

China's Supreme People's Court Solicits Comments on Draft Judicial Interpretation on Private Antitrust Litigation

On April 25, 2011, China's Supreme People's Court (the "SPC") unveiled a draft judicial interpretation regarding private litigation under the Anti-Monopoly Law (the "AML") (the "Draft Rules"). As the first detailed guidance on civil suits under the AML, the Draft Rules address a wide range of procedural issues, including jurisdiction, standing, consolidated proceedings, burden of proof, discovery, the relationship with administrative proceedings, damages and the statute of limitations. The SPC will accept comments on the Draft Rules until June 1, 2011.

I. BACKGROUND

Private enforcement actions are permitted under Article 50 of the AML, which provides that "operators who implement monopolistic conduct and cause loss to others shall bear civil liability according to law." Since the AML went into effect in 2008, 43 cases have reportedly been filed and 20 have been concluded.¹

On February 4, 2008, the SPC published a notice on causes of action in civil cases and granted jurisdiction over AML cases to the Chinese courts' intellectual property tribunals (the "IP Tribunals").² On July 28, 2008, the SPC issued a Circular on Carefully Studying and Implementing the Anti-Monopoly Law (the "Circular").³ The Circular did not specify procedural rules for private litigation, but this fact has apparently not discouraged private lawsuits under the AML.

¹ See the Response of the Representative from the Intellectual Property Tribunal of the Supreme People's Court to the Press Regarding the Judicial Interpretation of the Anti-Monopoly Law (hereinafter the "Response"), available at: http://www.rmfb.com.cn/paper/html/2011-04/26/content_26384.htm

² The notice went into effect on April 1, 2008, see http://www.chinacourt.org/flwk/show.php?file_id=125019

³ See http://www.law-lib.com/law/law_view.asp?id=261527

II. KEY PROVISIONS IN THE DRAFT RULES

A. JURISDICTION

The Draft Rules specify that certain Intermediate People's Courts are the courts of first instance for civil litigation under the AML,⁴ and the IP Tribunals of these courts will be responsible for trying AML cases. The Draft Rules do not address the question of jurisdiction over foreign companies, but the AML applies to companies operating outside of China if their operations have the effect of restricting or eliminating market competition within China.⁵

B. STANDING

According to the Draft Rules, both direct and indirect purchasers are entitled to sue for damages under the AML, as long as they satisfy the relevant standing requirements under the Civil Procedure Law.⁶ The passing-on defense is impliedly recognized under the Draft Rules, which provide that the defendant bears the burden of proof if it argues that the plaintiff has transferred part or all of the alleged loss to a third party.⁷

C. CONSOLIDATED PROCEEDINGS

While U.S.-style "opt-out" class actions are not allowed in China, the Civil Procedure Law allows collective actions.⁸ Consistent with the Civil Procedure Law, the Draft Rules permit collective actions under the AML by allowing the court to consolidate actions brought against the same defendant for the same monopolistic conduct.⁹

⁴ Draft Rules, Art. 1. Specifically, the intermediate courts that have jurisdiction over AML cases include: the intermediate courts of the capital cities of the provinces and autonomous regions, the intermediate courts of the cities specifically designated by the state plan, the intermediate courts within the municipalities and the intermediate courts designated by the Supreme People's Court.

⁵ AML, Art. 2.

⁶ Draft Rules, Art. 4, and the Civil Procedure Law, Art. 108. The standing requirements under Article 108 of the Civil Procedure Law include: (1) the plaintiff is a citizen, legal person or an entity having a direct interest in the case; (2) there is a specific defendant; (3) there is a concrete claim, a factual basis and a cause for the action; and (4) the action falls within the scope of acceptable civil lawsuits and the court has jurisdiction over it.

⁷ Draft Rules, Art. 10.

⁸ Civil Procedure Law, Art. 53.

⁹ Draft Rules, Art. 5.

D. RELATIONSHIP WITH ADMINISTRATIVE PROCEEDINGS

The Draft Rules make clear that judicial enforcement and administrative enforcement of the AML are parallel and independent processes. A plaintiff may bring an action in court directly or bring a follow-on suit against after the relevant AML Enforcement Authority (the “AMEA”) has determined that activity violates the AML.¹⁰ If an AMEA has commenced investigation into the case but has not reached a decision, the court should still conduct a comprehensive review of the parties’ claims.¹¹ If necessary, however, the court may suspend the case pending the results of the AMEA’s investigation¹²

E. BURDEN OF PROOF

In general, the plaintiff bears the burden of proving the existence of the alleged monopolistic conduct, as well as the causal relationship between the conduct and the damages claimed.¹³ Recognizing that meeting the requisite burden of proof can be a major obstacle for plaintiffs,¹⁴ the Draft Rules would introduce presumptions to ease this burden.¹⁵ For example, a plaintiff generally needs not prove an anti-competitive effect when alleging harm from a horizontal agreement to fix prices, limit output, divide markets, restrict the purchase or development of new technology or jointly boycott transactions or a vertical agreement to fix resale prices or set minimum resale prices.¹⁶

In abuse of dominance cases, plaintiffs usually bear the burden of proving the relevant market, that the defendant holds a dominant position, and that the alleged monopolistic conduct constitutes an abuse of dominance.¹⁷ However, a rebuttable presumption of dominance is established if the plaintiff is able to prove any of the following circumstances:

¹⁰ Draft Rules, Art. 6. There is an exception, however, for cases involving administrative monopolies, in which an abuse of administrative power must be found before plaintiffs may bring a follow-on suit.

¹¹ See the Draft Rules, Art. 15.

¹² See the Draft Rules, Art. 16.

¹³ Draft Rules, Art. 7.

¹⁴ See Angela Huyue Zhang, *The Enforcement of the Anti-Monopoly Law in China, An Institutional Design Perspective*, ANTITRUST BULLETIN (forthcoming), available at: <http://ssrn.com/abstract=1783037>.

¹⁵ See the Response, *supra* note 3.

¹⁶ *Id.*

¹⁷ Draft Rules, Art. 9.

- i. The defendant is a public utility company supplying water, electricity, heat or gas;
- ii. The defendant has been granted an exclusive legal right to supply certain products or services; or
- iii. The relevant market lacks effective competition and the counterparty is highly dependent on the products or services supplied by the defendant.¹⁸

In addition, the Draft Rules provide 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 all be deemed preliminary evidence for the purpose of proving dominance.¹⁹

F. DISCOVERY

Under China's current rules of evidence, parties are responsible for submitting their own evidence.²⁰ While courts may order production of documents,²¹ parties' ability to compel document production is very limited, as there are no penalties for failure to comply with discovery requests.²² As a result, parties often need to apply to the court for orders to preserve evidence.²³

To tackle the problem of the lack of disclosure by defendants in stand-alone actions, the Draft Rules allow courts to compel defendants to disclose relevant evidence in certain limited circumstances.²⁴ If the defendant refuses to submit adverse evidence without justification, the court may presume the plaintiff's allegations stand in accordance with the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Civil Procedure Law, Art. 64.

²¹ Civil Procedure Law, Art. 65.

²² See Zhang, *supra* note 14.

²³ Civil Procedure Law, Art. 74. See also Zhang, *supra* note 14.

²⁴ Draft Rules, Art. 12.

specific facts of the case.²⁵ Sanctions may be imposed on a defendant who refuses to comply with a discovery order.²⁶

In addition, under the Draft Rules, a plaintiff would be discharged from the burden of proving any facts that have been acknowledged in the AMEA’s findings.²⁷ The burden of proving an infringement is effectively reduced in a follow-on action, as the plaintiff may take advantage of a prior decision finding an infringement.

G. EXPERT WITNESSES

Parties to a proceeding would be able to apply to the court to appoint independent expert agencies or personnel to conduct market research or economic analysis on specific issues or engage expert witnesses on their own initiatives.²⁸

H. TECHNOLOGY CONTRACTS

Article 18 of the Draft Rules provides that a technology contract that has not been found to have violated the AML may still be annulled if the court decides that the contract “unlawfully monopolizes technologies, or impedes technology development” as provided under Article 329 of the Contract Law.²⁹ According to the SPC’s 2004 interpretation of technology contracts, there are six circumstances under which a technology contract may be found to have “illegally monopolized technology or impeded technology development”.³⁰

²⁵ *Id.*

²⁶ *Id.*

²⁷ Draft Rules, Art. 11.

²⁸ Draft Rules, Art. 13.

²⁹ Draft Rules, Art. 18.

³⁰ See the SPC’s Judicial Interpretation concerning Certain Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts, Art. 10. These circumstances include: (i) restricting one party from conducting new research and development on the basis of the technology subject to the contract or restricting one party from using the improved technology, or the conditions for both parties to exchange the improved technologies with each other not being reciprocal, including circumstances such as requiring one party to gratuitously provide the other party with the improved technology, to transfer the improved technology to the other party non-reciprocally, to gratuitously and solely occupy, or jointly own the intellectual property of the improved technology; (ii) restricting one party from obtaining similar or competitive technology from other sources; (iii) impeding one party’s sufficient exploitation of the contractual subject technology in a reasonable way pursuant to the market demand, including unreasonably restricting the quantity, varieties, price, sales channel or export market of the technology subject to the contract; (iv) requiring the technology acceptor to agree to conditions (including purchasing technologies, raw materials, products, equipment, services or accepting persons) that are not indispensable for exploiting the technology ; (v) unreasonably restricting the channels or sources for the technology acceptor to purchase raw materials, parts and components, products or equipment; and (vi) prohibiting the acceptor of the technology from making objections to the validity of

However, these restrictions do not necessarily trigger antitrust violations. Indeed, as Article 329 of the Contract Law came into effect long before the adoption of the AML, Article 329 likely used the term “monopolize” loosely, and not in its technical antitrust sense.

I. STATUTE OF LIMITATIONS

The statute of limitations for AML cases is two years from the time at which the plaintiff knows or should have known about the infringement caused by the alleged monopolistic conduct. If the relevant AMEA has investigated the matter and determined that the defendant’s conduct constitutes a violation of the AML, however, the limitation period begins on the day that the plaintiff knows or should have known about the decision of the AMEA.³¹ If the plaintiff has filed a complaint with an AMEA, the statute of limitations is tolled until the plaintiff knows or should have known about an AMEA decision not to initiate an investigation, to dismiss the case or to terminate the investigation.³²

III. CONCLUSION

The Draft Rules provide important guidance to the Chinese judiciary and the general public on a wide range of procedural issues relating to civil antitrust litigation. The Draft Rules address many of the practical difficulties plaintiffs face in private enforcement actions. In particular, the Draft Rules alleviate plaintiffs’ burden of proof in certain cases and, for the first time, give plaintiffs the right to make discovery requests in civil AML cases. These provisions, if adopted, should greatly enhance private antitrust enforcement in China.

* * *

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the “Practices” section of our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

the intellectual property of the contractual subject technology, or attaching conditions to the objections made. This judicial interpretation was promulgated on December 16, 2004 and became effective on January 1, 2005.

³¹ See the Draft Rules, Art. 20.

³² *Id.*

New York

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

Washington

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

Paris

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

Brussels

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

London

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

Moscow

Cleary Gottlieb Steen & Hamilton LLC*
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax
* an affiliate of Cleary Gottlieb Steen &
Hamilton LLP

Frankfurt

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

Cologne

Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

Rome

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

Milan

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

Hong Kong

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

Beijing

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax

Buenos Aires

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
54 11 5556 8900
54 11 5556 8999 Fax