencent</td>
<td>IT &amp; software</td>
<td>Guangdong High People's Court</td>
<td>Exclusive dealing, tying</td>
<td>2011</td>
<td>Plaintiff won first-instance trial</td>
</tr>
</tbody>
</table>

### III RELEVANT MARKET DEFINITION AND MARKET POWER

The approaches to defining relevant market and assessing market power presented in the black letter law of China are consistent with other major antitrust regimes.

Nonetheless, through lack of experience and transparency, the Chinese antitrust implementing authorities rarely provide reasoning regarding market definition, market power and abusive practices, nor justifiable reasons.

#### i Relevant market definition

The basic AML principles of the abuse of dominance are comparable to Article 102 TFEU and Section 2 of the Sherman Act. The assessment of market definition is stipulated in the Relevant Market Definition Guide. In accordance with the guide, the basis for defining the relevant market is demand substitution and supply substitution. Article 8 of the Guide provides that the factors to be considered include:

- **a** the evidence of turning to other products when the price or other factors of the product concerned are changed;
- **b** the appearance, characteristics, quality and technical features, and functionality of the product;
- **c** price variance between products;
- **d** the distribution channel; and
- **e** other factors.

Article 9 of the Guide addresses the factors to be considered when defining the relevant geographic market:

- **a** the evidence of turning to other regional products when the price or other factors of the product concerned are changed;
- **b** the transportation cost and the characteristics of transportation;
- **c** the region in which the majority of the demanders purchase the product in practice, and the regional distribution of major business operators’ products;
- **d** trade barriers such as tariff, regulations, and environmental and technical factors; and
- **e** other factors.
The Relevant Market Definition Guide also mentions defining the relevant market by applying the ‘small but significant and non-transitory increase in price’ method (the SSNIP test or hypothetical monopolist test), a tool frequently used by both EU and US antitrust regimes. This modern tool has never been used by NDRC or SAIC, but the courts have taken a lead in this regard.

ii Dominant position

A dominant market position under the Chinese antitrust regime is defined in Article 17 of the AML and further clarified by implementing rules. It refers to a market position held by one or multiple undertakings that enables the undertakings to:

a control the price, volume or other trading terms\(^\text{13}\) in the relevant market; and

b block or affect the ability of other undertakings to enter the relevant market, by impeding or delaying other undertakings’ entry into the market, or substantially increasing other undertakings’ entry costs, so that the competitors cannot compete effectively post-entry.

iii Market share presumption

As illustrated in the table below, Article 19 of the AML specifies the market share thresholds that are regarded as preliminary evidence of a dominant market position:

<table>
<thead>
<tr>
<th>Number of undertakings</th>
<th>Aggregated share in the relevant market</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>Half</td>
</tr>
<tr>
<td>Two</td>
<td>Two-thirds</td>
</tr>
<tr>
<td>Three</td>
<td>Three-quarters</td>
</tr>
</tbody>
</table>

The preliminary evidence of market dominance can be rebutted by proof showing lack of sufficient market power despite high market share.\(^\text{14}\) In addition, under the preliminary evidence, if any of the undertakings has a market share of less than 10 per cent, this undertaking shall not be deemed to have a dominant position.\(^\text{15}\)

IV ABUSE

i Overview

Article 17 of the AML sets out a non-exhaustive list of seven types of behaviours that may be regarded as abusive and therefore prohibited. The seven kinds of abusive behaviours include:

a excessive pricing or buying at an unfairly low price;

\(^{13}\) According to Article 17 of the Provisions of Anti-Price Monopoly, ‘other trading terms’ include the factors that can have substantial impact on a market, such as grade of commodity, payment terms, method of delivery, after-sales service, trading options, technical constraints, etc.

\(^{14}\) See Article 19 of the AML.

\(^{15}\) Ibid.
Because of the limited number of cases, it is difficult to confidently conclude what kind of abusive practice is most likely to be investigated by NDRC or SAIC. Nonetheless, the Qualcomm case, the IDC case and the Yiyuan case have largely pointed to excessive pricing, tying and discriminatory treatment.

ii Exclusionary abuses

‘Exclusionary abuses’ means the dominant undertaking abuses its position by excluding its competitors; for example, by selling below cost, refusing to deal, tying or bundling.

The foregoing cases suggest that both SAIC and NDRC seem to have interest in exclusionary abuses. The more recent decision in the Yiyuan case is worth noting in that it demonstrates SAIC’s willingness and capacity to deal with exclusionary practices.

Meanwhile, although there has been no final decision in the China Unicom/China Telecom dominance abuse case,16 the ongoing investigation has shown that the two telecommunication giants had abused their dominant position in the broadband access market and the inter-network settlement market to exclude competitors.

iii Discrimination (including discriminatory pricing)

NDRC’s ongoing investigations against Qualcomm and IDC are focusing on whether the two companies have abused their dominant positions to charge excessive licensing fees and undertake discriminatory licensing.

The Guangdong Court has wrapped up a market dominance abuse case in relation to price discrimination (i.e., the Huawei/IDC case).17 The Court states in the decision that IDC has a dominant position in the SEP licensing market and the royalty rate offered by IDC to Huawei has been disproportionately higher than that offered to foreign handset manufacturers such as Apple.

iv Exploitative abuses (including excessive pricing)

‘Exploitative abuses’ means the dominant undertaking abuses its position by exploiting its customers or suppliers, for example, by selling at an unfairly high price or buying at an unfairly low price.

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17 For details, see Section VII, infra.
Excessive pricing is a typical exploitative abuse. In the *Shun Tong and Hua Xin* case, the two pharmaceutical companies, Weifang Shuntong Pharmaceutical Co, Ltd and Weifang Huaxin Pharmaceutical Trading Co, Ltd, were fined nearly 7 million renminbi for excessive pricing. According to NDRC, the two companies have gained full control of the domestic supply of promethazine hydrochloride and then raised the sale price from less than 200 renminbi yuan/kg to 300–1,350 renminbi yuan/kg.

V REMEDIES AND SANCTIONS

i Sanctions

In accordance with Article 47 of the AML, an undertaking that has abused a dominant position may be fined between 1 per cent and 10 per cent of its turnover in the past business year. In addition, the regulator may confiscate its illegal gains. Article 49 further states that when calculating the amount of the fine, the regulator shall consider the factors such as the nature, gravity and the duration of the illegal conduct. However, there is no detailed guidance on how to calculate the amount of sanctions (including the illegal gains and the fines). Furthermore, unlike MOFCOM, NDRC and SAIC are not obliged to publish their decisions. The two regulators, therefore, have substantial discretion, which may affect the legal certainty of the AML’s enforcement. In this regard, it is necessary for the authorities to issue detailed guidelines for the calculation of the amount of sanctions.

The cases published by NDRC or SAIC usually do not disclose the method of calculation either. In the *Yiyuan* case, the decision renders the amount of illegal gains and fines directly without any explanation.

ii Behavioural remedies (including interim measures)

Along with sanctions, Article 47 of the AML provides that the regulator may impose a cease-and-desist order to stop the illegal abusive conduct. However, there is no explicit legal basis regarding whether and how the regulator may impose interim measures for abusive conduct. The previous cases provide little clue in this regard given their lack of transparency.

iii Structural remedies

To date, there are no antitrust-related laws, regulations and rules in China explicitly authorising SAIC and NDRC to impose structural remedies upon undertakings for violation of Article 17 of the AML. Accordingly, all previous cases suggest that the regulators never adopt structural remedies for abusive violations.

Article 45 of the AML does not delineate the scope of the commitment that the undertakings under investigation may make, and no case has tested this issue. So

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19 See Article 44 of the AML; see also Article 25 of the ICA’s Provisions of Enforcement Procedure.
it remains to be seen whether a dominance investigation can be closed on the basis of structural commitments.

VI  PROCEDURE

Although SAIC and NDRC have their respective procedural rules, they are consistent with each other.

The stages of an SAIC or NDRC investigation are as follows:

\(a\) an antitrust investigation can be triggered largely from four possible sources: report, transference from other government agencies, \textit{ex officio} discovery and assignment by superior entities;

\(b\) SAIC delegates antitrust enforcement to its provincial branches on a case-by-case basis, while NDRC grants a general authorisation to local branches. But the two authorities maintain control at central government level of cases that have an impact nationwide;

\(c\) it falls within the regulators’ discretion to determine whether to open a formal investigation after receiving the leads;

\(d\) the investigative measures include:

- conducting the inspection by entering the business premises or other relevant place;
- interviewing the business operators under investigation, interested parties or other relevant entities or individuals;
- checking and duplicating relevant documents, agreements, account books, business correspondence and electronic data, etc., of the business operators under investigation, interested parties and other relevant entities or individuals;
- seizing and detaining relevant evidence; and
- checking the bank accounts of the business operators under investigation.

\(e\) the undertakings under investigation can offer commitments at any stage of an investigation. The regulators are entitled to decide whether to accept the commitment;

\(f\) the antitrust regulators may issue an exemption when the undertaking concerned fulfils the conditions set out by Article 15 of the AML; the authorities may also issue punishment decisions when they consider that the undertaking concerned has violated Article 17 of the AML. The regulators may publish the decisions but are not obliged to do so; and

\(g\) if unhappy with the decision, the undertakings under investigation may apply for an administrative review or file an administrative lawsuit with a court for judicial review.

SAIC and NDRC’s investigations vary significantly in terms of duration, and no statutory deadlines apply. Theoretically speaking, the investigations may last for years, and this is reflected in the fact that many market dominance abuse cases are still pending. Another concern is that the procedure lacks transparency as there is no obligation for SAIC, NDRC or their local branches to publish their decisions.
VII PRIVATE ENFORCEMENT

When considered against comparable years of adoption in the EU or even the United States, private enforcement is at the level of being actively pursued against abuses of dominant position in China. The Chinese courts do better in terms of transparency as they usually disclose their analytical approaches in their judgments.

i Huawei v. IDC

On 5 December 2011, Huawei filed the following complaints against IDC with the Shenzhen Court. Huawei accused IDC of requesting discriminatory royalty rates and tying the licensing of SEPs with non-SEPs; Huawei sought damages of 20 million renminbi from IDC, and requested the Shenzhen Court to determine an appropriate royalty rate under FRAND terms.

The Shenzhen Court found that IDC had abused its dominant market position by: (1) tying SEPs with non-SEPs during licensing negotiations; and (2) initiating investigations and proceedings in the United States with the aim of hindering Huawei from using the SEPs.

Moreover, the Shenzhen Court held that IDC failed to comply with its FRAND commitments in connection with its SEPs by: (1) requiring Huawei to pay royalties that were more than 100 times higher than those paid by Apple and other foreign handset makers; and (2) requiring Huawei to license all of its own patents obtained globally on a royalty-free basis to IDC.

Following the decision of the Shenzhen Court, IDC filed an appeal to the Guangdong Court. On 28 October 2013, the Guangdong Court upheld the previous decision made by the Shenzhen Court. It ordered IDC to pay Huawei compensation of 20 million yuan for abuse of market dominance in relation to the licensing of SEPs for 3G wireless communications.

However, the Guangdong Court found that the bundling of SEPs and non-SEPs could be justified on efficiency grounds, and therefore IDC’s tying practice did not violate the AML.

This case is one of only two cases in the history of Chinese antitrust private enforcement in which the plaintiff won. Although the Shenzhen Court decision on the appropriate royalty rate is subject to debate, it is still a landmark case for private antitrust enforcement in China.

ii Qihoo 360 v. Tencent

In November 2011, Qihoo 360 filed a lawsuit with the Guangdong Court under the AML against Tencent.

Qihoo 360 accused Tencent of abusive practices and claimed damages of 150 million renminbi. On 28 March 2013 the court held that Tencent had not committed an abuse of dominance as defined in the AML. Given the current stage of development in China’s private antitrust litigation, Qihoo 360 v. Tencent is a landmark case because the social influence of the plaintiff and the defendants, the claimed amount of damages and the long-term hostility between the two parties are unprecedented.
With regard to the product market, the collegiate bench held that in addition to instant messaging services, Tencent QQ software also provides advertising, information sharing and microblogging platforms. Translation and email services are available with MSN private messaging, and microblogging services can be accessed from Sina Weibo. All of these are comprehensive platforms that aim to attract consumers by offering free products in mainland China. The competition at issue concerned value-added services and advertising, one of the few areas that could account for such a dispute between two internet companies providing different products.

In terms of the geographic market, the court reasoned that the openness of the internet has blurred the boundaries between countries, and that the disputed definition of ‘market’ in this case was a global market, and not a Chinese market as Qihoo 360 had proposed.

In balancing these considerations, the court held that Tencent did not hold a dominant position in the relevant market in terms of market share, nor did it have sufficient market power to block the potential entry of competitors or substantially control upstream and downstream undertakings. As a methodological innovation, the court applied the SSNIP test to define the relevant market. This was the first time that Chinese courts have applied the SSNIP test.

Qihoo 360 accused Tencent of exclusive dealing by asking QQ users either to keep using QQ or uninstall the Qihoo 360 software, and by the tying of QQ Doctor and QQ Manager. Given that Tencent did not possess dominant power in the relevant market and provided uninstall options for users of QQ Doctor and QQ Manager, the court rejected the argument for exclusive dealing and tying. However, the court did not agree with Tencent's proposed remedy either.

Both parties brought in expert witnesses to assist in clarifying facts before the court. Antitrust analysis usually involves intricate economic and legal issues. The Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct clarifies that parties may introduce experts who can offer testimony that is technical in nature.

The Guangdong Court seems to have taken a cautious stance in defining the dominant position of an internet company. This observation is further evidenced by an interview with the presiding judge. He stated that the internet industry is characterised by frequent innovation and easy reproduction, so a dynamic view should be taken when considering alleged violations of the AML. Thus, necessary adjustments are better left to market mechanisms rather than relying on outside intervention.

Some experts have commented that compared with previous antitrust private litigation filed after the entering into force of the AML, Qihoo 360 v. Tencent is the first substantive and serious anti-monopoly case handled by a Chinese court. Henceforth, Chinese courts, together with the SAIC and the NDRC, may begin to challenge abusive behaviours with more muscle.

Qihoo 360 has filed an appeal with the Supreme Court, and the case is currently pending.
VIII FUTURE DEVELOPMENTS

Abuse of market dominance is a tough area for antitrust enforcement because of the difficulties in defining relevant markets and proving market dominance. However, we may still get the following clues from the limited number of cases.

First, the industries related to livelihoods have been the main targets of Chinese antitrust authorities. It is reported that NDRC will focus its investigation and enforcement efforts on six areas: aviation, household chemicals, automobiles, telecommunications, pharmaceuticals and home appliances.

Second, it seems, as suggested by the Qualcomm and IDC cases, that the authorities have attached more importance to the high-tech industries involving complex intellectual property rights issues.

Both SAIC and NDRC have expressed their willingness to strengthen the enforcement of the AML. Particularly, NDRC stated that it will keep a close eye on the abuse of dominant position. Therefore, it is fair to predict that there will be more active enforcement directed towards the abuse of dominant position in the foreseeable future. In addition, the recent Yiyuan case has indicated that SAIC and its provincial branches have improved capacities to deal with intricate abuse of market dominance cases.

These facts suggest that the abuse of dominant position may be the next focus of the AML. Meanwhile, we anticipate SAIC and NDRC issuing detailed guidelines with regard to the calculation of the amount of illegal gains and fines. Moreover, transparency is expected to be further improved in future by the regular publishing of decisions.

Private enforcement is expected to remain active in the years to come given the scarcity of public enforcement resources.

Undertakings’ awareness of the antitrust laws is increasing thanks to five years of promising enforcement. Chinese courts’ experience in dealing with complicated antitrust actions is accumulating as well. This progress is showcased by the Huawei/IDC case, in which the courts clearly defined the relevant market and IDC’s price discrimination. These encouraging facts may lead to more active private enforcement combating abuse of dominance.

However, it is still hard for the plaintiff to prove the defendant’s dominant position in courts. Mr Kong Xiangjun, the Judge of the Supreme Court, said the plaintiff’s burden of proof is ‘too heavy’ because in an antitrust-related civil lawsuit, the plaintiff, unlike the government agencies, is in a weak position in terms of gathering sufficient evidence.\footnote{See 孔祥俊谈审判垄断问题：诸多问题亟待明确 [Kong Xiangjun Talks about Antitrust Lawsuit: Several Issues Need To Be Clarified], Tencent, http://tech.qq.com/a/20120612/000236. htm, last visited on 14 April 2014.} Therefore, it can also be anticipated that the Supreme Court may issue judicial interpretations or guidelines to further relieve the plaintiff’s burden of proof, although it may not happen as soon as people would like.
Appendix 1

ABOUT THE AUTHORS

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Dr Zhan Hao is the managing partner of AnJie Law Firm. He has assisted many multinational and state-owned enterprises (SOEs) in concentration antitrust filings in China and to date he has secured approvals for all transactions he has represented. Dr Zhan has served in multiple fields, including automobile, energy, finance, machinery, electronics, textile, aviation high-tech and consumer goods.

He also has abundant experience in representing clients in antitrust investigations. For instance, he represented respondents in China’s first antitrust investigation into price cartels and obtained suspension of the investigation.

Dr Zhan has successfully defended clients in antitrust litigation in Chinese courts and has also offered competition law training and conducted antitrust analysis for numerous companies, including Fortune 500 companies, listed companies and SOEs.

He has been extensively involved in the drafting, advising, discussion and formulation of the Anti-Monopoly Law of the People’s Republic of China (AML) and its supporting regulations.

Dr Zhan has authored many academic books on the AML and he has obtained both a PhD in law and extensive experience in postdoctoral microeconomic research. He is an arbitrator for the China International Economic and Trade Arbitration Commission (CIETAC) and the vice president of the International Committee of the All China Lawyers Association.

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Wang Zhining graduated from the University of Glasgow in the United Kingdom with a PhD degree in competition law, and is currently working as an associate at AnJie Law Firm, Beijing, China.
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Song Ying graduated from the University of Bonn in Germany with a doctoral degree in competition law and is currently working as a senior associate at AnJie Law Firm. She has extensive experience in representing multinational and domestic corporate clients in antitrust investigations and has advised clients in a broad range of sectors such as the internet, aviation, automobile, electronics, telecommunications, energy, household electrical appliances, infant formula, food and semiconductors. Song Ying has filed many concentration notifications with the Ministry of Commerce of the People's Republic of China (MOFCOM) in respect of clients' transactions, and has also defended clients against competitors' objections. With in-depth experience in Chinese antitrust enforcement, Song Ying has also assisted many companies with their antitrust compliance projects. She has also been involved in the drafting, advising, discussion and formulation of the supporting regulations of the Anti-Monopoly Law of the People's Republic of China (AML).
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Li Xiang graduated from Maastricht University in the Netherlands with a master's degree in intellectual property and knowledge management, and received her bachelor's degree in law from Renmin University of China. Her major not only covers most sections of EU intellectual property laws, but also involves antitrust and unfair competition doctrines under the EU legislation system. Currently, she is working as an associate at Anjie Law Firm. Li Xiang's interest and practice focus on intellectual property and antitrust, and the intersection of these two areas. She has experience in filing of IP rights and concentration notifications. She has participated in several significant antitrust cases involving technology markets, and has done research on such hot topics as standard-essential patents, FRAND, patent trolls, patent hook-up, patent pools and cross-licensing, innovation markets and no-challenge clauses, among others.

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