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China's Top Court Set To Boost Anti-Monopoly Suits

By **Melissa Lipman**

Law360, New York (May 4, 2011) -- China's top court last week issued draft guidelines explaining how judges overseeing private litigation will interpret the country's competition law, a move that experts say could ease the way for more antitrust actions against multinational companies.

China's Anti-Monopoly Law went into effect in late 2008, but the legislation contained only broad parameters for antitrust enforcement that officials have been fleshing out over the past three years.

The courts have been hesitant to accept cases under the statute — taking on only 43 civil complaints through the end of 2010 without yielding any significant victories for plaintiffs — but the guidance issued by the People's Supreme Court on April 25 will likely encourage plaintiffs to pursue more litigation against both domestic and foreign companies, experts say.

Though the draft judicial interpretation, which is open for public comment until June 1, marks a retreat from earlier proposals that included provisions for double damages and a possible representative action mechanism, it does offer plaintiffs the chance for limited discovery not ordinarily available in the Chinese legal system as well as a way for courts to consolidate similar complaints. The guidance also explains how the courts will define abuse of dominance, including presumptions in some cases that companies hold the dominant spot in a given market.

Despite the fact that foreign companies have faced little in the way of private suits in China so far, multinational corporations should proceed with caution as the country's top court signals with the release of draft guidelines an effort to solidify the judiciary's approach to antitrust cases, antitrust attorneys say.

Given the fact that the draft does not require any of China's three regulators that have enforcement duties under the 2008 law to have investigated or singled out allegedly anti-competitive conduct before a plaintiff can launch a complaint, would-be plaintiffs may well try their luck in the courts without the backing of a government action, according to Mayer Brown JSM senior associate Gerry O'Brien.

"This approach may be seen as preferable by some plaintiffs who suspect that complaints against

foreign companies operating in China may be a low priority for the anti-monopoly authorities at the present time given that those authorities are widely considered under-resourced … and appear primarily focused on tackling domestic cartels," the Hong Kong-based senior associate said.

In particular, domestic companies might try to use the antitrust regime to challenge foreign patent and trademark holdings, O'Brien added.

"No doubt ... many domestic companies will consider that the Anti-Monopoly Law might provide them with an avenue to try and improve the terms under which they access and use foreign intellectual property, or might provide a means to try and restrict the position of leading international brands — notwithstanding that those brands may be partnering with Chinese companies," O'Brien said.

The language of China's competition statute exacerbates those concerns for foreign companies, according to Hughes Hubbard & Reed LLP partner Ethan Litwin.

"When the final text of the AML was released it had a number of parochial provisions in there regarding the misuse of IP, [and] the standard for what constitutes misuse of IP has not been well-developed in the two-and-a-quarter years since it was enacted," Litwin said. "Giving private companies the right to sue in Chinese courts, there's a certain nexus there that could lead to incredible mischief."

Still, at least in the short-term, foreign companies shouldn't expect to see a flood of antitrust litigation in the Chinese courts given the relative youth of the country's enforcement regime, according to Baker & McKenzie LLP special counsel Chun Fai Lui.

"A useful analogy would be IP infringements. In the '90s, most of the IP infringement actions in China were taken out by U.S. and European companies against domestic companies," Lui said. "It takes about at least 10 years, and then the tables turn around and we are now beginning to see in China domestic companies taking foreign companies to court for infringing on their design rights."

One of the most important aspects of the draft guidelines is the court's definition of what constitutes abuse of dominance, attorneys say.

In most cases, plaintiffs will have to provide evidence outlining the market, the defendant's alleged dominance and evidence that the defendant did in fact abuse that dominance. Then the burden of proof falls to the defendant, who can argue that the allegedly anti-competitive conduct is justified.

To make a case under the draft interpretation, a plaintiff can point to any information disclosed by a public company, market research reports, economic analyses and statistics from qualified outside experts, among other data.

In some instances, however, the courts will presume that a defendant is the dominant player in its market. Public utilities, for example, are automatically assumed to have dominance, as are defendants that have exclusive permission to provide certain products. If a plaintiff can show it is dependent on a supplier that faces little competition in its market, the courts will also assume the defendant is

dominant, according to the draft guidelines.

Those kinds of presumptions are "a lot simpler and less sophisticated" than the analytics used by enforcement agencies, Lui said, and the split could encourage forum-shopping.

The draft interpretation would also allow plaintiffs to seek a court order requiring defendants to turn over relevant evidence if they can demonstrate that the materials in question would show that the plaintiff has been harmed by the alleged wrongdoing and are relevant and necessary to the plaintiff's case. Plaintiffs further have to show that they cannot get the evidence without a court order and provide proof that the defendant does indeed have the materials in question.

China doesn't generally provide parties with much discovery, and Chinese courts often intensely scrutinize evidence, in some cases even requiring that materials be notarized or otherwise authenticated, according to Lui, who said it was unlikely that even with the draft's provision plaintiffs would end up with the type of extensive discovery found in the U.S.

Still, because most of the anti-monopoly cases brought before the courts have failed so far due to lack of evidence, O'Brien said it wouldn't be surprising if courts tried to help plaintiffs with apparently legitimate claims who found themselves unable to get the evidence they needed.

Even though plaintiffs do not have to wait for Chinese regulators to decide that a company has violated the antitrust law in order to bring a case, those that do launch follow-on actions would benefit by not having to prove any facts established by the authorities unless defendants could provide new evidence casting doubt on those conclusions, according to the draft interpretation.

While that proposal is similar to the way collateral estoppel works in the U.S., the Chinese concept appears to be "a little bit looser," according to Baker & McKenzie partner Charles Critchlow.

If a plaintiff does succeed in proving a defendant has run afoul of China's anti-monopoly statute, it can seek an injunction to stop the conduct or an order invalidating an illegal contract, as well as compensatory damages and reasonable expenses.

The Chinese courts appear, however, to have backed away from two possibilities they considered in earlier, less widely-circulated versions of the guidelines: punitive damages and class actions.

Both changes may well stem from the Chinese courts' efforts to focus on nailing down the key issues of how the country's civil antitrust litigation will work before venturing into those more complex matters, attorneys say.

"I suspect that the apparent abandonment of the idea of a double damages system was more a pragmatic decision ... in recognition of the fact that although there are good reasons to encourage civil actions ... the regime is perhaps not sufficiently mature at the present time to support such a system," O'Brien said.

The fact that the courts have been hesitant to take on many private cases so far also emphasizes how cautiously and slowly the Chinese judiciary often takes on new laws, according to Lui.

"Chinese courts are taking a very conservative approach, they don't want to make any ruling … that would expose them to criticism and ridicule by the antitrust community around the world," Lui said.

Still, Critchlow pointed out, as the law matures plaintiffs may take heed and pursue damages or other remedies from the courts despite early setbacks.

"You're going to see more enforcement against cartels and thought given to people consuming products as to whether [private actions are] a meaningful remedy for them," Critchlow said.

Other provisions in the draft interpretation include a two-year statute of limitations for antitrust cases that begins running when the plaintiff knew or should have known about the alleged wrongdoing, though if an enforcement agency probe leads to an official finding that a company violated the law, the period will start from the date of that decision.

If a potential plaintiff opts to take its complaint to one of the regulators before going to the courts, the limitations period will likewise be put on hold until the agency reaches a decision.

Overall, while the draft interpretation provides further guidance about private antitrust enforcement, it also raises a host of new questions going forward, Litwin said, and highlights the need for foreign companies to "proceed rather cautiously and conservatively" given the less-than-sterling record on equal treatment for foreign companies by Chinese regulators.

His advice: "Be careful, hire knowledgeable Chinese counsel and make sure your actions are not premised on assumptions under western law but take into account the realities of what's going on on the ground in China."

--Editing by Andrew Park.