CLEARY GOTTLIEB

Alert Memo

BRUSSELS, HONG KONG, WASHINGTON, JUNE 1, 2012

www.clearygottlieb.com

China's Supreme People's Court Finalizes Judicial Interpretation on Antitrust Civil Litigation

On June 1, 2012, the judicial interpretation (the "Judicial Interpretation") of China's Supreme People's Court (the "SPC") regarding private civil litigation under China's Anti-Monopoly Law (the "AML") took effect. This is the first SPC judicial interpretation addressing the AML.

I. BACKGROUND

The legal basis for private antitrust civil litigation in China is Article 50 of 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 went into force on August 1, 2008, Chinese courts have reportedly accepted 61 antitrust cases and ruled on 53.[1] In the majority of the decided cases, the courts have ruled for the defendants.[2]

A preliminary version of the Judicial Interpretation was published for comment on April 25, 2011 (the "2011 Draft").[3] 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 Chinese antitrust authorities.

II. SUMMARY OF THE JUDICAL INTERPRETATION

A. 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

---

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 *Id.*

3 For a detailed review of the 2011 draft version, please refer to our alert memorandum of May 2, 2011, *available at*: http://www.cgsh.com/chinas_supreme_peoples_court_solicits_comments_on_draft_judicial_interpretation_on_private_antitrust_litigation/.

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.[4] It is unclear whether a plaintiff filing a case pursuant to 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.[5]

B. RELATIONSHIP WITH ADMINISTRATIVE PROCEEDINGS

The Judicial Interpretation reiterates that a plaintiff may bring either a stand-alone action or a follow-on action after the relevant AML Enforcement Authority ("AMEA") has determined that the activity in question violates the AML (Article 2). The 2011 Draft contained one exception to this rule – only follow-on civil claims were allowed against designated or forced business operators that are involved in certain abuses of administrative power under Articles 32 and 36 of the AML.[6] There is no mention of this exception in the Judicial Interpretation, suggesting that such claims may be brought as stand-alone actions.

---

4 *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.

5 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 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.

6 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."

In addition, the 2011 Draft permitted courts to adjudicate a case even if an AMEA investigated but did not find any anti-competitive conduct and 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 a case when 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 facts that are verified by other non-appealable judgments and rulings or non-appealable 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 non-appealable judgments and rulings of courts, unless there is contrary evidence that is sufficient to rebut those facts.[7]

C. BURDEN OF PROOF

The Judicial Interpretation deleted the general provision in the 2011 Draft providing that the plaintiff bears the burden of proving the existence of the alleged monopolistic conduct, loss, and the causal link. Instead, Articles 7-9 detail the allocation of the burden of proof for horizontal agreements, abuse of dominance by undertakings, and abuse of dominance by public utility enterprises or other business operators holding an exclusive position according to law.[8] 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 defendant's proof of "no anti-competitive effect" here 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 U.S. and EU, such horizontal agreements (except for those to restrict the purchase or development of new technology) are considered *per se* illegal regardless of their effect, though in civil litigation in the U.S., plaintiffs must still establish that they were injured in fact by the anti-competitive conduct

---

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

8 Although no details are provided in the Judicial Interpretation, a claim for antitrust damages arising from anti-competitive concentrations should also be possible under Article 1 of the Judicial Interpretation.

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 in showing 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 a certain level of market power), and therefore plaintiffs should bear the burden of proof when challenging vertical agreements.[9]

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 highly rely 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 pursuant to "specific facts of the relevant market's structure and its competition landscape."

D. DISCOVERY

Given China's lack of discovery procedures, 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 judgments and rulings by AMEAs. In addition, the court could compel defendants to submit relevant evidence under some circumstances, and the draft implied that plaintiffs may be given some 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

[9] *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. The SPC's view is consistent with that held by the AMEAs (the State Administration for Industry and Commerce and the National Development and Reform Commission). AMEA officials have reportedly indicated on different occasions that vertical agreements are not an enforcement priority and that they have been considering block exemption rules for certain vertical agreements.

treated in civil proceedings and whether plaintiffs will be able to access AMEA's files relating to applications for leniency.[10]

The 2011 Draft also provided that public disclosure by listed companies and information acknowledged by the defendant itself could be regarded as *prima facie* evidence of dominance.[11] Although the Judicial Interpretation is less detailed in this regard than the 2011 Draft, it does state 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 antitrust violation. It is now unclear whether plaintiffs may use a defendant's commitments to infer the existence of monopolistic conduct.

E. EXPERT WITNESSES

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

F. VALIDITY OF CONTRACTS

The 2011 Draft contained a controversial provision establishing that a technology contract (or its relevant clauses) that had not been found to have violated the AML may still be voided if the court decided that the contract "unlawfully monopolizes technologies or impedes technology development" as provided under Article 329 of the Contract Law. This

---

[10] 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 leniency programs. These two programs are not completely consistent with each other and leave many important questions unanswered. For a detailed review of NDRC's and SAIC's leniency programs, please refer to our alert memorandums of January 17, 2011 and March 2, 2011, *available at*: http://www.cgsh.com/chinas_ndrc_issues_new_rules_and_announces_a_new_price_cartel_investigation_under_aml/ and http://www.cgsh.com/saics_first_cartel_case_and_final_rules_under_the_chinese_aml/.

[11] *See* Article 9 of the 2011 Draft (providing that public disclosure by listed companies, information acknowledged by the defendant itself, 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).

[12] 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.

provision has been dropped. This change may signal that the SPC recognizes that contracts violating Article 329 of the Contract Law do not necessarily in substance fall foul of the AML. The Judicial Interpretation (Article 15) retains the general provision establishing that contracts or charters of industry associations violating the AML shall be declared void by the courts.

G. STATUTE OF LIMITATIONS

Although the Judicial Interpretation deletes the explicit provision that the statute of limitations for AML cases is two years, it provides for a two-year limitation for damages (Article 16).[13] The general statute of limitations applicable to civil cases is two years.[14]

III. CONCLUSION

The Judicial Interpretation provides important guidance on antitrust civil litigation and is expected to improve the procedural consistency of the Chinese courts' application of the AML. However, the Judicial Interpretation leaves significant ambiguity 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 proceeding pending an AMEA's investigation), plaintiffs' access to leniency application documents, and how to calculate damages.

* * *

Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

---

[13] Article 16 of the Judicial Interpretation provides that "[i]f the alleged monopolistic conduct has continued for more than two years before the plaintiff filed an action with the people's court, when the defendant brings the statue of limitations defense, the amount of compensation for damages shall be calculated to cover the two years before the date when the plaintiff filed the action with the people's court."

[14] *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).

CLEARY GOTTLIEB

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299