

A Comment on Private Antitrust Litigation in China

By Daniel S. Mason and Athena Hou

Published in [Competition Law360](#)

One of the more significant and forward-looking aspects of China's Anti-Monopoly Law (the "AML") is its provision for the prosecution of private causes of action permitting civil litigants to seek damages for violations of the substantive provisions of that law.

Despite great expectations, however, few private lawsuits have been filed under the AML since its effective date of August 1, 2008. The lack of procedural rules has undoubtedly caused the paucity of such claims; inadequate discovery mechanisms and Chinese judges' understandable lack of experience in complex litigation are contributing factors.

Any commentary on the new law must, of course, be considered in light of China's socialist market economy, and unique social and cultural traditions. Accordingly, China's enactment of a statute akin to Section Four of the Clayton Act is a remarkable development, reflecting that country's efforts to develop a market economy.

In February, the authors led a discussion with justices of the Chinese People's Supreme Court ("SPC") and High Courts in Beijing and Shanghai, which addressed the facilitation of private litigation under the AML. Among the issues discussed were standing, burden of proof, discovery, class action procedures and consolidated proceedings, expert witnesses, and damage analysis.

While it is unrealistic to expect that Chinese courts will adopt substantive and procedural rules parallel to U.S. law on these points, it is clear to us that China's judiciary -- whose members are among the best and brightest legal minds of that country -- is eager to understand and learn from our experience. We expect that the judges will evaluate these rules in the context of their traditional framework.

The views expressed below reflect recent AML case law and our discussions with Chinese judges.

Background

Article 50 of the AML provides for private causes of action. It states generally: "Operators who implement monopolistic conduct and cause loss to others shall bear civil liability according to law."

On July 28, 2008, the SPC issued a Circular on Carefully Studying and Implementing the Anti-Monopoly Law. The Circular emphasizes the significance of the AML in protecting market competition and market order; assuring the optimization of market structure and market resource allocation; protecting consumer rights; and promoting development of China's national economy.

The Circular recognizes the complexity of antitrust cases and their potential for far-reaching impact on China's major industries. The Circular also acknowledges that while the AML is based on fundamental principles, it provides only "relatively simple" procedural guidance to courts.

Therefore, the Circular directed lower courts to familiarize themselves with such issues as jurisdiction, standing, and liability and damage analysis, in the hope that these lower courts will inform the SPC in formulating AML interpretive rules which are to be promulgated.

There are three government enforcement agencies, the National Development and Reform Commissions ("NDRC") and the State Administration for Industry and Commerce ("SAIC") and Ministry of Commerce ("MOFCOM").¹

The NDRC is in charge of investigating price-related illegal agreements. The SAIC is in charge of investigating other types of illegal agreements, abuse of market dominance and abuse of administrative authority in restricting competition. Neither the NDRC nor the SAIC has announced any investigations under the AML. Their practice will undoubtedly not only ease the way for private litigants but also contribute to the interpretation of the AML.

Jurisdiction

On February 4, 2008, the SPC directed that all AML cases be assigned to the intellectual property divisions of Chinese courts. This direction undoubtedly reflects the reality that these court divisions traditionally consist of better educated and more experienced judges, who have access to more resources than judges assigned to other divisions.

Accordingly, since August 1, 2008, all AML cases have been either filed or transferred to the intellectual property divisions. This has been the case notwithstanding the fact that such divisions are often part of the intermediate courts of China, and not courts of first instance.

Standing

The Circular requires courts to accept AML cases provided they satisfy the requirements of Articles 50 of the AML² and Article 108 of the Civil Procedure Law ("CPL").

Article 108 of the CPL requires a court to accept a case if: (1) the plaintiffs 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. The naming of Doe defendants is not permitted by this Article.

Although neither the AML nor the CPL specifies whether an indirect private purchaser may prosecute an AML claim for price-fixing damages, there is a consensus among China's judges that ultimate consumers should be permitted to recover such damages. In other words, under the AML, notwithstanding their indirect purchaser status, consumer plaintiffs will very likely be permitted to bring such cases. Whether direct purchasers will have to counter a pass-on defense remains to be seen.

¹ MOFCOM is only in charge of merger review.

² See *supra* text of Article 50.

The Burden of Proof

As in most jurisdictions, Chinese civil plaintiffs have the burden of proving their claims. Article 64 of the CPL provides: “A party shall have the responsibility to provide evidence in support of its own propositions.” Therefore, plaintiffs filing an AML claim must prove a violation of the AML and that their damages have resulted from that violation.

Discovery

China’s current discovery procedures are much more reflective of the limitations of Continental Europe than the more expansive U.S. Federal Rules. Chinese litigants must collect and submit their own evidence.

In theory, Chinese law contemplates some mechanism of discovery: “Counsel or other litigation representatives shall have the right to investigate and collect evidence, and may review relevant materials to the case.” Art. 61, CPL.

In practice, however, counsel’s ability to collect evidence is limited because the CPL does not provide sanctions against a party for failing to comply with a request for discovery.

In the event that a party is unable to obtain discovery due to “objective circumstances” or if the court considers certain evidence to be relevant to a case, the court can, on its own initiative, collect the discovery itself.

Article 64 of the CPL provides: “With respect to the evidence that cannot be obtained by any parties or their litigation representatives because of some objective reasons or that the evidence the people’s court considers necessary for adjudicating the case, the People’s Court shall investigate and collect such evidence. The People’s Court shall, according to the procedure prescribed by law, collect and examine evidence comprehensively and objectively.” However, this provision is rarely implemented in practice.

Two recent AML cases, *Beijing Sursen Electronic Technology Company v. Shengda Interactive Entertainment and Shanghai Xuanting Entertainment Information Technology* (decided Oct., 2009, Shanghai Intermediate People’s Court) and *Tangshan Renren Information Service Center v. Baidu* (decided Dec., 2009, Beijing No.1 Intermediate People’s Court),³ demonstrate the difficulty plaintiffs have encountered in satisfying their burden of proof under the current system.

In both cases, defendants were well-known major companies with significant market shares. However, both cases were dismissed because plaintiffs failed to establish defendants’ market dominance. Neither plaintiffs in these cases submitted expert opinions or any sufficiently “scientific and objective analysis” on defendants’ market shares.

It is clear to us that Chinese judges recognize (and are sympathetic to) the difficulty plaintiffs in AML cases face in satisfying their burden of proof. Although any significant liberalization of the discovery procedures is unlikely to occur any time soon, the Judges

³ In China, there is no comprehensive citation system developed. Information of these cases is based on internet news reporting.

have expressed an interest in imposing initial disclosure requirements parallel to Rule 26(a) of the Federal Rules of Civil Procedure.

A particularly important consideration to the Chinese in expanding discovery availability is the preservation of confidential information. We expect Chinese judges to seek a balance between the need for readily access to necessary information and a legitimate need for confidentiality and burden of excessive discovery.

Class Action /Consolidated Proceedings

Class actions are not recognized in China. Article 53 of the CPL does allow multiple cases sharing certain similarities to be consolidated: “When one party or both parties consist of two or more persons and the subject matter of the action is the same or under the same category, the people’s court may adjudicate them together upon the consent of all the parties. Such adjudication is called joint litigation.”

Articles 54 and 55 of the CPL provide the procedure for “representative group action.” Where the number of litigants on either side of the litigation is ten or more, the parties may select two or more representatives to carry out the litigation on their behalf, and acts of the representatives are binding. Art. 54, the CPL.

If the number of litigants cannot be ascertained at the time the lawsuit is filed, the court accepting the case may issue a notice instructing all persons whose interests are similarly affected to “register” within a specific time period. Art. 55, the CPL.

Those who seek to register with the court must demonstrate that their interests are similarly affected and they have suffered damages as a result. Art. 55, the CPL. Similarly, actions of the representatives are binding on those registered with the court as well. Art. 55, the CPL.

In considering whether to allow representative litigation, courts consider not only similarity of claims, but also practical issues, such as residence of the litigants, the local court’s ability to handle representative actions, and enforceability of the likely litigation outcome.

Such representative actions are most typical in cases involving labor disputes, product liability, environmental pollution, and market manipulation on the securities market. It remains to be seen whether such representative actions will be permitted under the AML.

Expert qualifications and damage analysis

Chinese judges are quite interested in the use of economic analysis -- particularly expert opinions -- in U.S. antitrust litigation. Although topics of economic analysis may be new to them, the concept of using expert witness is not.

The use of expert witnesses is well known to Chinese judges, and they are particularly called upon in intellectual property cases; an area with which judges sitting on AML cases are quite familiar. In intellectual property litigation, Chinese courts have even engaged their own experts to evaluate certain technical issues. The recent *Baidu* opinion required plaintiffs to present sufficiently “scientific and objective analysis.”

Conclusion

No analysis of the AML can be properly made without the appreciation of the complexity of political, economic and legal issues that Chinese courts are facing in adjudicating AML cases. Many of these social, political and economic considerations underlie the AML's introductory provision and its various exemptions to the prohibited conduct.

The absence of specific implementing rules and actions from the government enforcement agencies demonstrates the difficulty of balancing these factors, all of which challenge the AML enforcement. Typically in the United States, government prosecutions are followed by private litigation. The lack of government investigations contributes to the underdevelopment of private antitrust enforcement in China.

The SPC is expected to draft detailed rules to provide guidance to the courts handling the AML cases. Such rules will in theory allow litigants to more effectively litigate AML claims. Certain issues, such as class actions, and the treatment of special industries and the interest of state-owned companies, will most likely await future clarification.

By Daniel S. Mason and Athena Hou, Zelle Hofmann Voelbel & Mason LLP

Dan Mason and Athena Hou are partners with Zelle Hofmann in the firm's San Francisco office.