Antitrust Litigation in China – A Step Forward

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The legal basis for private antitrust civil litigation in China is Article 50 of China's Anti-Monopoly Law (the "AML"), which provides that "[w]here the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liability according to law." Since the AML entered into force on August 1, 2008, Chinese parties believing themselves to have been harmed by anti-competitive conduct have had more success in getting the attention of Chinese courts than of Chinese antitrust authorities. Chinese courts have reportedly accepted 61 antitrust cases and ruled on 53, although the courts have so far generally ruled in favor of the defendants.[1] By contrast, China's anti-monopoly enforcement authorities (the "AMEAs") have been relatively inactive in non-merger enforcement of the AML. The National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC") have issued very few decisions regarding domestic cartels and have publicly reported only three abuse-of-dominance investigations.[2]

The legal framework for Chinese antitrust litigation took a significant step forward on June 1, 2012, when the judicial interpretation (the "Judicial Interpretation") of China's Supreme People's Court (the "SPC") regarding private civil litigation under the AML took effect. This is the first SPC judicial interpretation addressing the AML.

I. BACKGROUND

In China, four levels of courts can hear civil disputes in the first instance: basic people's courts, intermediate people's courts, high people's courts, and the SPC.[3] The jurisdiction of these courts depends mainly on the subject matter of the dispute,

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1 *See* Press Release of the SPC (May 8, 2012), *available at:* http://www.court.gov.cn/xwzx/xwfbh/twzb/201205/t20120508_176702.htm.

2 All of the three investigations (*i.e.*, refusal to deal by two pharmaceutical companies, discriminatory treatment/margin squeeze by China Telecom and China Unicom, and tying by Wuchang Salt) were carried out by NDRC or its provincial agencies. None of the three investigations involved multinational companies. A fine was imposed in only one case (the refusal to deal by two pharmaceutical companies).

3 *See* Articles 18–21 of the Civil Procedural Law.

the complexity and impact of the dispute, and the amount in controversy. Appeals are heard by the next higher level court.

When the AML was first adopted, it was unclear which level of courts would have first-instance jurisdiction over civil claims for damages. The SPC classified civil claims under the AML as "intellectual property rights civil disputes" (later renamed "intellectual property rights and competition disputes").[4] As a result, subject to any special procedural rules, AML cases could in theory be heard in the first instance by 92 designated basic people's courts, as well as by intermediate people's courts and high people's courts, depending mainly on the amount in controversy.[5]

As mentioned above, AML civil litigation in China is also subject to special procedural rules adopted by the SPC, such as the Judicial Interpretation.[6] Drafting of the Judicial Interpretation began in 2009. A preliminary version of the Judicial Interpretation was published for comment on April 25, 2011 (the "2011 Draft"). The final Judicial Interpretation is less detailed than the 2011 Draft, particularly with regard to discovery and the interaction between court proceedings and investigations by the AMEAs. As discussed below, the Judicial Interpretation, among other things, changes the allocation of first-instance jurisdiction over civil litigation under the AML.

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[4] *See* SPC, Notice on Causes of Action in Civil Cases (issued on February 4, 2008 and effective as of April 1, 2008) (listing "anti-monopoly related disputes" under Item Sixteen, "Unfair Competition and Antitrust Disputes," in Section Five, "Intellectual Property Rights Disputes"), *available at*: http://www.law-lib.com/law/law_view.asp?id=249663. The 2008 notice was further amended in 2011. *See* SPC, Notice on Causes of Action in Civil Cases (issued on February 18, 2011 and effective as of April 1, 2011) (renaming Section Five as "Intellectual Property Rights and Competition Disputes," and distinguishing between unfair competition disputes and antitrust disputes by splitting the previous Item Sixteen into two items: Item Fifteen, "Unfair Competition Disputes," and Item Sixteen, "Antitrust Disputes"), *available at*: http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201103/t20110320_18959.htm.

[5] *See* SPC, Circular on Adjusting Standards for Various Levels of People's Courts to Have Jurisdiction in the First Instance over Intellectual Property Rights ("IPR") Civil Cases (issued on January 28, 2010 and effective as of February 1, 2010), *available at*: http://rmfyb.chinacourt.org/paper/html/2010-01/29/content_3343.htm; and SPC, Standards for Basic People's Courts to Have Jurisdiction in the First Instance over [General] IPR Civil Cases (issued on January 28, 2010 and effective as of February 1, 2010), *available at*: http://www.court.gov.cn/qwfb/sfwj/tz/201002/t20100222_1512.htm. The SPC also issued a circular providing that the tribunals responsible for IPR cases should also be responsible for antitrust civil lawsuits, whether or not IPR related. *See* SPC, Circular on Carefully Studying and Implementing the AML (issued on July 28, 2008).

[6] *See* SPC, Circular on Adjusting Standards for Various Levels of People's Courts to Have Jurisdiction in the First Instance over IPR Civil Cases (issued on January 28, 2010 and effective as of February 1, 2010), Item 5, *available at*: http://rmfyb.chinacourt.org/paper/html/2010-01/29/content_3343.htm (dealing with jurisdiction over special IPR civil cases, such as those involving antitrust, patents, or recognition of well-known trademarks).

II. SUMMARY OF THE JUDICAL INTERPRETATION

A. Jurisdiction

As noted, the Judicial Interpretation modifies the allocation of first-instance jurisdiction over AML civil litigation (Article 3). High people's courts will have no jurisdiction over AML civil lawsuits in the first instance. Certain intermediate people's courts[7] will continue to have jurisdiction over such lawsuits, alongside the SPC-approved basic people's courts. It remains to be seen which of the 92 basic people's courts that have first-instance jurisdiction over general IPR civil disputes will be approved by the SPC to exert first-instance jurisdiction over AML civil litigation.

B. Standing

The Judicial Interpretation defines private civil antitrust litigation as: (i) damages claims arising from anti-competitive conduct (usually tort claims) and (ii) disputes arising from anti-competitive provisions of agreements, charters of associations, *etc.* (contractual claims or otherwise) (Article 1). To qualify as "damages" under category (i), three conditions must be satisfied: (a) the damages must be actual damages; (b) there must be a causal link between the anti-competitive conduct and the damages; and (c) the damages must be of a type that the AML is intended to prevent.[8] It is unclear whether a plaintiff under category (ii) has standing regardless of whether she has suffered "damages."

The Judicial Interpretation eliminated the 2011 Draft's express grant of standing to both direct purchasers (who bought a product directly from the defendant) and indirect purchasers (who operate further downstream). Nevertheless, Article 1 implies that indirect purchasers have standing to sue and certainly does not expressly prohibit standing for indirect purchasers.[9]

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[7] Article 3 of the Judicial Interpretation provides that the intermediate people's courts having jurisdiction over antitrust civil litigation in the first instance include the intermediate people's courts of the capital cities of the provinces and autonomous regions, the intermediate people's courts in the municipalities directly under the control of the central government, the intermediate people's courts of the cities specifically designated in the state plan, and the intermediate people's courts designated by the SPC.

[8] *See* Interview of the responsible justice at the IPR tribunal of the SPC (May 9, 2012), *available at:* http://www.chinacourt.org/article/detail/id/516688.shtml.

[9] The people's courts may take a relatively broad approach to standing in antitrust civil cases. *See* Interview of the responsible justice at the IPR tribunal of the SPC (May 9, 2012) (stating that anyone having sufficient evidence to prove one of the two types of private antitrust litigation

C. Relation to Administrative Proceedings

The Judicial Interpretation reiterates that a plaintiff may bring either a stand-alone or a follow-on action after an AMEA has determined that the activity in question violates the AML (Article 2). The 2011 Draft contained one exception to this rule: against certain entities involved in specified abuses of administrative power under Articles 32 and 36 of the AML, only follow-on civil claims were allowed.[10] This exception is omitted in the Judicial Interpretation, suggesting that such claims may be brought as stand-alone actions.

In addition, the 2011 Draft permitted courts to adjudicate a case even if an AMEA had investigated the case without finding any anti-competitive conduct, and it gave courts discretion to suspend a case pending the results of an AMEA's investigation. The Judicial Interpretation drops these provisions but does not prohibit courts from adjudicating cases where an AMEA has investigated and found no violation.

Finally, the 2011 Draft stated that plaintiffs may establish a rebuttable presumption of an antitrust violation based on other non-appealable judgments, rulings or AMEA decisions. Again, the Judicial Interpretation is silent on this issue. However, this issue is partially addressed in Article 9 of the SPC's Rules on Evidence in Civil Litigation, which provides that a party does not need to prove facts verified by

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cases under Article 1 has litigation standing), *available at:* http://www.chinacourt.org/article/detail/id/516688.shtml. The SPC has stated that "as long as the conditions exist to accept a lawsuit under Article 108 of the Civil Procedural Law and under the AML, the people's courts should duly accept the case and adjudicate according to law." *See* the SPC, Circular on Carefully Studying and Implementing the AML (issued on July 28, 2008). The referenced conditions under Article 108 of the Civil Procedural Law are: "(i) the plaintiff must be a citizen, legal person, or an organization having a direct interest in the case; (ii) there must be a specific defendant; (iii) there must be a concrete claim, a factual basis, and a cause of action; and (iv) the lawsuit must be within the scope of civil lawsuits acceptable by the people's courts and within the jurisdiction of the people's court to which the lawsuit is filed." The referenced condition under the AML is that "the monopolistic conduct of an undertaking has caused losses to another person." *See* Article 50 of the AML.

[10] Article 32 of the AML provides that "[a]dministrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to require, or require in disguised form, units or individuals to deal in, purchase or use only the commodities supplied by the undertakings designated by them"; Article 36 of the AML provides that "[a]dministrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to compel undertakings to engage in monopolistic conducts that are prohibited by this law."

non-appealable court judgments and rulings, unless there is contrary evidence that is sufficient to rebut those facts.[11]

D. Burden of Proof

The Judicial Interpretation deleted the general provision in the 2011 Draft that the plaintiff bears the burden of proving the existence of the alleged monopolistic conduct, loss, and causal link between the infringement and the damages complained of. Instead, Articles 7-9 detail the allocation of the burden of proof for horizontal agreements and abuse of dominance.[12] While similar to the 2011 Draft, the Judicial Interpretation may slightly increase plaintiffs' burden of proof.

1. Anti-Competitive Agreements

Like the 2011 Draft, Article 7 of the Judicial Interpretation allows defendants to prove that horizontal agreements to fix prices, limit output, divide markets, restrict the purchase or development of new technology or jointly boycott transactions had "no anti-competitive effect." It remains unclear whether the requirement that a defendant prove the absence of "anti-competitive effect" means that the defendant bears the burden of proving no antitrust damages/injury on plaintiffs during the damages phase of a trial or, more generally, indicates that defendants may show that an agreement was not illegal because it had "no anti-competitive effect." In many jurisdictions, including the United States and the EU, such horizontal agreements are considered *per se* illegal, regardless of their effect, though in U.S. civil litigation plaintiffs must still establish that they were injured in fact by the anti-competitive conduct and, during the damages phase of a trial, the approximate level of damages resulting from the *per se* illegal agreement.

Plaintiffs retain the burden of proof to show harm from vertical agreements to maintain resale prices. The SPC has stated that most vertical agreements will not create competition problems (unless both the suppliers and the purchasers have market power), so plaintiffs should bear the burden of proof when challenging vertical agreements.[13] The SPC's view is consistent with the AMEAs' (SAIC and NDRC).

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[11] *See* SPC's Rules on Evidence in Civil Litigation, *available at:* http://www.court.gov.cn/bsfw/sszn/xgft/201004/t20100426_4533.htm.

[12] Although the Judicial Interpretation does not address the question, a claim for antitrust damages arising from anti-competitive concentrations should also be possible under Article 1 of the Judicial Interpretation. However, litigation against administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs for damages arising from abuses of administrative power would likely be treated as administrative litigation, which may be brought under the State Compensation Law.

[13] *See* Interview of the responsible justice at the IPR tribunal of the SPC (May 9, 2012), *available at:* http://www.chinacourt.org/article/detail/id/516688.shtml. Interestingly, not long after the Judicial Interpretation was published, the first judgment in China regarding a vertical agreement

AMEA officials have reportedly indicated on a number of occasions that vertical agreements are not an enforcement priority.

2. Abuse of Dominance

As in the 2011 Draft, in most abuse-of-dominance cases, the plaintiff must prove that the defendant has a dominant position in the relevant market and that the defendant abused that dominance (Article 8). If this is established, the defendant bears the burden of proving an acceptable justification. The Judicial Interpretation drops the 2011 Draft's rebuttable presumption of dominance when the defendant operates in a relevant market without effective competition and transaction counterparties are highly dependent on the defendant's products or services.

The Judicial Interpretation retains the 2011 Draft's rebuttable presumption of dominance when the defendant is a public utility enterprise or holds an exclusive position according to law. However, the Judicial Interpretation requires that this presumption be established based on "specific facts of the relevant market's structure and its competition landscape."

E. Discovery

Given the lack of discovery procedures in China, particularly as compared to the United States, the 2011 Draft offered plaintiffs several options for gathering necessary evidence. For example, as mentioned above, plaintiffs could rely on non-appealable decisions by AMEAs. In addition, the court could compel defendants to submit relevant evidence under some circumstances. The 2011 Draft also implied that plaintiffs may be given access to leniency application files. All of these measures have been dropped in the final Judicial Interpretation. It remains to be seen how non-appealable AMEA decisions will be treated in civil proceedings and whether plaintiffs will be able to access AMEA's files relating to applications for leniency.[14]

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under the AML was handed down (*Beijing Rainbow Medical Equipment & Supplies Company ("Rainbow") v. Johnson & Johnson ("J&J")*). On May 18, 2012, the Shanghai First Intermediate People's Court ruled for J&J in its dispute with Rainbow regarding resale price maintenance ("RPM"). J&J had terminated its distributor Rainbow for violation of J&J's RPM policy and for operating outside its authorized area. The court ruled against Rainbow because the latter did not prove (i) the anti-competitive effect of J&J's RPM (considering factors such as market shares, competitive landscape, the supply situation, and price fluctuation), (ii) Rainbow's antitrust damages, or (iii) the causal link. Under the Judicial Interpretation, if Rainbow brought an action under the second category of antitrust civil litigation ("a dispute arising from anti-competitive provisions of agreements, charter of associations, *etc.*") it remains unclear whether it would need to prove items (ii) and (iii).

[14] Article 46 of the AML allows a company to seek immunity or a reduction in sanctions by reporting anti-competitive agreements to the AMEA and providing the AMEA with important evidence of the agreements. NDRC and SAIC implementing rules provide further details about their respective

The 2011 Draft also provided that public disclosure by listed companies and admissions by defendants could be regarded as *prima facie* evidence of dominance.[15] Although the Judicial Interpretation is less detailed in this regard than the 2011 Draft, it states that plaintiffs may rely on information publicly released by defendants (Article 10). If such information is sufficient to prove a dominant position, the court may rule based on this evidence.

In addition, the Judicial Interpretation drops the 2011 Draft's prohibition on the use of plaintiffs' commitments in AMEA investigations to presume the existence of an antitrust violation. It is now unclear whether courts may use defendants' commitments to infer the existence of monopolistic conduct.

F. Expert Witnesses

Under the Judicial Interpretation, parties are limited to two expert witnesses each (Article 12),[16] but they are not limited to economic experts or industry experts as indicated in the 2011 Draft. Additionally, the court may appoint independent experts to conduct market research or economic analysis on specific issues (Article 13).

G. Validity of Contracts

The 2011 Draft contained a controversial provision to the effect that a technology contract (or its relevant clauses) that had not been found to have violated the AML could still be voided if the court decided that the contract "unlawfully monopolizes technologies or impedes technology development" under Article 329 of the Contract Law. The Judicial Interpretation drops this provision, possibly signaling that the SPC recognizes that contracts violating Article 329 of the Contract Law do not necessarily run afoul of the AML. The Judicial Interpretation (Article 15) retains the general provision that contracts or charters of industry associations violating the AML shall be declared void by the courts.

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leniency programs. These two programs are not completely consistent with each other and leave many important questions unanswered.

[15] *See* Article 9 of the 2011 Draft (providing that public disclosure by listed companies, admissions by defendants, and market research, economic analysis, monographic studies, and statistics provided by qualified independent third parties can be regarded as *prima facie* evidence for the purpose of proving dominance).

[16] It is reported that in the April 18, 2012 *Qihoo 360 v. Tencent* trial before the High People's Court of Guangdong Province, both parties engaged two expert witnesses to testify. Qihoo 360 also engaged an expert economist to present an economic report.

H. Statute of Limitations

Although the Judicial Interpretation deletes the explicit provision that the statute of limitations for AML cases is two years, it limits damages to two years (Article 16), the general statute of limitations in civil cases.[17]

III. CONCLUSION

The Judicial Interpretation provides important guidance on antitrust civil litigation in China and should increase the consistency of the Chinese courts' application of the AML. However, the Judicial Interpretation is ambiguous on a number of issues, including indirect purchaser standing, plaintiffs' discovery rights, the interaction between court and AMEA proceedings (particularly whether a court may or should stay its proceedings during an AMEA's investigation), plaintiffs' access to leniency application documents, and the calculation of damages. The ambiguity on discovery issues is particularly striking, as one of the Judicial Interpretation's aims is to promote private enforcement of the AML by levelling the playing field between plaintiffs and defendants. Nevertheless, unless and until the AMEAs become more active in non-merger areas, private antitrust civil litigation will continue to play a prominent role in AML enforcement.

[17] *See* Article 135 of the General Principles of the Civil Law (providing that unless provided otherwise by law, the statute of limitations on application to a people's court for protection of civil rights shall be two years).