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Enforcement Structure of China's Anti-Monopoly Law

Although China's Anti-Monopoly Law (AML) came into effect on 1 August 2008, questions as to which entity (or entities) will enforce the AML have persisted. Recent announcements made by governmental authorities at the national level have begun to shed some light on the matter, but the specific jurisdiction of each component of the enforcement structure remains to be seen.

Enforcement Framework

There is no single governmental authority enforcing the AML. Rather, the enforcement regime could be viewed as a dual-tiered model. Generally speaking, various enforcement procedures are allocated among three Chinese governmental authorities at the regulatory level:

- The Ministry of Commerce (MOFCOM) will supervise merger control filings.
- The State Administration for Industry and Commerce (SAIC) is in charge of investigations within industry sectors for the existence of monopoly agreements, abuses of dominant market position, and abuses of administrative powers to eliminate and restrict competition (save any aspects that involve monopoly pricing).
- The National Development and Reform Commission (NDRC) will handle situations where pricing monopolies may be involved.

Simply put, this division of enforcement roles at the regulatory level reflects the historical responsibilities of these authorities.

At the policy level, Article 9 of the AML establishes the Anti-Monopoly Committee (AMC) directly under the State Council. Its role is to formulate and publish overall competition policies, evaluate overall market competition status, publish reports, formulate and publish antitrust guidelines, and coordinate high-level strategy regarding anti-monopoly enforcement work. Vice Premier Wang Qishan is the director of the AMC, and his senior authority is expected to facilitate the effective operation of the AML, which will be jointly handled by MOFCOM, the SAIC and the NDRC.

Possible Jurisdictional Overlap

It is quite possible the current allocation of enforcement functions between MOFCOM, the SAIC and the NRDC will lead to jurisdictional overlap. For example, matters regarding monopoly agreements and abuse of dominant market position frequently involve pricing issues. In such a scenario, it is not yet clear how the SAIC and the NDRC will split their functions. As a result, multinationals under investigation may have to deal with more than one authority until regulatory roles are more explicitly defined.

Chinese Courts Prepare for Antitrust Lawsuits

According to the AML, business operators that engage in monopolistic conduct and cause damages to others shall bear civil liability. Further, the Supreme Court promulgated a notice in late July 2008 requiring courts to accept anti-monopoly related civil cases which shall be handled by their respective Intellectual Property Divisions. To date, however, very few anti-monopoly cases have been filed with the courts for several reasons. Aside from the well-known fact that anti-monopoly cases are extremely complex in nature, certain implementation rules related to the AML (both procedural and substantive) have yet to be issued. As a result, certain questions remain unanswered: Which courts will have jurisdiction over AML-related

cases? What parties can be a plaintiff in an AML-related lawsuit? How should a party be defined that has suffered loss as a result of monopolistic conduct? How should the burden of proof be reasonably allocated between a plaintiff and a defendant?

Confronted with such pressing issues, the Supreme Court has indicated it is considering drafting judicial interpretations addressing these matters and also creating a specialized tribunal within its own Intellectual Property Division in order to provide guidance to junior courts when hearing AML-related civil cases.

The First Shot

On 31 July 2008—the day before the AML took effect—a Beijing lawyer on behalf of the public interest (the Complainant) lodged complaints against Microsoft with MOFCOM, the SAIC and the NDRC. Alleging monopolistic practices, the claims seek the assessment of fines totalling US\$1 billion. On 21 August 2008, the Complainant received two notices. One was from MOFCOM and stated that anti-monopoly investigations would be conducted by both the NDRC and the SAIC. The second was issued by the NDRC and gave notice that the complaint would be investigated. Although it remains unclear exactly how these investigations will move forward, it will be interesting to see precisely what matters will be addressed by each regulatory level entity and, moreover, what role (if any) the AMC will play.

In sum, whether the AML will trigger a flood of lawsuits in China leading to greater consumer activism against big corporations is still an open question. Nevertheless, it is generally agreed that the AML will bring about profound changes in both the Chinese regulatory and legal environments. Therefore, any businesses with (or contemplating) operations or investments in China are well advised to have a thorough grasp of the AML.

New Judicial Interpretation on Limitation of Actions Released

In order to ensure the correct application of provisions regarding the Limitation of Actions (the Limitation), China's Supreme Court formulated The Rules of the Supreme People's Court on Several Issues Concerning the Application of Limitation of Actions in Hearing Civil Dispute Cases (the Interpretation). The Interpretation was implemented on 1 September 2008.

The Limitation is a basic and very important principle of China's civil and business law. A party's right of claim will not be supported by the court if the other party addresses a plea on the grounds of expiration of the Limitation.

The Interpretation is the first exclusive interpretation of the Limitation. Before the Interpretation's promulgation, the Limitation was prescribed separately in the General Principles of the Civil Law (the General Principles), the Contract Law, the Property Law, the Civil Procedure Law and several other interpretations, and was neither systematic nor complete. Based on the principles of the Limitation in the aforementioned laws, the Interpretation integrated the previous judicial interpretations of the Supreme Court; clarified some key points; and made many detailed provisions on the scope of application and the beginning, discontinuance and suspense of the Limitation, as well as several other supplementary provisions.

Scope of Application and Exceptions

In accordance with the Interpretation, the Limitation shall only apply to claims of a creditor's rights, except for the following categories:

- Claims for the principal and interests of deposit
- Claims for the principal and interests of public debts, financial bonds and public corporate bonds
- Claims for payment of contribution arising from an investment relationship
- Other exceptional claims on a creditor's right

Beginning of the Limitation

Generally, the Limitation shall begin when the time limit for performance of debt has expired. For instalment debt, the Interpretation provides that the Limitation shall be counted as of the day on which the last period is due.

Where a contract is rescinded, the Limitation of a claim for return of property or compensation shall be counted as of the rescindment date. However, a claim for rescindment of contract shall not be subject to the Limitation, which is generally two years; the time limit for exercising such a claim is one year, as stipulated in Article 55 of the Contract Law.

The Limitation of claims for illegal profits shall begin when the entitled party knows or should have known of the existence of illegal profits and who the opposing party is.

Where a person who acts as a manager has paid out the necessary expenses in a voluntary service, the Limitation of claims for compensation shall start when the service is completed and the manager knows or should have known who the beneficiary is.

Discontinuance of the Limitation

The General Principles stipulate in Article 140 that the Limitation shall be discontinued if suit is brought or if one party makes a claim for or agrees to fulfilment of obligations. Based on this article, the Interpretation makes a further clarification.

In terms of the Interpretation, where a party submits an indictment or addresses an oral suit to a court, the Limitation shall be discontinued as of the submitting date or the addressing date. The following actions shall be judged to have the same effect as bringing a suit:

- Applying for arbitration
- Applying for order of payments
- Applying for bankruptcy or lodging a bankruptcy claim
- Applying for declaration of the disappearance or death of a debtor for the purpose of claiming rights
- Applying for measures before litigation, such as property preservation or a temporary ban
- Applying for compulsory execution
- Applying for participation in litigation by being notified or the addition of another party
- Advocating offset during a litigation
- Other actions which have the same effect as bringing a suit

The following circumstances shall be deemed as one party “making a claim”:

- A party hands the claim letter to the other party directly, the other party signs or seals the letter, or the arrival of the letter can be testified in some other way.
- A party advocates rights by mail or electronic text, and such mail or electronic text reaches or should reach the other party.
- Where a party is a financial institution, it withholds the principal and interests of debt from the other party’s bank account in light of laws or agreements.
- Where a party’s whereabouts are unknown, the other party publishes a claim declaration on national media, or local media in the domicile of the whereabouts-unknown party, except as otherwise stipulated by law or judicial interpretations.

If one party “agrees to fulfilment of obligations”, where the obligor commits to or takes actions in instalment performance, partial performance, offering a guarantee, a request for delay of performance or making payment plan, it can be deemed as having the same effect as if the obligor agrees to fulfilment.

Additionally, the Limitation shall be discontinued if the right owner claims to the Public Security Bureau, the People’s Procuratorate or an institution that is entitled to settle civil disputes, such as the People’s Intermediation Commission for protection of civil rights.

Suspense of the Limitation

Under the following circumstances, which can be deemed as the Other Obstacles prescribed in Article 139 of the General Principles, the Limitation shall be suspended:

- The person whose legal rights are infringed upon is a person with limited capacity for civil conduct or a person with no capacity for civil conduct, and he or she has no statutory agent, or his or her statutory agent dies, loses the power of agency or loses the capacity for civil conduct.
- The inheritor or the manager of the inheritance has not been confirmed after the beginning of inheritance.
- The right owner is controlled by the obligor or other people, and as a result fails to advocate his or her rights.
- The right owner can not advocate his or her rights for any other reason.

Miscellaneous

The Interpretation also stipulates rules about the application of the Limitation during the process of litigation.

When hearing a case, the court shall neither apply the Limitation on its own initiative nor clarify the issues relating to the Limitation.

The plea of the Limitation shall be addressed during the period of the first instance. If a party pleads in the second instance, unless there is new evidence, the plea will not be supported by the court.

Where a party agrees to fulfilment of obligations or has fulfilled the obligations voluntarily after the expiration of the Limitation, he or she will lose the right to plead in the terms of such expiration.