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# Resolving Competition Related Disputes under the AML: Theory & Practice

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# **Making, Enforcing and Accessing the Law**

ECLS 2014 Conference

CUHK, Hong Kong

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# **Resolving Competition Related Disputes Under the AML**

## **Theory & Practice**

Prof. Beth Farmer

# Presentation Theme

- Effective enforcement of competition laws and regulations
- Benefits society, consumers and market participants, and
- Promotes a competition culture.
- Private civil actions can contribute to
  - Healthy economic development (AML Art. 1)
  - Consumer welfare, and
  - Efficient enforcement

# The AML

- The “Economic Constitution,”
- A “fundamental law” to prohibit monopolies, promote competition and maintain market order
- Establishes a dual enforcement system (private and government)

# 12<sup>th</sup> Five Year Plan

- Scientific development
- Improvement of the socialist market economy mechanism
- Development of democracy and comprehensive improvement of the legal system
  - National People’s Congress
  - 12<sup>th</sup> Five Year Plan for the National Economic and Social Development of the People’s Republic of China (NPC, 16 March 2011)
  - 7 China Comp. Bull. 2 (March 2011)

# Outline

- The Anti-Monopoly Law (2008)
- Supreme People's Court
  - Regulation on Relevant issues Concerning the Application of Law in the Trial of Civil Monopoly Dispute Cases (Draft for Comments, April 25, 2011)
- Agency investigations and actions
- Private civil actions
- Conclusion: experience and challenges

# Development of the AML

- Ancestors of the AML
  - Anti-Unfair Competition Law (1993)
  - SAIC Regulations (1992, 1998)
- AML (2008)
  - Purpose: “presenting and prohibiting monopolistic conduct, protecting fair market competition, improving economic operating efficiency, safeguarding the legitimate interests of consumers and societal and public interests, and enhancing the healthy development of the socialist market economy”



# The Substance of the AML

- Categories of business conduct covered:
  - Horizontal cartels
  - Anticompetitive mergers (concentrations)
  - Abuse of dominant positions (monopolization)
  - Unreasonable restraints on distribution
  - Abuse of administrative powers
- Mainstream competition law with Chinese characteristics

# Enforcing the AML

- 3 enforcement authorities:
  - NDRC (National Development And Reform Commission)
  - MOFCOM (Ministry of Commerce)
  - SAIC (State Administration for Industry and Commerce)
- Private right of action
  - Art. 50
  - “If an undertaking engages in monopoly conduct and causes losses to others, it shall assume civil liability in accordance with the law.”

# **The 3 Agencies:**

**MOFCOMM**

**NDRC**

**SAIC**

**Scientific Development of Regulations**

# Regulations Facilitate Civil Cases

- **Clarify some substantive AML provisions**
- **Describe burdens of proof**
- **Identify relevant factors for decision**
  - Anti-Pricing Monopoly Regulation (NDRC, 2011)
  - Anti-Price Monopoly Administrative Enforcement Procedure Regulations (NDRC 2011)
  - Provisions Regarding the Abuse of Dominant Market Position (SAIC 2011)
  - Provisions Regarding the Prohibition of Monopoly Agreements (SAIC 2011)

# **Supreme People's Court**

## **Harmonizing Civil Litigation**

# Competition Causes of Action Under the AML

- Horizontal monopoly agreement
- Vertical monopoly agreement
- Monopoly pricing
- Predatory pricing
- Refusals to deal
- Designated transactions
- Bundling transactions
- Discriminatory treatment
- Concentrations of undertakings

Supreme People's Court, Amendments to the Provisions on Causes of Actions in Civil Cases (effective 1/04/11)7 China Comp. Bull 2 (March 2011)

# Supreme People's Court Rules Address Civil Cases

- **Provisions on Issues Concerning the Application of Law in the Trial of Monopoly Civil Dispute Cases (Draft Rules) (April 2011 draft for comments)**
- Rules were needed:
  - AML permits private cases
  - Competition cases are complex
  - The AML leaves room for interpretation
  - The Civil Law and Civil Procedure Law principles must mesh with the AML

# The Court's Approach

- Follow the law
  - AML, Civil Law, Civil Procedure Law, etc.
- Summarize mature justice experience
- Stick to the national conditions and reality
- Coordinate the relationship between administrative agency enforcement and civil litigation
- Reflect a global vision and international perspective
  - Responses to Reporters' Requests, from a Superintendent of the IP Tribunal of the Supreme People's Court (2011)



# Draft Rules

- Address important questions
  - Jurisdiction
  - Standing to sue
  - Collective actions
  - Burdens of proof
  - Presumptions
  - Evidence
  - Limitation of actions

# Jurisdiction

- **Intermediate Courts in**
  - capital cities of provinces and autonomous regions,
  - Municipalities at provincial level (Beijing, Chongqing, Shanghai, Tianjin),
  - Cities listed in the State Plan (currently, Shenzhen, Dalian, Qingdao, Ningbo, Xiamen) (King & Wood, China Law Insight, 29/04/11)
  - As designated by the Supreme People's Court
- **Specialist courts, also hear IP cases**

# Comparative Perspective

- European Union
  - The Court of First Instance
  - Appealed to the ECJ
- United States
  - Federal District Courts
  - Not specialists in competition law or economic issues

# Standing

- “natural persons, legal persons, and other organizations who have suffered harm from monopolistic conduct ...” (Art. 4)
  - Includes consumers and undertakings
  - Direct and indirect purchasers
  - Passing on defense,
    - Defendants have the burden to prove (art. 10)

# Comparative Perspective

- European Union
  - Private right of action available since 2013
- United States
  - Private civil damages actions permitted
  - Natural persons, undertaking and state Attorneys General as parens patriae on behalf of consumers
  - Indirect purchasers generally not permitted to sue for damages

# Collective Actions

- “The aggrieved parties of monopolistic conduct may choose to bring an individual action or a joint action.” Art. 5
- Individual cases may be consolidated by the court

# Comparative Perspective

- European Union
  - Private right of action and some form of collective action adopted in 2013
- United States
  - Class actions permitted as allowed under the Federal Rules of Civil Procedure

# Burdens of Proof

- The aggrieved parties (plaintiffs) have the burden of proving the violation,
  - Causation and
  - Damages
  - Civil Procedure Law and Arts. 7, 8, 9
- Private parties may sue for damages directly or in a follow-on after enforcement agency action



# Shifting Burdens of Proof

- Presumptions of facts
  - Art. 11
- Burdens of proof are shifted to defendants in some circumstances
  - Arts. 8, 9, 10

# Obtaining Evidence

- The Plaintiff may apply to the court for an order
  - Directing the defendant to produce relevant evidence
  - Art. 12 (includes sanctions for failure to comply)
- Plaintiffs must show that
  - The alleged monopoly conduct probably caused it to suffer economic damages,
  - It made reasonable efforts but could not obtain the evidence,
  - It is likely that the Defendant possesses the evidence

# Comparative Perspective

- United States civil litigation
  - Plaintiff's complaint must show that the claim is plausible and not mere speculation,
  - Bell Atlantic Corp. v. Twombly (2007)
  - Ashcroft v. Iqbal (2009)

# Other Litigation Matters

- The Court may authorize expert witnesses
  - Including specialists to analyze and report
  - At the request of parties, or
  - On its own
  - Art. 13, Civil Procedure law
- Confidentiality
  - The Court may protect confidential information
  - Art. 14

# Remedies

- Injunctions
  - Prohibitory or
  - Mandatory
  - Preliminary injunction ?
- Civil damages
- Costs
  - Arts. 17, 18, 19, AML, Civil Procedure Law, Tort Liability Law, Contract Law

# Civil Litigation

# Private Cases

- Supreme People's Court report
  - 43 antimonopoly cases accepted and heard
  - 29 cases concluded
  - Between 01/08/08 and 31/12/10
- Claims based on
  - Monopoly agreements
  - Abuse of a dominant position

# Recent Statistics Show Increase of AML Filings

- Between 2008 and 2011, 43 cases were accepted and heard by local courts
  - Responses to Reporters' Requests re the Draft for Comments of the Judicial Interpretations of the AML from a Superintendent of the IP Tribunal of the Supreme People's Court (2011)
- A further 18 cases were accepted in 2011 and 46 by the first half of 2012
  - Wang and Hughes 2012 quoting Mr. Jin Kesheng, Vice President, Intellectual Property Tribunal under the Supreme People's Court



# Enforcement actions by 2012

- **SAIC**

- 10 provincial agencies opened 18 investigations
- 8 infringement decisions
- Majority subject: anticompetitive agreements

- **NDRC**

- NDRC and provincial agencies
- 49 investigations
- 20 infringement decisions

- **MOFCOM**

- Reviewed 586 mergers
- 18 conditional approvals, 1 disapproved

# Leading Cases – AML ch. 14

- Renren v. Baidu (2009)
  - Claim: abuse of dominance, exclusive dealing
  - Market: search engines
  - Outcome: dismissed
- Li Fangping v. China Netcom (2009)
  - Claim: abuse of a dominant position
  - Market: telecommunications services
  - Outcome: dismissed
- Source: Emch article

# Other private cases – AML ch. 14

- Liu Dahua v. Dongfeng Nissan (2011)
  - Claim: abuse of dominant position
  - Market: spare parts for Nissan passenger vehicles
  - 9 China Comp. Bull 2 (May 2011)
- Sursen v. Shanda (2009)
  - Claim: abuse of dominant position
  - Market: online literature
  - Outcome: dismissed
  - Source - Emch article

# Private Civil Cases

- Shanxi Joint Transport Group Co, Ltd. V. Taiyuan RY Bureau (2011)
  - Claim: AML and Anti-Unfair Comp. Law,
  - Allegation: refusal to approve plaintiff's ticket offices, anti-administrative monopoly complaint
  - 13 China Comp. Bull 3 (Sept. 2011)

# Private cases – AML ch. 2

- Omeg SA v. Taobao (20/07/11)
  - Claim: resale pricing
  - Remedy sought: 2 million RMB, injunction
  - 11 China Comp. Bull. 3 (July 2011)

# Alternatives to Litigation

- Complaint to the alleged violator under the AML
- Complaint to the government authority

# Private Complaints

- China Automobile Dealers Ass'n issues notice to Beijing-Benz Automobile Co, Ltd. (15/03/11)
  - Claiming resale price maintenance, territorial limits violate the AML
  - 8 China Comp. Bull 4 (April 2011)
- Hudong.com requests SAIC to investigate Baidu for abusing dominant position (23/02/11)
  - PRNewswire (30/5/11)

# Complaints

- Microsoft sued Tonecan Network for piracy. Defendant and seeks an agency investigation into Microsoft's alleged abuse of dominance excessive pricing
  - Aug. 2010 China Comp. Bull 3 (2010)
- Beijing lawyers request the NDRC to investigate price fixing in the banking sector
  - Aug. 2010 China Comp. Bull 3 (2010)



# Resources

- Adrian Emch, Antitrust in China – the Brighter Spots, 2011 E.C.L.R. issue 3 (2011),
- Richean Li, Unraveling the Jurisdictional Riddle of China’s Antitrust Regime, Feb-11(2) Comp. Policy Int’l (2011)
- R. Ian McEwin & Corine Chew, China – the Baidu Decision, 6 Comp. Policy Int’l J. 223 (2010)
- Lester Ross, Litigation Under China’s Anti-Monopoly Law, 11 Antitrust Chronicle (2010),
- China Competition Bulletin

# Concluding Thoughts

# Future Directions

- Courts and Agencies will continue to clarify the AML
  - Through Court rules and decisions,
  - Agency regulations and enforcement
- Courts will increase their expertise with experience
  - Procedure under rules and guidelines
  - Complex economic theories under the AML
  - Challenges of proof of conspiracy, civil liability

# Conclusions

- Leadership of the responsible agencies
  - Investigation, enforcement
  - Guidelines and regulations
- Role of private civil litigation
  - Redress of harm
  - “private attorney general”
- Judicial expertise

# **Thank you**

## Any Questions?