



JONES DAY
COMMENTARY

FILING ANTITRUST SUITS IN CHINESE COURT

As the Chinese Anti-Monopoly Law (“AML”) came into force on August 1, 2008, the Chinese media has speculated widely as to which companies will be the first targets of lawsuits under the powerful new law. Article 50 of the AML provides that companies that cause losses to others by violating the AML are subject to civil liability. This vague provision leaves open two questions about private litigation under the AML: (1) whether private parties can file lawsuits directly with courts without a prior finding of infringement by the Antitrust Enforcement Authority (“AMEA”) in the first place; and (2) whether a specialized antitrust tribunal or another set of courts will have jurisdiction over AML cases. These questions seem to be answered by the Regulation on Cause of Action in Civil Cases, promulgated by the Supreme People’s Court (“SPC”) on April 1, 2008 (“SPC Regulation”), and the Notice on Study and Adjudication of AML Disputes, published by the SPC on July 28, 2008 (“SPC Notice”).

CATEGORIZATION OF ANTI-MONOPOLY DISPUTES UNDER THE IP DISPUTES GROUP

In China, causes of action are organized into categories that provide guidance on whether a Chinese

court will accept a complaint and which law will be applied by the court. Among the 10 broad categories and four levels of a total of 361 causes of action, unfair competition and monopoly disputes are included within section 16, entitled Unfair Competition and Monopoly Disputes, which includes the following causes of action:

- No. 154 counterfeiting disputes
- No. 155 false advertising
- No. 156 infringement of trade secret
- No. 157 dumping
- No. 158 tying and imposing unreasonable trading conditions
- No. 159 lottery sales
- No. 160 commercial slandering
- No. 161 bid rigging
- No. 162 monopoly

Other than the monopoly disputes (No. 162), other causes of actions under section 16 are claims under the Anti-Unfair Competition Law.

In China, IP cases are tried in special IP Tribunals. Classifying monopoly disputes under the umbrella

group of IP disputes indicates that cases arising out of the AML will be tried by the IP Tribunal.¹

JURISDICTION OF THE IP TRIBUNAL OF THE PEOPLE'S COURT

The SPC Notice provided further confirmation that the IP Tribunal will handle civil cases under the AML.² The Notice stated that the AML has a close relationship with abuses and protection of intellectual property rights ("IPR"), and that the AML and the Anti-Unfair Competition Law belong to the field of competition law. Together, the SPC Regulation and the SPC Notice appear to make clear that the IP Tribunal will have jurisdiction over AML cases.

The SPC Notice also notes that antitrust cases are highly complex, involving both economics and legal issues, and that outcomes of antitrust cases will have significant influence both on the enterprises concerned and the industry. The Notice goes on to exhort local courts to prepare to handle these cases and to report new issues to the SPC. Based on the tone and content of the Notice, it appears that the SPC is instructing the Chinese courts to take a relatively cautious approach to lawsuits under the AML.

SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR CIVIL LAWSUITS UNDER THE AML

The SPC Notice states that courts shall accept and adjudicate cases filed under the AML, as long as the case satisfies the requirements of Article 108 of the Civil Procedure Law and the applicable provisions of the AML. Article 108 of the Civil Procedure Law prescribes the fundamental elements of any cognizable civil case, which are that: (1) the plaintiff must

be a citizen, legal person, or other entity that has an interest in the case; (2) the defendant must be identified specifically; (3) the claims, facts, and arguments must be specific; and (4) the case must be a civil case within the scope of the jurisdiction of the courts generally, and within the jurisdiction of the specific court in which the lawsuit is filed.

It appears from the SPC Notice that private parties can directly bring damages claims in court without a prior finding of infringement by the AMEA, since such a prerequisite is not required by either the Civil Procedure Law or the AML. The early cases under the AML will provide more guidance on the specific types of plaintiffs that will have standing, the identification of proper defendants, and the particular elements of claims that must be pled to state a claim under the AML.

ADMINISTRATIVE LAWSUITS UNDER THE AML AND JUDICIAL REVIEW OF DECISIONS BY THE AMEA

Where the interested parties are dissatisfied with AMEA decisions under the AML, they may lodge administrative lawsuits to challenge the decision. Article 53 of the AML provides that AMEA decisions to prohibit or permit concentrations, or to impose conditions on concentrations (*i.e.*, merger decisions), shall be first subject to administrative reconsideration by the AMEA before lawsuits can be filed challenging the decisions. In contrast, when challenging other decisions by the AMEA (*i.e.*, decisions on unlawful agreements and abuses of a dominant market position), the parties may choose either to apply for administrative reconsideration or immediately file an administrative lawsuit with the courts. Administrative suits are to be handled by the Administrative Disputes Tribunal in accordance with Administrative Litigation Procedure Law and other relevant laws.

1. In China, not every level of local court has IP Tribunals. IP Tribunals usually reside within intermediate courts, although some sophisticated and experienced first-level local courts also have jurisdiction over such cases, including the Beijing Hai Dian District Court.

2. http://news.xinhuanet.com/newscenter/2008-07/30/content_8861459.htm.

Pursuant to the Administrative Reconsideration Law, decisions by the ministries under the State Council shall be reconsidered by the ministry that issued the decision. If the parties are dissatisfied with the reconsideration decision, they may apply for a final administrative order by the State Council or file an administrative suit under the court.³ Since the AML is mainly to be enforced by the Ministry of Commerce (“MOFCOM”), the State Administration for Industry and Commerce (“SAIC”), and the National Development and Reform Commission (“NDRC”), as constituents of the AMEA, and since these agencies are ministries under the State Council, the decisions of those enforcement authorities are subject to reconsideration by the same agency that rendered the original decision.

The time limit for administrative reconsideration is 60 days as of acceptance of application for administrative reconsideration, with a possible extension of an additional 30 days for complicated cases.⁴ For example, parties must undergo a 60- or 90-day administrative reconsideration by MOFCOM before filing a court suit to challenge a merger decision by MOFCOM. For other decisions under the AML, the administrative reconsideration procedure is optional.

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3. Article 14, Administrative Reconsideration Law, http://www.china.com.cn/law/flfg/txt/2006-08/08/content__7063886.htm.

4. Article 31, Administrative Reconsideration Law, http://www.china.com.cn/law/flfg/txt/2006-08/08/content__7063886.htm.

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