PRC Courts Clarify Aspects of Anti-Monopoly Civil Actions

On 25 April 2011 China's Supreme People's Court (SPC) published a draft judicial interpretation that explains how civil cases relating to alleged violations of the country's Anti-Monopoly Law (AML) may be handled going forward. The draft is entitled *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Monopoly Civil Cases*.

Release of the draft is a welcome development, given that a number of civil cases in this area have already been permitted to proceed (although none, it is understood, involving major foreign multinationals) notwithstanding the absence of clear procedural and substantive rules on case handling.

The new document contains 20 articles, and deals with issues such as standing to bring civil cases, the burden of proof, the extent of civil liability, and the relevant statute of limitations for such cases. Comments on the draft have now been invited, with 1 June 2011 set as the deadline for submissions.

In this update, we summarise key aspects of the draft and the progress of civil actions relating to the AML to date.

The right of plaintiffs to bring both stand-alone and follow-on civil cases

The draft judicial interpretation repeats certain provisions in the AML providing that a party who is injured by another party's anti-competitive conduct in violation of the AML may file a civil case in order to seek compensation and related orders. The draft also confirms a previous designation by the SPC that certain Intermediate People's Courts will be the courts of first instance for such cases, and the relatively well-regarded and well-trained intellectual property divisions of such courts are expected to continue to take a leading role in case handling. According to the draft, the courts are required to accept civil cases under the AML if they satisfy the requirements of instituting a civil action under the provisions of Article 108 of China's Civil Procedure Law (which, amongst other things, stipulates that the plaintiff must have a direct interest in the case, and the claim, factual basis and defendant must be appropriately specified).

The draft makes it clear that such cases can generally be brought whether or not China's Anti-Monopoly Enforcement Authorities (AMEAs) have investigated or made a determination on the relevant matter. However, the draft provides that the courts may elect to suspend hearing a civil case if an AMEA is in the process of its own investigation. Further, an exception is made in relation to certain matters involving alleged 'administrative monopoly' (anti-competitive use of state administrative power), in respect of which it appears a prior finding of abuse of administrative power by an AMEA is required before a follow-up civil case may be brought.

Civil cases that are brought as a follow-on case after an AMEA determination may, however, have some strong advantages from the plaintiff's perspective.

In particular, the draft provides that the plaintiff in such cases will not need to prove any facts that have already been acknowledged in the AMEA's findings. Such facts will essentially be considered by the courts as satisfactorily established, unless the defendant can produce new evidence to show otherwise.

Burden of proof

Article 7 of the draft provides that the plaintiff will usually bear the burden of proving the existence of alleged anti-competitive conduct by a defendant, as well as any injury in respect of which compensation is claimed and a sufficient link between that injury and the defendant's conduct.

However, the draft also provides that certain forms of agreement will be automatically deemed to restrict competition, and will therefore be presumed anti-competitive and unlawful unless the parties to those agreement can show that this is not the case (or that a relevant defence applies). The relevant forms of agreement are those listed in Articles 13 and 14 of the AML, being:

- agreements between competitors to do such things as fix prices, limit production volumes, divide markets, limit the development or application of new technology, or jointly boycott transactions; and
- agreements between parties at different levels of the vertical supply chain to fix the prices of products re-sold to third parties, or to limit the minimum prices of products re-sold to third parties.

In relation to abuse of dominance cases, the draft provides that the plaintiff usually bears the burden of proving:

- the alleged relevant market involving the monopolistic behaviour;
- the dominance of the defendant in the relevant market; and
- that the defendant has abused that power and therefore contravened the AML.

The defendant will then bear the onus of proving that any conduct it engaged in that may otherwise be considered to be unlawful abuse of dominance was justified and therefore lawful in the circumstances.

Interestingly, however, the draft builds on provisions in the AML that automatically presumes business operators to possess market dominance in certain cases. According to the draft, this presumption will arise if the plaintiff shows that the defendant is:

- a public utility supplying the community with water, electricity, heat, gas etc.
- an undertaking that is vested with exclusive qualification for supplying certain products or services; or
- involved in supplying a product that lacks effective competition, in respect of which purchasers are highly dependant.

The draft also provides some explanation of the types of evidence that may be relied upon to establish a defendant's dominant market position. In particular, the draft mentions that disclosed information of a listed company, information acknowledged by the alleged monopolist itself, reports on market researches, economic analysis, monographic studies, and statistics provided by qualified independent third parties will be taken into consideration.

Orders for production of evidence by the defendant

According to the draft, the plaintiff can apply to the court for a ruling that the defendant must submit relevant evidence, provided that the following conditions are met:

- the evidence can prove that the plaintiff has been, or is likely to be, harmed by the alleged anti-competitive behavior;
- even after making reasonable efforts, due to objective reasons, the plaintiff cannot obtain the evidence without a relevant order from the court;
- the evidence is relevant to the case, and is necessary to prove the claims or assertion of the plaintiff; and
- there is evidence which proves that the defendant possesses the evidence in question.

Any refusal by the defendant to obey such an order issued by the court could then lead to a fine, detention,

or may even constitute a criminal act under China's Civil Procedure Law.

Orders that may be made at the conclusion of the case

If the court finds that a defendant has violated the AML, it may (on request of the plaintiff) make various orders, such as requiring the defendant to stop the infringing act and pay for the damages, as well as any reasonable expenses incurred by the plaintiff in bringing the case. Additionally, relevant contracts including unlawful terms under the AML may be ruled invalid.

Interestingly, the newly published draft judicial interpretation does not contain any provisions suggesting a double-damages regime may apply in AML cases for certain successful cases by plaintiffs. This is a departure from an earlier draft that was circulated to just a small group of law firms and experts for comment.

Statute of limitations

According to the draft, a two-year statute of limitations period will normally apply for civil cases relating to violations of the AML, with the period beginning on the day the defendant knows, or should have known, about the relevant violation.

However, some exceptions are also provided for.

If an AMEA has investigated the matter and has determined that the defendant's conduct does constitute a violation of the AML, the statute of limitations period will begin on the day that the plaintiff knows, or should have known, about the AMEA's determination taking effect.

If the plaintiff has filed a complaint regarding the matter with an AMEA, but the AMEA has not yet reached a decision, then the statute of limitations period will be suspended during the period between lodgement of the complaint with the AMEA and the conclusion of the AMEA's investigation.

Further, the draft also contemplates that the courts should permit a plaintiff to bring a civil action relating to a violation of the AML after the two-year statute of limitation period has expired, if the alleged anti-competitive conduct of the defendant is still continuing. However, provided that the defendant enters a demurrer on the ground that the plaintiff 's action has passed the two-year limitation for action, the calculation of damages in such cases will cover only the two years beginning from the day that the plaintiff brings the action to the court.

Other matters addressed by the draft

Several further matters are addressed in the draft. For example, the draft contemplates that economic experts and other specialists may be involved in civil cases to help explain relevant matters, and provides that parties may apply to the court to have measures taken to ensure protection of their business secrets during the course of hearings.

Additionally, the draft provides that a plaintiff may choose to bring an individual action or a joint action, with the courts also able to consolidate multiple cases into one action provided that those cases concern the same defendant and conduct.

The progress of civil actions relating to the AML to date

According to official statistics released by the Chinese authorities, just 43 civil action cases under the AML had been submitted to, and accepted by, China's people's courts to the end of 2010 - many of which are understood to have focused on alleged abuse of dominant market position. Based on decisions made public so far, it is believed that very few - if any - of the plaintiff's claims in these cases were sustained by the people's courts (and some were withdrawn by the defendant, due to settlements or other reasons, before a decision was handed down).

While it is clear further cases have arisen since that time, no comprehensive records on the precise number of cases are understood to be available. It is also not clear whether other potential cases are commonly being rejected by the courts for any reason. However this is not inconceivable given that the courts may be reluctant to hear cases involving state owned enterprises or foreign multinationals, or involving particularly complex issues, before the approach to issues dealt with in the new draft judicial interpretation are confirmed.

Conclusion

With a 1 June 2011 deadline set for submissions on the new draft, it appears likely that key aspects relating to the future handling of AML-related civil cases will be finalised in the coming months. This may open the door to a significant increase in the number of such cases coming before the courts, and the apparent reluctance of the courts to hear such cases when they involve foreign multinationals as defendants may evaporate. Accordingly, all businesses with operations or sales into China should ensure they have taken relevant compliance steps to minimise the risk of becoming a target in this emerging area of anti-monopoly enforcement in China.

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