

Chinese Municipal Government Held in Breach of Anti-Monopoly Law

In a potentially significant milestone for enforcement of China's Anti-Monopoly Law ("AML"), a municipal government in east Guangdong Province has been held to have engaged in a violation of the law and accordingly has been required to modify some of its rules and practices impacting the commercial sector.

The decision, handed down by the Guangdong Provincial Government on 12 June 2011, related to conduct by the Heyuan Municipal Government in east Guangdong Province. Specifically, the municipal government was found to have violated the AML by restricting the promotion and sale of global positioning system ("GPS") vehicle tracking systems in its region. The decision is one of the first widely reported cases in which the so-called 'administrative monopoly' provisions in Chapter V of the AML have been successfully invoked by complainants, representing another step forward for enforcement of antitrust in China.

In this legal update we briefly examine the decision and its significance.

Background - the 'administrative monopoly' provisions in the AML

Chapter V of the AML prohibits government agencies from abusing their regulatory or administrative powers to interfere in competition, particularly regarding (but not limited to) inter-provincial and inter-regional business. Given the long history of state control over many key sectors of the Chinese economy, and ongoing concerns about

anti-competitive practices involving government agencies in China, the administrative monopoly prohibitions are potentially a very significant aspect of the law.

In addition to a general prohibition of government agencies abusing their powers to eliminate or restrict competition, Chapter V includes provisions prohibiting several of the most common forms of administrative monopoly - such as:

- conduct by government agencies that compels consumers to buy or use products supplied by particular entities (often being entities in which the administrative agency or its key staff have a financial interest) for the purpose of restricting competition (Article 32 of the AML);
- conduct by government agencies that hinders the free flow of products among different regions for the purpose of restricting competition (Article 33 of the AML).

These prohibitions have been supplemented by various implementing regulations that effectively expand the scope of activities that may be considered to constitute unlawful administrative monopoly practices.

However, the various agencies authorised to enforce other key prohibitions in the AML, such as the State Administration of Industry & Commerce ("SAIC"), have no power to impose sanctions in response to cases of administrative monopoly. Instead, these agencies (or their local branches, after delegation of

power) can only refer issues to the superior agency of the perpetrator and make proposals for rectification and/or discipline of that perpetrator. This mirrors the approach of previous Chinese legislation intended to deal with administrative monopoly practices.

Accordingly, since promulgation of the AML there have been concerns that the AML regime will be no more successful than previous attempts to compel administrative agencies to abide by fair competition principles. In this context, any example of the AML's administrative monopoly prohibitions being utilised to successfully eradicate anti-competitive behaviour by government agencies is viewed as an encouraging development, and a sign that the AML may be used more successfully than previous legislative tools to address issues in this area. To date, however, such examples have been rare.

The new administrative monopoly case

According to information published on the website of the SAIC, a new administrative monopoly decision was handed down by the Guangdong Provincial Government on 12 June 2011, following investigation of a petition that was filed with the local branch of the SAIC in January 2011 by three manufacturers of GPS systems for automobiles.

The petitioners complained that the Heyuan Municipal Government in Guangdong Province had abused its administrative power and restricted competition in breach of the AML by implementing decisions that favoured a particular supplier in their industry and in particular restricted the extent to which competitors could operate in the market and with whom they could trade.

More specifically, it is understood the complaint focused on several decisions by the municipal government during 2010 to:

- appoint GPS products manufactured by the company New Space-Time Navigation Technology

Co., Ltd ("NST") as the city's official automobile tracking and monitoring platform;

- compulsorily require other GPS operators operating in the region to upload their monitoring data onto NST's platform (and authorise NST to charge the other GPS operators a data upload fee for this);
- require that real time monitoring data of specified types of automobiles in Heyuan be uploaded to the NST monitoring platform; and
- request the local traffic management to ensure that automobiles whose monitoring data was not uploaded to NST's monitoring platform would not be 'cleared' as part of a mandatory annual review system for such automobiles.

Although this has not been made explicitly clear from the information released by the SAIC on this case to date, it seems that the petitioners alleged that the decisions by the Heyuan municipal government were for the purpose of restricting competition rather than for legitimate reasons such as ensuring public safety (despite the Heyuan city government claiming that this was the basis for its actions).

Following their investigation, and with guidance from the SAIC, the Guangdong Administration of Industry & Commerce ("AIC") upheld the complaint - presumably on the grounds that the Heyuan municipal government did have an anti-competitive purpose and/or that the adverse impact on competition that resulted from its decisions was disproportionate to any valid aims. The Guangdong AIC accordingly recommended to the Guangdong Provincial Government that the Heyuan Municipal Government be required to adjust its conduct. In response, the Guangdong Provincial Government issued an administrative review decision confirming the violation of the AML and ordering that the abusive conduct cease.

Implications of the case

According to reports in the Chinese press, this is the first time a local AIC has been formally involved in guiding the correction of municipal government behaviour that has been found to violate the AML. As it is known that the SAIC has been liaising with local AIC branches to broaden their knowledge and enhance their ability to assist in enforcement of the AML, it is likely further cases of this nature will follow.

While this will be seen as a welcome development by many business operators in China and supporters of enhanced anti-monopoly enforcement in the country more generally, concerns remain about the fact that government agencies found to have breached the administrative monopoly prohibitions remain likely to face very limited repercussions. Indeed, if the relevant superior government body to which such a case is referred refuses to cooperate, the SAIC/local AICs and other AML enforcement agencies in China are powerless to address the issue.

For now, the key take-out from the case is perhaps the sign that some local AICs are becoming more involved in AML-related enforcement. These entities, and other local bodies subordinate to the under-resourced national-level agencies charged with enforcement of the AML's key behavioural prohibitions, will play a crucial role if China is to expand on what is currently very limited (and merger control-focused) enforcement of the AML.

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