

E-ALERT | Antitrust & China Practice

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CHINESE COURT ISSUES RULES GOVERNING PRIVATE ANTITRUST LITIGATION

On May 8, China's Supreme People's Court ("SPC") issued its *Rules on the Application of Laws for Adjudicating Civil Disputes Arising From Monopolistic Conduct* ("the Rules"). According to the SPC, the Rules, which take effect June 1, are intended to ease plaintiffs' burdens and are thus likely to have a significant impact on private enforcement of China's Anti-monopoly Law ("AML"). Companies doing business in China may wish to consult with antitrust counsel to minimize their potential exposure to private AML litigation.

BURDENS OF PROOF

Under Chinese law, a party that advances an argument bears the burden of proof. The Rules, however, adopt presumptions for private AML actions which shift the burden to defendants to prove that their conduct is justified or has not had anticompetitive effects. Although these presumptions are drawn from the AML itself, their adoption by the SPC is likely to make it easier for private plaintiffs to advance their AML claims. For example:

- **Abuse of Dominance.** Under the Rules, the plaintiff bears the burden of proving that the defendant holds a dominant position in the relevant market and that the defendant's alleged monopolistic conduct falls under one of the categories of behavior that the AML proscribes, such as refusals to deal "without a legitimate justification." The burden then shifts to the defendant to justify its conduct or to prove that it will not have the effect of eliminating or restricting competition. This approach is consistent with the AML, which does not require a plaintiff or an AML enforcement agency to conduct a competitive effects analysis before the burden shifts to a defendant whose dominance has been established.
- **Monopolistic Agreements.** Similarly, if a plaintiff sues to obtain damages resulting from an agreement among competitors to fix prices, restrict output, allocate markets, boycott, or restrict the transfer or adoption of new technology, the Rules place the burden on those defendants to prove that their agreement does not have the effect of eliminating or restricting competition. The Rules are silent regarding whether the plaintiff bears the burden of proving the existence of the alleged agreement. Although the draft of the rules that was submitted for public comment in 2011 contained similar provisions regarding vertical agreements, those provisions were removed from the final Rules.

EVIDENCE RULES

In releasing the Rules, the SPC acknowledged the hurdles plaintiffs face in proving their cases in AML-related civil actions, as well as the often technical nature of such cases. Although provisions in the earlier draft that allowed plaintiffs to petition the court to compel discovery were removed, the final Rules include other provisions that are designed to ease evidentiary burdens. For example:

- **Using public statements as proof of dominance.** The *Rules* allow a plaintiff to establish a rebuttable presumption of a defendant's dominance by using the defendant's own public statements about its market position. It is not clear what sort of statements will be sufficient; however, Article 19 of the AML provides a rebuttable presumption of market dominance by firms that have at least a 50 percent share of a relevant market. This suggests that potentially any claim or acknowledgement of such a share in a press release or other public document may be accepted by Chinese courts as evidence of dominance. Thus, companies may wish to exercise caution when publicly stating their relative market position.
- **Presuming dominance by public utilities and other firms with market positions granted by the State.** The *Rules* appear to permit courts to presume dominance by public utilities and other entities that have been granted monopoly market positions by the State, presumably including state-owned firms.
- **Use of experts.** The *Rules* permit parties to apply to the court to engage expert witnesses to appear in court to explain specific issues in the case. They may also ask the court to appoint professional institutions or independent experts to conduct market research or economic analysis. If parties fail to reach an agreement on the choice of expert witness to conduct market research, the court may appoint one under the *Rules*.

PRIVATE DAMAGES

Private damages are available for AML plaintiffs, but neither the *Rules* nor the AML specify a method for calculating them. However, private AML actions may be brought either as tort claims, recovery for which is limited to single damages under China's Tort Law (which permits punitive damages only in product liability cases), or as claims seeking to annul unlawful contracts under China's Contract Law. The *Rules* specify that plaintiffs may be compensated for costs incurred to investigate and prevent AML violations, but it is unclear whether attorneys' fees may also be included.

The *Rules* do not include a provision from the earlier draft which explicitly required a plaintiff to prove causation; however, Article 14 of the *Rules* permits courts to grant relief if the defendant is shown to have engaged in monopolistic conduct "that has caused losses by the plaintiff," which could be read to require some showing by the plaintiff of causation and proof of loss.

COLLECTIVE ACTION

Finally, the *Rules* essentially permit limited class actions by allowing the consolidation of multiple actions – brought in different courts regarding the same alleged monopolistic conduct – into a single case. The previous draft required that such actions also be brought against the same defendant and permitted consolidation of cases brought in the same court; however, those provisions were removed from the final version of the *Rules*.

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There has been a growing interest in China in private actions under the AML. The SPC has reported that more than 60 such cases had been filed by the end of 2011, in sectors such as transportation, food and drug, internet services, and other consumer-focused industries. Although few of these cases have proceeded beyond initial stages, the SPC believes that China's courts will begin seeing more of them and has indicated that the *Rules* are intended to assist private plaintiffs with what are typically complex and difficult cases. Companies that do business in China – particularly those that have significant sales in particular markets or which collaborate with competing firms – should consult with counsel to ensure that they have taken appropriate steps to minimize their exposure to private AML litigation risks.

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