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New Developments in Civil Antitrust Litigation in China

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I. INTRODUCTION

The year 2011 provided significant headway for the development of antitrust-related civil actions in China. Courts not only achieved progress in terms of case acceptance and adjudication, but also made a huge step forward in the setting-up of the civil antitrust litigation system. With regard to the former, the number of antitrust-related court cases accepted and adjudicated has progressively increased, the number of judgments issued has steadily grown, and courts' trial experiences and expertise have gradually improved. With regard to the latter, the issuance of the Provisions of the Supreme People's Court on Several Issues concerning the Application of the Law in Adjudication of Monopoly-Related Civil Disputes (Draft for Comments)² ("Draft Provisions") on April 25, 2011 was a major achievement.

These two features in the development of antitrust litigation are complementary –i.e., the accumulation of experience in adjudicating individual cases has been essential for the Draft Provisions and, conversely, those provisions have, to a certain extent, provided an important theoretical framework for litigated antitrust cases.

II. TRENDS AND CHARACTERISTICS OF CIVIL ANTITRUST LITIGATION IN CHINA

In 2010, new antitrust cases accepted at first instance totaled 33 nationwide, with 23 cases already resolved. For the first half of 2011, this number was seven new cases, and eight cases (including some filed before) were resolved. Within this period of time, various second instance matters with a relatively important impact were also completed. For example, three antitrust-related disputes—*Tangshan Renren v. Baidu*,³ *Li Fangping v. China Netcom*,⁴ and *Huzhou Yiting Termite Control Services v. Huzhou City Termite Control Research Institute*⁵—were all concluded at second instance, with the appeals denied and the plaintiffs' claims dismissed.

¹ Justice of the Supreme People's Court of the People's Republic of China, Intellectual Property Rights Bench.

² Provisions of the Supreme People's Court on Several Issues concerning the Application of the Law in Adjudication of Monopoly-Related Civil Disputes (Draft for Comments), April 25, 2011, available at http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm.

³ Beijing Intermediate People's Court No. 1, *Tangshan Renren Information Service Co., Ltd. v. Beijing Baidu Network Technology Co. Ltd.*, [2009] Yi Zhong Min Chu Zi No. 845, December 18, 2009. Upheld on appeal by Beijing High People's Court, *Tangshan Renren Information Service Co., Ltd. v. Beijing Baidu Network Technology Co. Ltd.*, [2010] Gao Min Zhong Zi No. 489, July 9, 2010.

⁴ Beijing Intermediate People's Court No. 2, *Li Fangping v. China Netcom (Group) Co. Ltd. Beijing Branch*, [2008] Er Zhong Min Chu Zi No. 17385, December 18, 2009. Upheld on appeal by Beijing High People's Court, *Li Fangping v. China Netcom (Group) Co. Ltd. Beijing Branch*, [2010] Gao Min Zhong Zi No. 48, June 9, 2010.

⁵ Huzhou Intermediate People's Court, *Huzhou Yiting Termite Control Services Co., Ltd. v. Huzhou City Termite Control Research Institute Co., Ltd.*, [2009] Zhe Hang Zhu Chu Zi No. 553, June 7, 2010. Upheld on appeal by Zhejiang High

Making an initial assessment of the litigation situation since 2010, the following trends and particularities in civil antitrust litigation can be identified:

- Regarding the characteristics of plaintiffs, the number of cases where lawyers act as plaintiffs to seek publicity or to encourage the court to take a clear position on certain legal issues has decreased, while the number of cases where market players harmed by anticompetitive conduct go before court to protect their rights and interests has increased. This indicates an increasingly sound approach toward the Anti-Monopoly Law of the People's Republic of China⁶ ("AML") by the general public.
- The underlying anticompetitive conduct at issue in the court actions spans a relatively wide range of industries. In addition to industries where antitrust cases have traditionally been frequent, the court actions include cases about cutting-edge technology. The court cases show a progression toward markedly more diverse sectors including transportation, pharmaceuticals, food, home appliances, information networks, etc. The existence of antitrust cases indicates that the AML deters anticompetitive conduct. Yet, defending fair and free competition will clearly still remain a challenge in the near future.
- The cases show another trend of diversification—*i.e.*, there have been both abuse of dominance cases and monopoly agreements cases. However, in terms of numbers, abuse of dominance cases have made up the majority of cases. Still, for the first time, claims of vertical monopoly agreements have entered the civil litigation channel. The public shows strong trust in the ability of the judiciary to resolve antitrust-related civil actions.
- There have been relatively few cases where the plaintiffs request symbolic or low levels of compensation, while those cases where significant sums of compensation were at stake have increased. Indeed, in a few cases, the plaintiffs requested as much as RMB 200 million (approximately U.S.\$31.7 million; EUR 24.5 million).
- Although the proportion of plaintiffs actually winning cases has been comparatively small, a few judgments favorable to plaintiffs—holding the actions of the defendants to be anticompetitive and ordering the payment of compensation for damages—have begun to emerge. This trend is likely to provide an incentive for parties harmed by anticompetitive conduct to protect their rights through the redress made available by law.
- The places where the cases are heard have also become more diverse. While previous cases were heard in Beijing, Shanghai, and Chongqing (three municipalities directly under control of the central government), recent cases saw the involvement of courts in Zhejiang, Shandong, Guangdong, Guangxi, Liaoning, and other provinces and regions. Moreover, the Guangxi Zhuang Autonomous Region was the first to see a plaintiff successfully win a case.

As the above examples illustrate, with the deepened level of enforcement of the AML, the public's perception of the law has already shifted from a state of hesitation and skepticism to a state where the law is actively being used. Enforcement of the AML is gradually becoming a standard practice. Since the first victory where the plaintiff was granted compensation, civil

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

⁶ Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No.68.

actions have increasingly been viewed as important tools to prevent and stop anticompetitive behavior.

Nonetheless, as the (relatively low) rates of success by plaintiffs in civil antitrust disputes indicate, the awareness and general understanding among the public about the AML is still at an early stage. In some cases filed under the AML, the actions of the defendants clearly do not constitute anticompetitive conduct but, rather, are anti-unfair competition or consumer protection cases. This indicates that litigants and courts still have a long way to go in terms of raising the awareness, understanding, and use of the AML. It will still be some time before the enforcement of the AML has become a routine matter.

III. NEW PROGRESS ON GUIDANCE FOR CIVIL ANTITRUST LITIGATION

From 2010 onwards, the Supreme People's Court has accelerated the pace of providing guidance on the procedure in private antitrust litigation. After two years of preparations, research, and several rounds of revisions, the Supreme People's Court circulated the Draft Provisions for public comment on April 25, 2011. The Draft Provisions are based on the AML, the General Principles of Civil Law of the People's Republic of China ("General Principles of Civil Law"),⁷ the Civil Procedure Law of the People's Republic of China ("Civil Procedure Law"),⁸ the Tort Liability Law of the People's Republic of China ("Tort Liability Law"),⁹ the Contract Law of the People's Republic of China ("Contract Law"),¹⁰ etc. The provisions aim to clarify various questions related to jurisdiction, the parties and litigation method, evidence and burden of proof, civil liability, and statute of limitation, etc.

Within its 20 articles, the Draft Provisions lay out both the basic framework as well as specific regulation for private antitrust litigation. They include the following principles:

- *Compatibility with existing legal rules:* The Draft Provisions are based on the rules relating to the AML, in combination with the General Principles of Civil Law, the Civil Procedure Law, the Contract Law, the Tort Liability Law, and other regulations. They aim to provide comprehensive guidance on questions of jurisdiction and case acceptance, the legal standing of parties, burden of proof, civil liability, and statute of limitation.
- *Accumulation of case experience:* During the drafting process, not only the experiences of the courts in China in antitrust cases after the entry into force of the AML were taken into account, but also the courts' handling of antitrust-related cases under the Anti-Unfair Competition Law of the People's Republic of China ("Anti-Unfair Competition Law").¹¹ In addition, the Supreme People's Court has conducted a significant amount of investigative research.
- *The conditions in China—existing in practice—as a starting point:* Clear and easily accessible rules allow the parties to fully utilize the potential and benefits of civil antitrust litigation, raise peoples' awareness for competition, and foster a spirit of healthy competition. At the same time, they avoid over-deterrence and undue restraints of market vigor. In addition, the

⁷ General Principles of Civil Law of the People's Republic of China, [1986] Presidential Order No. 37.

⁸ Civil Procedure Law of the People's Republic of China, as last amended by [2007] Presidential Order No. 75.

⁹ Tort Liability Law of the People's Republic of China, [2009] Presidential Order No. 21.

¹⁰ Contract Law of the People's Republic of China, [1999] Presidential Order No. 15.

¹¹ Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No.10.

rules allow coordination between administrative antitrust enforcement and private litigation to ensure an optimal outcome for the enforcement of the AML.

- *Global vision:* The Draft Provisions embody a global vision and take an international perspective by drawing upon the private antitrust litigation experience of more mature antitrust jurisdictions, while adapting it to the Chinese legal system and other circumstances specific to China.

There are a few points that should be highlighted from the Draft Provisions.

First, looking at the issue of jurisdiction for civil antitrust cases, the Draft Provisions allocate jurisdiction by taking into account the highly technical nature, considerable complexity, and the relatively significant impact of such cases. The Draft Provisions clarify that, at first instance, the adjudication of antitrust cases falls under the jurisdiction of the Intermediate People's Courts of the cities where the government of a province or autonomous region is located, the cities specifically designated in the State plan, and the cities directly under the control of the central government, as well as the Intermediate People's Courts designated by the Supreme People's Court. As private antitrust litigation is still in its infancy, there is scope to deepen the judges' knowledge of the regulations and particularities of this type of litigation. Thus, concentrating jurisdiction among courts with adequate resources and case-handling experience has the benefit of guaranteeing a sound level of adjudication and providing a common standard for judgments.

Any private litigation adjudicated on the basis of the AML is, due to its intrinsic nature, a civil antitrust dispute. Such dispute can be a torts claim, or a contractual or other dispute. With regard to monopoly agreements, for example, the parties to an agreement may be at loggerheads over the essence of the agreement. For instance, an action filed by one party to the agreement may meet an antitrust defense or counterclaim by the other party. Currently, these types of defenses and counterclaims can have a direct impact on the effectiveness of the contract. If the court where the action is filed does not accept the action on file or requests the plaintiff to file elsewhere on the grounds of lack of jurisdiction for antitrust matters, then there is a risk that different courts hearing cases about the same contract could adopt conflicting decisions. This could negatively impact the credibility and authority of private litigation. Hence, the Draft Provisions follow the solutions of other countries on this issue; in this type of situation, the court lacking jurisdiction over antitrust cases has to transfer the matter to a court that has jurisdiction.

Second, the Draft Provisions explore whether indirect purchasers have standing in civil antitrust cases. Article 4 of the Draft Provisions stipulates that where the anticompetitive conduct results in harm to natural persons, legal persons, or other organizations, including business operators and consumers, civil actions can be filed before the courts in accordance with Article 50 of the AML. This provision also addresses the question of whether indirect purchasers have standing to file private actions. In essence, in many countries, the legislative intent and policies on private antitrust litigation are key to determine whether or not indirect purchasers have standing. In China, the legislative intent behind the AML is not only to prevent and prohibit anticompetitive conduct, protect fair market competition, and improve economic efficiency, but also to safeguard the interests of consumers and the public. Pursuant to Article 50 of the AML, if anticompetitive conduct harms a person, then he or she can request the author of the conduct to assume civil liability. That provision does not impose additional requirements for standing as plaintiff.

In principle, therefore, business operators and consumers have standing both when they suffer direct and indirect harm as a result of the anticompetitive conduct. As indirect purchasers, individual consumers are often the ultimate victims of monopolistic conduct. If they are not allowed to file court actions, then it may not be possible for them to obtain compensation for the damages suffered, which would seem unfair. In addition, conferring standing to indirect victims, especially end consumers, may increase the likelihood that anticompetitive conduct is detected and stopped in a timely manner and redress sought by the victims of the conduct is facilitated. At the same time, from an international perspective, more and more jurisdictions allow indirect purchasers to file antitrust actions. In conclusion, it seems necessary to grant standing to indirect purchasers, although it is clear that this choice needs further exploration in practice.

Third, regarding the methods of litigation, the Draft Provisions propose two methods—*i.e.*, direct, *ex novo* actions and follow-on actions. The AML sets out a double-track administrative and civil judicial enforcement system. The two enforcement channels have their own characteristics and complement each other. In civil antitrust disputes, the plaintiff often faces difficulties in collecting evidence and lacks expertise, etc. If conduct has already been investigated by an antitrust agency and has been held to be anticompetitive, then a court action filed after the final administrative decision is adopted may be more effective for the victim to protect its interests and, ultimately, receive compensation for damages. With this in mind, the Draft Provisions give guidance on such follow-on actions.

With regard to monopolistic conduct not yet investigated by any antitrust agency, the Draft Provisions allow plaintiffs to file actions without the need to first await an administrative decision. The reason for this stipulation is as follows. In the first place, the AML does not contain an "administrative decision first" requirement. A draft of the AML did contain such a requirement, but the relevant provision was ultimately deleted from the law as enacted. This indicates that the AML follows a different path. If there were such a requirement of "administrative preemption" for private antitrust actions, then this would not only lack legal basis but would also impinge on parties' rights to seek legal redress.

In the second place, from the perspective of international antitrust enforcement, the trend is to allow direct actions. At present, "administrative preemption" provisions are rare on the international level. Although in many countries civil actions for compensation of damages in practice frequently occur after an administrative decision is issued, the great majority of countries do not prohibit the filing of direct actions before the courts. This is all the more so, as direct actions are possible in other important areas of the law. Finally, despite the high level of specialization and technical expertise required for antitrust litigation, judges will be competent and ready after studying, researching, and gathering practical experience in this area of the law. In a notice in 2008, the Supreme People's Court already provided clarifications on this point.¹²

Fourth, the Draft Provisions aim to achieve consistency between civil antitrust litigation and administrative enforcement proceedings, as well as effective coordination between the two types of procedures, in particular in the following three ways:

¹² Notice by the Supreme People's Court on In-Depth Studying and Implementing of the Anti-Monopoly Law of the People's Republic of China, [2008] Fa Bu 23.

1. The Draft Provisions give guidance on follow-on litigation—which allows those harmed by monopolistic conduct to file an action before courts after the decision adopted by an administrative antitrust agency has become effective—and in this way contribute to achieving consistency. Here "becoming effective" means that the final decision of the administrative antitrust agency has come to have legal force, which can occur in two ways:
 - a) The parties concerned do not file an administrative law appeal against the decision by the antitrust agency within the deadline stipulated by law or regulation. In that case, the decision becomes legally effective.
 - b) The case may be that a party concerned lodges an administrative law appeal against the decision within the statutory deadline, but the court upholds the decision in a judgment having become effective. In this situation, too, the administrative decision is confirmed to have become legally effective.
2. The Draft Provisions confirm that a legally effective decision by an administrative antitrust agency finding conduct to be anticompetitive has an impact on follow-on actions, as the plaintiff no longer needs to prove the facts confirmed to exist in the decision.
3. When administrative enforcement and civil litigation run in parallel, the court may decide on a case-by-case basis on whether or not to suspend the trial.

Such a design, as explained above, provides a guarantee for efficient cooperation and coordination between court proceedings and administrative enforcement in terms of case acceptance, adjudication, and determination of facts. Of course, recourse to civil courts and administrative enforcement are ultimately separate procedures to seek redress. Although the investigation by an administrative antitrust agency does not find a specific conduct to be anticompetitive, the court must still examine the pleas brought forward by a party concerned and issue a judgment. Moreover, there is still room for in-depth consideration on whether it is necessary to have a judicial interpretation to clarify how to coordinate the relationship between the two redress procedures. The Draft Provisions only raise these issues; hopefully, future judicial practice will be able to resolve them.

Fifth, on the question of evidence, the Draft Provisions provide explanations and guidance on issues such as the allocation of the burden of proof, relief from the burden to prove facts, responsibility for the defendant to provide evidence, expert testimony, and so on. The guidance is in line with the AML, the relevant provisions of the Civil Procedure Law, and their principles.

As for the allocation of the burden of proof, the Draft Provisions differentiate between different kinds of monopolistic conduct and clarify the evidentiary burden placed upon the parties. For example, for those monopoly agreements that in normal circumstances are highly likely to have the grave effect of eliminating or restricting competition, the plaintiff will not be required to provide evidence showing that the agreement has this effect, unless the defendant has put forward sufficient counter-evidence. Of course, such effect can be understood in a simple manner—*i.e.*, the monopoly agreement *per se* has an anticompetitive effect—unless a statutory exemption can be proven to apply or the procompetitive effect outweighs the anticompetitive effect.

In addition, the Draft Provisions allow for the "preliminary determination" that public service enterprises and business operators with an exclusive right for the provision of specific products or services hold a dominant market position, unless the defendant provides sufficient evidence to the contrary. At the same time, the Draft Provisions further clarify under what conditions the plaintiff can request that the defendant be ordered to submit evidence and what the consequences of obstructing the submission of evidence are. In addition, there is guidance for the parties concerned on how to rely on expert witnesses to bring to light the relevant facts.

The introduction of such measures, to a certain degree, departs from the existing framework for the provision of evidence in civil litigation. In that way, one of the Draft Provisions' most important merits is to decrease the burden of proof for plaintiffs.

Sixth, the Draft Provisions clarify the ways of how to assume civil liability. Pursuant to Article 50 of the AML, business operators must assume civil liability if their anticompetitive conduct causes loss to others. This provision does not limit liability to the payment of compensation alone, but refers to the general concept of "civil liability" in Chinese law. Thus, the AML leaves a large room of discretion for civil liability as a result of anticompetitive conduct. The various methods stipulated in the General Principles of Civil Law, the Tort Liability Law, and the Contract Law are applicable in similar fashion in the domain of liability for anticompetitive conduct.

Looking at courts' experiences on an international level, liability for anticompetitive conduct generally encompasses ceasing the infringement, taking precautionary measures to avoid damage, and compensating for the damage caused. Against this background, the Draft Provisions draw lessons from both international and local judicial practices. They clearly stipulate that the party engaging in anticompetitive conduct has to assume the responsibility for ceasing the infringement, taking damage avoidance measures, and compensating the damage, in accordance with the specific pleas of the plaintiff and the particularities of the individual case.

The release of the Draft Provisions had a wide-ranging impact among the public. In addition to comments and suggestions being put forward, the draft also received positive appraisals. By July 1, 2011 the Intellectual Property Rights Bench of the Supreme People's Court had received 252 comments and suggestions, covering all articles of the Draft Provision. Among them, 15 High People's Courts in China provided a total of 86 comments. The United States government submitted 21 recommendations through its embassy in China. Seven social organizations submitted a total of 85 comments. Six companies and law firms submitted 32 comments, and ten individuals put forward a total of 28 comments.

The Intellectual Property Rights Bench of the Supreme People's Court is currently reviewing these comments, with the aim to further revise and complete the Draft Provisions. However, it should be noted that while the efforts of the Intellectual Property Rights Bench of the Supreme People's Court mark an important step, the content of the Draft Provisions is not set in stone and hence the likelihood of there being further changes is relatively high.

IV. ADDITIONAL PROGRESS IN RELATION TO CIVIL ANTITRUST LITIGATION

Beyond the progress achieved in speeding up the drafting process for the judicial interpretation on civil antitrust litigation, the Supreme People's Court issued other normative materials to clarify questions about case acceptance and the application of the law.

In a case in 2010, the Supreme People's Court provided guidance as to jurisdiction where a plaintiff files an action under both the Anti-Unfair Competition and the AML.¹³

Similarly, in the official reply to the Liaoning High People's Court in the *Snow Beer v. North Green Foods* case, the Supreme People's Court noted that, pursuant to Article 20(2) of the Anti-Unfair Competition Law, a business operator is entitled to lodge a civil action with the courts whenever its lawful rights and interests are harmed.¹⁴ Hence, a business operator has the right to file a civil action in an unfair competition case related to predatory pricing before the courts, and the courts must accept the case on file in accordance with the law. Moreover, in such situations, jurisdiction is to be determined pursuant to Article 6 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law in the Trial of Civil Cases Involving Unfair Competition.¹⁵ If a plaintiff wishes to file the action at the same time on the basis of the AML, jurisdiction over the entirety of the case will lie with the Intermediate People's Courts in the capital of the province at issue or those designated by the State plan.

By resolving the issue of simultaneous jurisdiction, this reply by the Supreme People's Court also clarifies the relationship between the AML and the Anti-Unfair Competition Law. The AML itself does not provide any guidance on its relationship with other competition-related laws. Yet the competition-related provisions in the Anti-Unfair Competition Law—such as those on administrative monopoly, abuse of dominance by public service enterprises, predatory pricing, etc.—do not stand in inherent conflict with the AML. Prior to express abrogation by the legislature, the relevant provisions in the Anti-Unfair Competition Law that concern monopolistic conduct continue to be legally effective. Hence, if a plaintiff chooses to file an action under the Anti-Unfair Competition Law, the courts must apply this law. If the plaintiff at the same time chooses to file the action under the AML as well, the courts must apply that law simultaneously.

V. CONCLUSIONS

Progress made in relation to civil antitrust litigation not only has an impact on the effectiveness of private enforcement but—more generally—is equally instrumental to achieving optimal and effective implementation of the AML.

As the progress achieved in 2010 and 2011 in relation to civil antitrust litigation in China indicates, judges have learned to understand the key principles of antitrust law within a relatively short period of time and have improved their skills in handling antitrust disputes. At the same time, through their case-handling experience and the publication of the Draft Provisions, they have deepened their understanding of the AML and have contributed to raising awareness among the public and the application of the law. It is easy to anticipate that civil antitrust litigation will play an ever more important role for the sound implementation of the AML in the future.

¹³ Reply of the Supreme People's Court on the Questions of Case Acceptance for Unfair Competition Disputes Related to Low Price Dumping and Determination of Jurisdiction, [2010] Min San Ta Zi No. 13.

¹⁴ Report Concerning the Review Application of the Unfair Competition and Monopoly Dispute between the Plaintiff Snow Beer (Liaoning) Co., Ltd and Defendants North Green Foods Co., Ltd and Qinghe Moni Beer Branch, [2010] Min San Ta Zi No. 13, October 15, 2010.

¹⁵ Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law in the Trial of Civil Cases Involving Unfair Competition, [2007] Fa Shi No. 2.