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Private Antitrust Litigation in China—The Burden of Proof and Its Challenges

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I. INTRODUCTION

On March 20, 2013, the Guangdong High People's Court issued its verdict in the dispute between two leading Chinese information technology companies, Qihoo 360 ("360") and Tencent.² The court dismissed 360's claim that Tencent had committed an abuse of dominance in violation of the Anti-Monopoly Law ("AML")³ on the grounds that 360 had put forward a wrong definition of the relevant market and that Tencent was not in a dominant position.

The reaction in the local press was instant—observers claimed that the burden of proof was too high for plaintiffs seeking redress for antitrust violations through the Chinese courts, in particular for abuse of dominance cases.⁴

Although not all judgments are made public in China and the picture is therefore incomplete, the judgments that have been published since the AML took effect close to five years ago would seem to confirm the difficulties for plaintiffs to succeed in private antitrust actions in China. The publicly available information indicates that only very few plaintiffs have won a clear victory in AML-based actions thus far.

This article examines how the burden of proof is allocated in private antitrust suits in China, and tries to assess whether the criticism about the high burden of proof is merited. The remainder of the article is organized as follows: section 2 provides an introduction to the legislative background, and section 3 lays out the general principle for the burden of proof in antitrust cases. Sections 4 and 5 describe two broad ways for parties to "lower" the burden of proof—by resorting to presumptions and by seeking discovery through the courts. Section 6 concludes.

II. LEGISLATIVE BACKGROUND

Only one provision in the AML directly addresses civil antitrust litigation: Article 50 stipulates that market players causing damage to others through their anticompetitive practices shall bear civil liability.

To implement Article 50 of the AML, China's highest court—the Supreme People's Court ("SPC")—issued the Provisions on Several Issues concerning the Application of the Law in the

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² Guangdong High People's Court, *Beijing Qihoo Technology Co. Ltd. v Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Calculation Systems Co. Ltd.*, March 20, 2013, [2011] Yue Gao Fa Min Chu Zi No. 2.

³ Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, August 30, 2007.

⁴ See, for example, Dai Jianmin, *Qihoo 360's Defeat – a Temporary End for China Internet's First Anti-Monopoly Lawsuit*, ForbesChina, March 29, 2013, available at http://www.forbeschina.com/review/201303/0024652_all.shtml (last visited on April 13, 2012).

Trial of Civil Dispute Cases Arising from Monopolistic Conduct ("Judicial Interpretation") in January 2012, which came into effect in June 2012.⁵ Two provisions in the Judicial Interpretation explicitly regulate the allocation of the burden of proof (Articles 7 and 8), and other provisions have a somewhat more indirect impact on that allocation.

More generally, private antitrust lawsuits are deemed "civil lawsuits" and hence fall under the remit of the Civil Litigation Law.⁶

A third set of rules that regulate or guide the procedure of private antitrust actions are the provisions and case practice of intellectual property right ("IPR") disputes. The reason for this is that jurisdiction over antitrust actions has been given to the IPR benches of specific, high-level courts in China.⁷ Therefore, in most cases, the judges hearing the antitrust cases have substantial experience in IPR litigation.⁸

III. GENERAL PRINCIPLE FOR ALLOCATING THE BURDEN OF PROOF

The AML is silent on the procedural aspects of antitrust litigation before courts. According to Article 64 of the Civil Litigation Law, a party bears the burden of providing evidence in support of any allegations it makes [谁主张, 谁举证]. Hence, within the realm of civil litigation—including antitrust civil litigation—the general principle is that the plaintiff bears the burden of proof for its claims, while the defendant needs to provide the evidence for its defense and (the case being) counterclaims.

For evidence presentation, a party may call upon the testimony of "expert witnesses."⁹ In particular in private actions in software, trade secrets, and patent infringement cases, especially when the case is related to complex technologies, expert witnesses are a frequently seen phenomenon. For example, in the patent infringement case between Wuhan Jingyuan and Fuji Water Corporation, the Fujian High People's Court entrusted an appraisal agency as an "expert witness" to examine whether the particular technology at issue fell under the patent claim.¹⁰ Both the Fujian High People's Court and the SPC on appeal accepted the conclusion made by the appraisal agency, and awarded damages over RMB 50 million to the plaintiff. Similarly, in the antitrust field, in *Tencent*, both the plaintiff and the defendant appointed economists as experts.

According to the AML, there are three types of anticompetitive practices: monopoly agreements, abuse of dominance, and anticompetitive mergers.¹¹ As there have not been private

⁵ Provisions by the Supreme People's Court on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, [2012] Judicial Interpretation No. 5.

⁶ Civil Litigation Law of the People's Republic of China, as last amended by [2012] Presidential Order No. 59, August 31, 2012.

⁷ Notice by the Supreme People's Court on In-Depth Studying and Implementing the Anti-Monopoly Law of the People's Republic of China, [2008] Fa Fa No. 23.

⁸ Understanding and Application of the Provisions by the Supreme People's Court on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct in SUPREME PEOPLE'S COURT, UNDERSTANDING AND APPLICATION ON THE SUPREME PEOPLE'S COURT'S JUDICIAL INTERPRETATIONS OF INTELLECTUAL PROPERTY RIGHTS, p. 267.

⁹ Judicial Interpretation, art. 12. Up to two expert witnesses are allowed under the Judicial Interpretation.

¹⁰ Supreme People's Court, *Wuhan Jingyuan Environment Engineering Co., Ltd. v. Fuji Water Corporation and Huayang Electrical Co., Ltd.* [2008] Min San Zhong Zi No.8.

¹¹ AML, art. 3.

actions in the merger field thus far, we will not discuss this aspect further. In contrast, private actions have been filed against both monopoly agreements and abuses of dominance. These two types raise their own specific issues, and we will consider them separately below.

A. Monopoly Agreements

1. The Law

The AML defines a monopoly agreement as "an agreement, decision or other concerted practice which eliminates or restricts competition."¹² The AML further contains two separate provisions, listing the types of agreements that constitute horizontal and vertical monopoly agreements, respectively. For horizontal agreements, cartel-like agreements—such as price-fixing, limiting output, or market partitioning—are explicitly outlawed.¹³ For vertical agreements, resale price maintenance ("RPM") is the only prohibition explicitly listed in the AML.¹⁴ Similar to European Union competition law with Article 101(3) of the Treaty on the Functioning of the European Union, the AML also contains an exemption provision for potentially illegal monopoly agreements, if the agreements lead to efficiencies or other pro-competitive results, or certain identified public policies are furthered.¹⁵

According to the general principle that the party asserting a claim bears the burden of its proof, the plaintiff needs to prove that a given agreement is one of the types listed in the AML. For example, the plaintiff must prove that the parties to a horizontal agreement actually fixed prices, or that the agreement imposed a RPM obligation on a distributor in a vertical agreement.

With regard to the exemption provision, Article 15 of the AML itself allocates the burden of proof, as it states that Article 13 and Article 14 shall not apply "if the business operators can prove"—i.e., the defendant—that the concluded agreement falls under any of the exemptions.¹⁶

Furthermore, as mentioned above, the definition of a "monopoly agreement" in the AML states that such an agreement "eliminates or restricts competition." The AML's statement is presented as a definition, rather than a constitutive requirement for a monopoly agreement. In other words, it is not clear whether the AML requires a plaintiff filing a private action to prove that the agreement has anticompetitive effects.

2. Horizontal Agreements

For horizontal agreements, the SPC's Judicial Interpretation states that if an agreement involves one of the activities listed in Article 13(1) of the AML, then the defendant must assume the burden to prove that the agreement does not eliminate or restrict competition.¹⁷ In other words, cartel-like conduct is presumed to have anticompetitive effects, and the burden of proof shifts to the defendant to prove it does not. This situation is very similar to the special burden of

¹² AML, art 13(2).

¹³ AML, art. 13(1).

¹⁴ AML, art. 14.

¹⁵ AML, art. 15.

¹⁶ *Id.*

¹⁷ Judicial Interpretation, art. 7.

proof in patent infringement litigation when it involves a patented process for manufacturing new products.¹⁸

From a Western perspective, it is surprising to see that a defense claiming the absence of effects is possible at all for cartel conduct. In the United States and the European Union, cartel conduct is *per se* illegal, even if there are no negative effects on competition in practice (for example, because the cartel agreement is not implemented).¹⁹ But Chinese law appears to depart from Western practice. Indeed, in December 2012, the Guangdong High People's Court issued its judgment in the *Shenzhen pest control* case where some members of an industry association agreed not to charge fees below a certain minimum level.²⁰ The court eventually ruled against the plaintiff—a buyer of the “cartelized” products—*inter alia* on the ground that the agreement did not have significant anticompetitive effects.

To a certain extent, the fact that there appears to be no *per se* illegality of any kind of agreement in China is also reflected in the exemption provision of Article 15 of the AML: there are no limitations to the application of Article 15 in the text of the AML. Hence, from a pure textual basis, it would be possible to argue that no agreement is *per se* illegal under the AML, not even a cartel agreement. From this it would follow that the defendants in a private antitrust suit can attempt to prove that one or more of the exemption situations listed in Article 15 are present. On this point, in the *Shenzhen pest control* case, the Court of first instance applied Article 15 of AML, implying that pest prevention services are not purely commercial services but are liable to affect the health of the public and the environment. Following the court's logic, pest prevention services would be a kind of service related to the public interest. However, although it upheld the findings of the lower court, the second-instance court did not pronounce itself about the application of Article 15.²¹

3. Vertical Agreements

For vertical agreements, the SPC Judicial Interpretation is silent on the burden of proof—in contrast to a draft version of the Judicial Interpretation that allocated the burden to prove restrictive effects upon the plaintiff. Still, observers interpret the fact that there is explicit language allocating the burden to prove anticompetitive effects upon the defendant in horizontal agreement cases, together with the absence of any language for vertical agreements, to mean that, in vertical agreement cases, the plaintiff must prove that the agreement has the effect of restricting competition in the marketplace. For example, a book issued by the SPC finds that, for vertical agreements, the general principle for the burden of proof should be used because their

¹⁸ Jonathan Liang, *Reverse Burden of Proof in Patent Infringement Litigation*, CHINA PATENT & INVENTION, Vol. 10 (2006) (in Chinese).

¹⁹ See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); and Case C-209/07 *Beef Industry Development Society* [2008] ECR I-8637.

²⁰ Shenzhen Intermediate People's Court, *Shenzhen Huiexun Science and Technology Co., Ltd. v. Shenzhen Pest Control Association*, [2011] Shen Zhong Fa Zhi Min Chu Zi No. 67.

²¹ Guangdong High People's Court, *Shenzhen Huiexun Science and Technology Co., Ltd. v. Shenzhen Pest Control Association*, [2012] Yue Gao Fa Min San Zhong Zi No. 155.

effects on competition are not clear, and that therefore the plaintiff must prove that a vertical agreement has the effect of excluding and restricting competition.²²

The issue of the burden to prove anticompetitive effects of vertical agreements is at the heart of the *Johnson & Johnson* case. In that case, a distributor of Johnson & Johnson brought an action against the medical equipment maker before the Shanghai Intermediate People's Court, alleging that Johnson & Johnson had introduced an unlawful RPM clause into their distribution contract. In May 2012, the court ruled in favor of Johnson & Johnson, in spite of its factual finding that the distribution contract indeed contained such a RPM clause and that Johnson & Johnson terminated the contract when it discovered that the distributor had sold below the minimum prices.²³ The main reason for the court to dismiss the action was that the distributor had failed to adduce sufficient evidence to show that the RPM clause actually had an anticompetitive effect in the market.²⁴

B. Abuse of Dominance

1. The Law

The AML itself does not allocate the burden of proof in abuse of dominance cases. In contrast, the Judicial Interpretation states that the plaintiff bears the burden to prove that the defendant has a dominant market position and that it abused that position, while the defendant must provide evidence for its potential defense that the conduct is legitimate.²⁵

In turn, the proof of dominance is essentially a two-step analysis: the "relevant market" needs to be defined before "dominance" on it can be examined.

2. Relevant Market

Judging from the text of the law, China follows international practice to define the relevant market. The AML sets out the basic principle—*i.e.*, the relevant market encompasses the product scope and the geographic scope. The Guidelines on the Definition of the Relevant Market implement this provision, and put forward guidance on how the definition is to be made.²⁶ In past private actions, the Chinese courts have largely followed the principles set out in the guidelines, although only some courts (e.g., in the *Tencent* and *Huzhou termite* cases²⁷) explicitly referred to them.

The AML and the Judicial Interpretation do not specifically deal with the question of who must assume the obligation to define the relevant market. However, the various judgments issued since the AML came into effect make it clear that the burden rests with the plaintiff.

²² See Supreme People's Court, *supra* note 8, p. 270.

²³ Shanghai Intermediate People's Court No.1, *Bangrui Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd. and Johnson & Johnson Medical (China) Ltd.*, May 18, 2012, [2010] Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 169.

²⁴ The *Johnson & Johnson* case is on appeal, and the judgment is expected shortly.

²⁵ Judicial Interpretation, art. 8.

²⁶ Anti-Monopoly Commission of the State Council Guidelines on the Definition of the Relevant Market, May 24, 2009.

²⁷ High People's Court of Zhejiang, *Huzhou Yiting Termite Control Services Co., Ltd. v. Huzhou Termite Control Research Institute Co., Ltd.*, [2010] Zhe Zhi Zhong Zi No. 125, August 27, 2010.

In practice, the definition of the relevant market has proven to be one of the major challenges for plaintiffs filing actions under the AML.²⁸ The most noteworthy example is the *Tencent* case, where the court embarked on a lengthy analysis of the parties' arguments in relation to the relevant market.

With regard to the product market, the court in *Tencent* found that the relevant market was broader than the plaintiff claimed, going beyond instant messaging to include also social networking sites and *Weibo*. In a case resembling the *Tencent* dispute—the *China Netcom* case—Mr. Li Fangping sued one of China's major telecommunications companies for abuse of a dominant market position. The Beijing Intermediate People's Court dismissed Li Fangping's action.²⁹ One reason was that Mr. Li did not succeed in proving that the relevant markets were those for fixed-line telephony, *xiaolingtong*, and ADSL services, as he claimed. Instead, the court found a relatively high degree of substitutability to exist between fixed-line telephony, *xiaolingtong*, and mobile telephony, on the one hand, and ADSL and wireless internet, on the other hand. Further, in the *Shanda* case, the plaintiff claimed that the defendant had abused its dominant position in the market for "online literature" in China.³⁰ On appeal, the High People's Court in Shanghai found that the evidence put forward by the plaintiff spoke both of "online literature" and "original online literature" markets, and therefore held that the plaintiff failed to clearly define the market.³¹

With regard to the geographic market, the court in *Tencent* also dismissed the plaintiff's arguments that the geographic scope of the relevant market was China, finding instead a worldwide market. This finding somewhat stands in tension with the judgments in the *Baidu* and *Shanda* cases, where the courts found the markets (search engine and online literature) to be China-wide only. In *Baidu*, the High People's Court rejected the defendant's argument that the internet was a "world without borders" but instead held that search engine was a national market. In a similar way, the High People's Court in the *Shanda* case endorsed the plaintiff's view that the geographic scope of the "online literature" market was China, noting that the internet covers the entirety of the country.

However, in our opinion, in part the reason why the actions in *Baidu* and *Shanda*, and other cases, were dismissed is that the plaintiffs' arguments were not sufficiently well structured in antitrust terms and may not have been sufficiently supported by hard evidence.

²⁸ Adrian Emch, *Abuse of Dominance in China—The First Cases*, in XIAOYE WANG (ED.), CAPACITY BUILDING FOR THE ENFORCEMENT OF COMPETITION LAW, SOCIAL SCIENCES ACADEMIC PRESS, p. 158 (2012), (in Chinese).

²⁹ Beijing Intermediate People's Court No. 2, *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch*, December 18, 2009, [2008] Er Zhong Min Chu Zi No. 17385. On appeal, the Beijing High People's Court upheld the judgment by the lower court, including on the market definition point. Beijing High People's Court, *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch*, June 9, 2010, [2010] GaoMin Zhong Zi No. 481.

³⁰ Shanghai Intermediate People's Court No. 1, *Shusheng Electronics Technology Co., Ltd. v Shanda Internet Development Co., Ltd.*, October 20, 2009, [2009] Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 113.

³¹ Shanghai High People's Court, *Shusheng Electronics Technology Co., Ltd. v Shanda Internet Development Co., Ltd.*, December 15, 2009, [2009] Hu Gao Min San (Zhi) Zhong Zi No. 135.

3. Dominance

The AML contains quite a few details on how "dominance" in the relevant market is to be assessed. Generally speaking, the AML follows European Union and, perhaps more closely, German competition law.³²

Article 17(2) of the AML defines a dominant market position in a "qualitative way," as a company's ability to control the price, the quantity, or other trading conditions in the relevant market or to restrict others from entering into the relevant market. Article 18 then sets out a few factors to be used in the assessment of whether a company is in a dominant market position: its market share and the state of competition in the relevant market; its ability to control the sales or purchase markets; its financial and technical capacity; the extent of economic dependence on it by other companies; and entry barriers. Finally, Article 19 contains a few presumptions of dominance, based on market shares; for example, a single firm is presumed to be dominant if its market share is 50 percent or more.

The need to prove dominance has probably been the single most difficult requirement for plaintiffs in private actions in China.

For example in the *Tencent*, *Baidu*, *Shanda*, and *China Netcom* cases, the courts all rejected the plaintiff's claim that the defendant had a dominant market position. Except for the *Tencent* case, the courts found that the plaintiff had not provided sufficient evidence showing dominance. In the *Tencent* case, the court went further and found that Tencent did not have a dominant position.

The plaintiffs in all four cases appeared to have relied mainly on the possibility to *presume* market dominance on the basis of Article 19 of the AML—*i.e.*, if the defendant has a market share over 50 percent, it is presumed to be dominant.

However, the courts in both the *Baidu* and *Shanda* cases held that the plaintiffs had failed to provide sufficient evidence for the presumption to apply. In *Baidu*, the judge at first instance recognized the possibility for a plaintiff to rely on the dominance presumption but, at the same time, stated that "[i]f a plaintiff in an anti-monopoly civil litigation decides to use the presumption provision that the defendant has a dominant market position, it must support it through the provision of sufficient evidence on the calculation of the defendant's market share or the methodology."³³

In the case at hand, the judge found that the plaintiff had not met the burden of proof. The plaintiff mainly relied on two kinds of sources—*i.e.*, articles from the press (published in the *China Securities Journal* and on the website of a consulting company) and an excerpt from

³² Adrian Emch & Qian Hao, *The New Chinese Anti-Monopoly Law - An Overview*, eSapience Center for Competition Policy (November 2007), at 10.

³³ Beijing Intermediate People's Court No. 1, *Tangshan Renren Information Service Co. Ltd. v Baidu Network Information Science and Technology Co. Ltd.*, [2009] Yi Zhong Min Chu Zi No. 845, December 18, 2009. The decision of the Intermediate People's Court does not seem to be publicly available. However, the presiding judge of the case spoke to the press after the judgment. The transcript is available on the court's website. See press release at China Court news, available at <http://www.chinacourt.org/html/article/200912/18/386685.shtml> (last visited on March 4, 2013).

Baidu's website. In the judge's view, these materials did not sufficiently explain the method and basic data for calculating the defendant's market share. The judge therefore found she lacked the necessary evidence to conduct a "scientific and objective analysis."³⁴ Similarly, in *Shanda*, the plaintiff provided marketing materials available on the internet as evidence. The Intermediate People's Court found that the accuracy of those materials had not been verified, and thus held this type of evidence to be insufficient.³⁵

In IPR litigation, courts will generally accept evidence taken from the internet as authentic. If the accuracy of the content on the website is not challenged in the litigation, then the court should accept it on file.³⁶ If, say, the defendant challenges the accuracy of the plaintiff's evidence taken from the internet, then it generally needs to do so on the basis of clear arguments, and not just mere assertions. In addition, the plaintiff can also notarize the internet evidence, which will give its arguments additional credibility. In the extreme, the plaintiff can even take laptops to the court hearing and offer the judges the possibility to double-check the authenticity in real time. For example, in a recent copyright infringement case in Beijing, the District Court at first instance checked—and accepted—online information during the court hearing.³⁷

That said, Huawei—the plaintiff in the *InterDigital* case—must have successfully proven dominance, as it won the case on the merits.³⁸ Similarly, the plaintiff in *Shaanxi digital TV* won the case, including its argument that the defendant had a dominant position. In that case, the defendant was found to have a legal monopoly and a 100 percent share of the cable TV transmission services market in Shaanxi province, which the court found to be the relevant market.³⁹ The Xi'an Intermediate People's Court also found that entry barriers were very high, requiring a large-scale cable transmission network and very significant investment. Likewise, in the *Huzhou termite* case, the Zhejiang High People's Court accepted that the defendant had a dominant position, as it was the only termite control company registered with the government authorized to offer those services in Huzhou.⁴⁰ The court held that the defendant was "presumed" to be dominant according to Article 19 of the AML.

³⁴ *Id.*

³⁵ In the *Shanda* case, an important factor in the court's conclusion may have been that, in its defense, the defendant provided marketing materials from the plaintiff's website which advertised Sursen—not Shanda—as the world's largest internet book portal.

³⁶ Provisions of the Supreme People's Court on Evidence in Civil Litigation, [2001] Judicial Interpretation No. 33, art. 8; and Guiding Opinions of the Beijing High People's Court on the Determination of Liability for Copyright Infringement Damages, [2005] Gao Fa Fa No. 12, art 33.

³⁷ Haidian District People's Court, *Beijing Huayu v. Beijing Baoruan*, [2011] Hai Min Chu Zi No.7507.

³⁸ Reportedly, this judgment has been sealed at the request of the party(ies) and, to the best of our knowledge, is therefore not available publicly or to the authors.

³⁹ To the best of our knowledge, the judgment of the Xi'an Intermediate People's Court has not been publicly released in its entirety. However, an article by Yao Jianjun, judge at the same court, provides some insights into the case. See Yao Jianjun, *The attributes and constitutive elements of bundling trading conduct*, available at http://rmfyb.chinacourt.org/paper/html/2013-02/28/content_58680.htm (last visited on April 13, 2012).

⁴⁰ Zhejiang High People's Court, *Huzhou Yiting Termite Control Services Co., Ltd. v. Huzhou Termite Control Research Institute Co., Ltd.*, [2010] Zhejiang High People's Court No. 125, August 27, 2010.

4. Abuse

Article 6 of the AML contains the general principle that a company in a dominant market position must not abuse that position to eliminate or restrict competition. Article 17(1) contains a list of specific types of abuses including excessive, predatory and discriminatory pricing, refusal to deal, exclusive dealing, tying, etc.

According to the general principle for the allocation of the burden of proof in civil litigation, it is for the plaintiff to prove that the defendant committed an abuse.⁴¹ In the past actions filed under the AML, too, the courts imposed the burden to prove abusive conduct upon the plaintiff.

On this point, the plaintiffs' success rate has been somewhat better (as compared to proving dominance).⁴² For example, in *China Netcom*, the first-instance court held that the defendant's conduct had a restrictive effect, which implied that it was potentially abusive. The Guangdong High People's Court in *Tencent* went further and held that Tencent's conduct amounted to exclusive dealing. This finding was all the more surprising, as the court held that Tencent was not dominant and that therefore the prohibitions in Article 17 of the AML did not apply. Instead of exercising judicial economy, however, the court continued the analysis of whether Tencent's behavior constituted abusive conduct. Following that analysis, the court found that Tencent's measure to make 360's competing anti-virus software incompatible with its flagship QQ instant messaging services (where 360 alleged Tencent was dominant) constituted unjustified exclusive dealing in violation of the AML (but not illegal tying under the law). In *China Netcom*, the Intermediate People's Court appeared to implicitly accept that the defendant's conduct led to discrimination between users but also found that the defendant merely protected itself against credit risk.

In contrast, in *Baidu* and *Shanda*, the courts did not appear to agree that the plaintiffs managed to discharge its duty to prove the abusive conduct. That said, the courts in both cases in practice considered the abuse and justifications together (see below). In *Baidu*, the Intermediate People's Court found that there was no evidence that Baidu's conduct was discriminatory or constituted "forcing," and that it did not constitute abusive conduct within the meaning of the AML. At least in part, the reason for the court's finding was that Baidu's conduct was justified for valid reasons. In *Shanda*, the Intermediate People's Court held that the plaintiff failed to prove that Shanda had engaged in "forcing," and then conducted an analysis of why Shanda's conduct was in, any event, justified.⁴³

5. Valid Reasons

The AML stipulates that all but one of the listed types of abusive conduct can be justified for "valid reasons." The law does not state who bears the burden of proof, but the function of the

⁴¹ Judicial Interpretation, art. 8(1).

⁴² Emch, *Abuse of Dominance in China—The First Cases*, *supra* note 28, p. 166 *et seq.*

⁴³ On appeal, the Shanghai High People's Court exercised judicial economy and held that it did not have to examine this aspect because it had already found that there was no proof that Shanda had a dominant market position.

"valid reasons" concept as a justification implies that it is upon the defendant to bear the burden of proof. The Judicial Interpretation explicitly confirms this point.⁴⁴

In the past judgments under the AML, the defendants have been remarkably successful in discharging their duty to prove the existence of "valid reasons."⁴⁵

As indicated, in both *Baidu* and *Shanda*, the courts accepted the defendants' explanations that the conduct at issue was justified and therefore did not constitute an abuse. In *China Netcom*, too, the Intermediate People's Court held that the defendant's conduct was justified by a valid reason, namely to protect itself against credit risk. In the *Tencent* case, the court made a lengthy analysis of justification possibilities for the company's "exclusive dealing" conduct. Interestingly, the court referred to general civil law and tort law rules about justifiable "self-defense" and "damage avoidance" measures. Ultimately, the court decided that Tencent's measures—though targeted at 360's tortious behavior, as Tencent claimed, to render 360's anti-virus software incompatible with Tencent's software—negatively affected Tencent's software environment beyond what was necessary. In particular, the court seemed to take issue with the fact that the ultimate target of Tencent's countermeasures was the QQ user (who had a reduced choice of anti-virus software—from two providers to one), not 360.

IV. PRESUMPTIONS

There has been quite some criticism in the antitrust community in China, especially among academics, that the burden of proof for private actions is too high.⁴⁶ It is noteworthy to point to the *Baidu* case, for example, where the High People's Court on appeal explicitly recognized that the plaintiff had "made a great effort" to discharge its obligation to prove the defendant's dominance, but still found that the plaintiff had not discharged its burden of proof.

Possibly in reaction to this criticism, the SPC adopted the Judicial Interpretation, which put forward some presumptions that lower the burden of proof, as they effectively shift the burden to the defendants.⁴⁷

A. Anticompetitive Effects for Cartel Conduct

As mentioned, Article 7 of the Judicial Interpretation requires the defendant to prove that cartel-like conduct falling under the activities described in Article 13(1) of the AML do not have anticompetitive effects.

In the *Shenzhen pest control* case, the first-instance judgment was released *before* the Judicial Interpretation, although the appeal decision by the second-instance court came out after the release. The first-instance court explicitly noted that there were no specific rules on the

⁴⁴ Judicial Interpretation, art. 8(2).

⁴⁵ Emch, *Abuse of Dominance in China—The First Cases*, *supra* note 28, p. 169 *et seq.*

⁴⁶ See, for example, ForbesChina.com, March 29, 2013, available at http://www.forbeschina.com/review/201303/0024652_all.shtml (last visited on April 13, 2012). See Kong Xiangjun (Ed.), *Supreme People's Court Judicial Interpretation of Understanding and Applying Intellectual Property Rights*, p. 268, and Wang Jian, *Thoughts on how to improve China's private anti-monopoly litigation*, *STUDIES IN LAW AND BUSINESS*, Vol. 3 (2010).

⁴⁷ Apart from these presumptions, the AML itself has a market share-based presumption of dominance, as mentioned before.

burden of proof in private antitrust actions at that moment in time. Hence, as mentioned, one of the reasons that led the court to dismiss the action was that the plaintiff had not sufficiently proven that the price-fixing agreement had a negative impact on competition. If the Judicial Interpretation had been applied in full, the outcome on this particular point would have been different.

B. Dominance by Public Utilities and Legal Monopolists

Article 9 of the Judicial Interpretation stipulates that the courts can presume dominance of "public service companies" (namely, utilities such as water or electricity providers) and operators that are in a monopoly position according to the law (such as salt or tobacco suppliers which enjoy exclusive rights in China).⁴⁸ Although the provision speaks of "determination," it allows the defendant to provide evidence to the contrary and hence effectively works like a presumption. Even so, this presumption is not automatic, as the provision is formulated as a possibility for the court to decide, on the "basis of the market structure and market condition."⁴⁹

In the *Shaanxi digital TV* case, the Judicial Interpretation had already been released and, in fact, the court referred to it on several occasions. As mentioned, in its assessment whether the defendant had a dominant position, the Xi'an Intermediate People's Court found that the cable TV transmission services market at issue was subject to a legal monopoly at the provincial level [省级专营]. Not surprisingly, the court deducted that the defendant was the only player in the market (and the only one authorized to conduct "content control" of the programs to be broadcasted) and therefore had a market share of 100 percent. Against this background, interestingly, the public information available on this case does not refer to Article 9 of the Judicial Interpretation, even though cable transmission operations in Shaanxi might arguably be a natural monopoly occupied by a utility and/or be subject to a legal monopoly granted according to the law.⁵⁰

C. Dominance Upon "Self-admission"

Article 10 of the Judicial Interpretation allows the plaintiff to rely on information in the public domain released by the defendant. This figure is called "self-admission" [自认] in Chinese court practice. The background to that figure is that general civil litigation rules stipulate that allegations that are expressly acknowledged by the party against whom they are directed are "exempt" from the burden of proof.⁵¹ If the information shows the defendant's dominance, then the court again has the possibility to "determine" that the defendant is dominant, unless the latter proves the contrary. Hence, this provision works like a presumption (that effectively reverses the burden of proof).

⁴⁸ For a discussion of the concepts of these types of entities, see Adrian Emch, *Abuse of Dominance in China: A Paradigmatic Shift?*, EUR. COMPETITION L. REV. 615, 620 (2008).

⁴⁹ In a way, this presumption possibility brings AML litigation closer to litigation under the Anti-Unfair Competition Law, which has provision targeting tying by public service enterprises and business operators that are in a monopoly position according to the law. See Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No. 10, September 2, 1993, art. 6; and Certain Provisions on the Prohibition of Anti-Competitive Practices by Public Service Enterprises, [1993] SAIC Order No. 20.

⁵⁰ The pre-condition for this line of argument to be credible is that the court's definition of the relevant market is correct, which is a different issue whose discussion is beyond the scope of this article.

⁵¹ Certain Provisions of the Supreme People's Court on Evidence in Civil Litigation, [2001] Fa Shi No. 33, art. 8.

In the *Baidu* case, the judgments came out *before* the Judicial Interpretation was issued. Indeed, the second-instance court specifically pointed out that the general principle for the burden of proof under civil litigation rules applied—*i.e.*, the person that brings a claim must prove it—as there were no specific rules on the burden of proof in private antitrust cases at that time. If the Judicial Interpretation had been applied to the *Baidu* case, it is possible that the plaintiff might have been more successful on the dominance argument. As noted, the plaintiff produced print-outs of Baidu's own website stating that it was "the largest Chinese search engine in the world" and that its market share was well above 50 percent, and argued that this would trigger the market share presumption of dominance contained in the AML. The court in that case rejected this approach, finding the printouts not to be fully reliable because they also play a role in the "order of competition in the relevant market and economic development." What the court may have meant is—it seems—that companies tend to overstate the importance of their market positions for marketing purposes.

In the *Dongfeng-Nissan* case, the plaintiff also brought the "self-admission" argument to bolster its claim that the defendant had a dominant position. In that case, the plaintiff had called staff of the defendant in charge of customer service and recorded the telephone conversation. However, the Changsha Intermediate People's Court did not accept the "self-admission" character of the recordings because the defendant had not "released" this information into the public domain.⁵²

V. DISCOVERY

Apart from the use of presumptions, Chinese civil litigation rules provide some ways for the plaintiff to seek "discovery." The fact that those rules can provide some support for plaintiffs lacking sufficient evidence was highlighted by the second-instance court in *Baidu*. The court rejected the plaintiff's request to take into account its "litigation capability" when assessing the sufficiency of the evidence, by noting, "on the issue about the proof of such kinds of facts relating to specialized facts as market shares, the current evidence regime in civil litigation provided the parties the choice between many types of methods of proof."⁵³

A. Investigation and Evidence Collection by the Court

Article 64 of the Civil Litigation Law provides that if a party is unable to obtain the necessary evidence itself due to "objective reasons"—or where the court considers it necessary for the trial of the case—the court can investigate and collect the evidence itself. The plaintiff's request that the court investigate and collect evidence must be made at least seven days before the deadline the court set for providing evidence.⁵⁴ For example, court-ordered investigation and evidence gathering may be appropriate where the defendant controls the accounts related to its infringing activities. Therefore, if a plaintiff wants to be able to assess the amount of the damages through a court decision, it may request the court to issue an evidence preservation order and

⁵² Changsha Intermediate People's Court, *Liu Dahua v. Dongfeng Nissan Passenger Vehicle Company of Dongfeng Motor Co., Ltd. and Hunan Huayuan Industrial Company*, December 12, 2011, [2011] Chang Zhong Min Wu Xhu Zi No. 158.

⁵³ Beijing High People's Court, *Tangshan Renren Information Service Co. Ltd. v Baidu Network Information Science and Technology Co. Ltd.*, [2010] Gao Min Zhong Zi No. 489, July 9, 2010, page 18.

⁵⁴ Certain Provisions of the Supreme People's Court on Evidence in Civil Litigation, *supra* note 51, art. 19(1).

gather the data in the accounting books of the defendant. That was the situation in the copyright infringement case between two educational institutions where the court at the first instance preserved the accounting books of the defendant upon application of the plaintiff, and arranged an audit of the accounts.⁵⁵

In addition, according to the Civil Litigation Law, even without a request from the plaintiff, the court may conduct an investigation and a collection of evidence on its own initiative if it considers that there is a potential conflict with public interests.⁵⁶ Of course, anticompetitive conduct may not only harm the plaintiff but also public interests, as is illustrated by the fact that redress against such conduct can be sought both by enterprises (defending their own, private interests) and by government authorities (acting in the public interest). Hence, court-initiated evidence collection in private antitrust cases would make sense, to a certain degree. However, in practice, Chinese courts rarely order an investigation and evidence collection on their own motion, and we are not aware of any instance where this has been the case under the AML. Even outside the AML field, such cases seem very infrequent. However, in at least one case—a design infringement case in Guangdong—the Guangdong High People's Court upheld the investigation into a third party made by the first-instance court on its own motion. That investigation helped to clarify the real source of the infringing products in the case at hand.⁵⁷

B. Fact and Issue Verification and Assessment

Article 76 of the Civil Litigation Law allows a party to request the court to verify the facts underlying a specific (usually technical) issue. To that end, the parties are asked to consult with each other and jointly designate a person for the verification process. If consultation fails, the court designates one for them.

In an equivalent way, the Judicial Interpretation allows the plaintiff, upon agreement with the defendant, to appoint a specialized investigation and evaluation institution that can advise the court on certain technical issues or, if the plaintiff and defendant fail to reach an agreement, request the court to appoint one.⁵⁸

Article 79 of the Civil Litigation Law allows the parties to request the appointment of an additional expert to appear before court to share his or her opinion on the verification result or a specific issue.

VI. CONCLUSION

Private litigation under the AML has started relatively slowly. In the majority of cases thus far, the defendants have prevailed and the actions were dismissed. In many instances, the

⁵⁵ Beijing No.1 Intermediate People's Court, *Educational Testing Service v. Beijing New Orient Training School*, [2001] Yi Zhong Zhi Chu Zi No. 35; and Beijing High People's Court, *Beijing New Orient Training School v. Educational Testing Service*, [2003] Gao Min Zhong Zi No. 1393. See, also, Supreme People's Court, *Yamaha v. Zhejiang Tianhua*, [2006] Min San Zhong Zi No. 1.

⁵⁶ Civil Litigation Law, art. 64. The court may intervene on its own motion where "a fact may harm the national interest, social interest or lawful rights and interests of others." See Certain Provisions of the Supreme People's Court on Evidence in Civil Litigation, *supra* note 51, art 15.

⁵⁷ Guangdong High People's Court, *Chen Shuting v. Qiu Shaoqiu*, [2011] Yue Gao Fa Min San Zhong Zi No. 221.

⁵⁸ Judicial Interpretation, art. 13(1).

courts found that the plaintiff had not provided sufficient evidence to support its arguments. From a mere statistical perspective, the court practice so far appears to suggest that the burden of proof is high for private antitrust actions in China.

In our view, however, such conclusions are not entirely accurate or, at best, are premature. The reason is that in many cases the parties seemingly did not employ all of the resources available to them for the preparation and presentation of evidence. For example, in *China Netcom*, the plaintiff provided very little evidence, such as just a few print-outs from websites of third parties and the contract it had with the defendant. As discussed in this article, Chinese civil litigation rules would have allowed the plaintiff to seek evidence through other means, such as the appointment of experts or reliance on presumptions.

With a few exceptions, such as the *Tencent* case where both parties were advised by lawyers and economists with antitrust experience, in most other cases thus far the parties did not seem to reach out to specialists, and to some extent that lack of antitrust-specific know-how was reflected in their arguments. To an extent, we believe that this circumstance has had an influence on the quality of court actions and may, in part, explain why the courts have frequently dismissed the actions of the plaintiffs.

Hence, we do not share the views that—based on the statistics on judgments thus far—the burden of proof in private antitrust cases is insurmountable in China.

Quite to the contrary, given the increase in business litigation in China in general and the quite important manpower constraints at the governmental authorities in charge of antitrust enforcement, we would expect antitrust to become an increasingly regular topic before the courts in China and anticipate that plaintiff wins will become less of a rarity in the future.