A Review of Certain Key Developments in the Implementation of China’s Anti-Monopoly Law in 2012

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Over the past year, China has continued to make progress in the implementation, now in its fifth year, of its Anti-Monopoly Law (AML). One key development was the release by the PRC Supreme People’s Court (SPC) of a long-awaited judicial interpretation of antitrust civil litigation. Other noteworthy updates include the issuance by the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) (the Chinese authority in charge of merger reviews) of new rules for its enforcement of the AML and its move toward greater transparency.

SPC’s Judicial Interpretation of Antitrust Civil Litigation

Antitrust civil litigation continues to be an avenue for business operators to protect themselves against unfair business practices. There have been a number of antitrust civil cases filed in Chinese courts covering a wide spectrum of industries, including transportation, pharmaceuticals, food, and IT. According to the SPC, many of the antitrust civil cases filed relate to alleged abuse of dominant market positions rather than anticompetitive agreements. It was also reported that in these cases, courts have seldom ruled in favor of the plaintiffs, largely because of a failure by plaintiffs to prove their claim.

On May 3, 2012, SPC issued the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trials of Civil Dispute Cases Arising from Monopolistic Conducts (Judicial Interpretation), which came into force on June 1, 2012. The Judicial Interpretation serves to fill in the gaps between the AML and antitrust civil litigation and sets out certain fundamental principles and procedures for antitrust civil litigation that appear to be favorable to plaintiffs in certain antitrust civil actions.

The Judicial Interpretation specifically clarifies, among other things, certain issues that had previously been unclear, including plaintiffs’ standing to sue, jurisdiction, consolidation of proceedings, the allocation of the burden of proof, and the use of expert witnesses and independent professional institutions.

Under the Judicial Interpretation, any natural persons, legal entities, or other organizations may file a civil action if the matter involves a dispute arising from: (i) losses caused by monopolistic acts, or (ii) violations of the AML by unlawful contracts or charters of trade associations.

A key feature of the Judicial Interpretation is the specification of the burden of proof in antitrust civil litigation:

– In the case of the horizontal monopoly agreements set out in Article 13(1) – (5) of the AML, the Judicial Interpretation provides that the defendant shall be responsible for proving that such agreements do not have the effect of eliminating or restricting competition. However, the Judicial Interpretation is silent on the burden of proof in the case of vertical monopolistic agreements, and that silence appears to indicate that plaintiffs challenging such agreements may still need to prove the anticompetitive effects of such agreements. According to certain news reports, a judge at the intellectual property rights tribunal of the SPC suggested that most vertical agreements may not create competition problems (unless both the suppliers and the purchasers have a certain degree of market dominance) and hence the burden of proof is on the plaintiff in such cases.

– In the case of abuse of dominant market position, the Judicial Interpretation provides that the plaintiff shall bear the burden of proving that the defendant is dominant in the relevant market and that the defendant’s conduct or behavior has abused its dominant market position. The plaintiff is permitted to use information published by the defendant as evidence of the defendant’s dominance. However, if the defendant raises the defense that its conduct or behavior is justifiable, then such defendant shall bear the burden of proving this.
Furthermore, if the defendant is a public utility or other business operator that enjoys a monopolistic position under the law, the court can, based on the market structure and competitive conditions, determine that such defendant has a dominant market position unless such determination is rebutted by evidence to the contrary.

Overall, the Judicial Interpretation provides further guidance on antitrust civil litigation and may facilitate plaintiffs’ bringing certain antitrust claims. It is anticipated that the volume of antitrust civil litigation will continue to grow. Large multinational corporations, leading Chinese state-owned enterprises, and industrial giants should take note of this trend and take appropriate measures to mitigate their exposure to such litigation.

MOFCOM’s Merger Control Review Progress Continues

More Information on Merger Control Cases Released

On November 16, 2012, in an unprecedented move, MOFCOM released data on merger control transactions that had been unconditionally approved since the implementation of the AML, including the total number and the list of such transactions. According to such data, from August 1, 2008 to September 30, 2012, MOFCOM cleared 474 merger control transactions in total, of which 458 were cleared unconditionally. MOFCOM also indicated that going forward, it would periodically publish data on unconditionally approved transactions. We believe that this is an indication of MOFCOM’s continuing efforts to increase its transparency.

As for transactions that were conditionally cleared, MOFCOM continued with its previous practice of publishing the details of such decisions. In 2012, the following six transactions were conditionally cleared: the establishment of a joint venture by Henkel Hong Kong Holdings Co., Ltd. and Tiande Chemical Industry Co., Ltd. (February 9, 2012), the acquisition of Hitachi Global Storage Technologies by Western Digital Corporation (March 2, 2012), the acquisition of Motorola Mobility by Google (May 19, 2012), the acquisition of Goodrich Corporation by United Technologies Corporation (June 15, 2012), the acquisition of a controlling stake in Niuhai Holdings Ltd. by Wal-Mart Stores Inc. (August 13, 2012), and the establishment of a joint venture by ARM Holdings plc, Giesecke & Devrient GmbH, and Gemalto N.V. (December 6, 2012).

Of the transactions that were conditionally cleared by MOFCOM under the AML, it is interesting to note that MOFCOM had imposed behavioral remedies in more than half of such cases. Compared with certain relatively well-established merger control regimes in the EU and US, MOFCOM had seemed reluctant to impose structural remedies. However, in the UTC/Goodrich transaction, MOFCOM cleared the transaction with the key condition that Goodrich’s power systems business must be divested within six months, thereby imposing a structural remedy for the first time. It remains to be seen whether this case is an indication of MOFCOM’s changing attitude toward the types of remedies imposed.

Another interesting conditional clearance decision in 2012 concerned the Wal-Mart/Niuhai Holdings transaction, which involved Wal-Mart’s acquisition of an additional 33.6% of equity in Niuhai Holdings. This acquisition increased the US retailer’s ownership of Niuhai Holdings from 17.7% to 51.3% and gave it control of the online direct sales business of Yihaodian, a leading online supermarket retailer in China. A significant condition that MOFCOM imposed on Wal-Mart in this transaction was the prohibition against using a variable interest entity (VIE) structure to engage in value-added telecommunications services offered by Yihaodian. Although MOFCOM did not go so far as to express an opinion as to whether a VIE structure was illegal, it is widely perceived that the prohibition is an indication of MOFCOM’s unfavorable view of the use of VIE structures to circumvent foreign investment restrictions in China.

New Rules in 2012

In 2012, two sets of new rules published by MOFCOM concerning merger control review came into effect. The first was Interim Measures for Investigating and Handling Concentrations of Business Operators that Fail to File Notification in Accordance with the Law (effective February 1, 2012) (Interim Measures). For concentrations that trigger the filing criteria but are not duly filed, Interim Measures set out the investigation procedures, timelines, and relevant rights of the business operators being investigated, and reiterated the potential penalties that MOFCOM may impose on business operators whose concentrations are proved to be in violation of the AML following MOFCOM’s investigation.

The other set of new rules was the Form for Notification in Connection with Anti-Monopoly Reviews of Concentrations of Business Operators (Amended) (Form) and its Instructions (Instructions), which came into force on July 7, 2012. The Form and Instructions provide certain clarifications on the scope of information and documentary requirements for merger control filings. For example, the Form and Instructions include guidance on how to determine the identity of “business operators involved in the concentration”. However, the Form and Instructions also introduced additional information requests (for example, the filing parties are required to disclose transactions in the past three years that relate to the same relevant market).

More Regulations to Come


The consideration of a fast-track process for merger review is encouraging and welcomed as the current merger review process in China is relatively onerous in both its timing and documentary requirements, regardless of whether the transaction under review has any real competition concerns or not. It has been reported that the Fast-Track Rules under consideration would streamline the merger review process by classifying transactions on the basis of market shares. Once such rules
are officially issued, it is anticipated that the merger control review process for straightforward cases that are unlikely to have any competition concerns would be substantially expedited.

Endnotes

The Standing Committee of the National People’s Congress issued the Anti-Monopoly Law on August 30, 2007, and the law came into effect on August 1, 2008.

Article 13 of AML provides as follows: “Enterprises with competitive relationship are prohibited from concluding monopolistic agreements in respect of: (1) fixing or changing price of commodities; (2) restricting the quantity of commodities in production or to be sold; (3) splitting the sales market or raw and semi-finished materials procurement market; (4) restricting the purchase of new technologies and equipment, or restricting the development of new technologies and products; (5) boycotting transactions; and (6) other monopolistic agreements confirmed as such by the Anti-monopoly Law enforcement authority under the State Council. For the purposes of this Law, monopolistic agreements include agreements, decisions and other behaviors in concert that exclude or restrict competition.”

Vertical monopolistic agreements generally refer to those agreements between business operators and other parties (such as distributors or purchasers) that include terms fixing the resale price or setting a minimum resale price, or other terms limiting, excluding, or restricting competition.

Prior to this, MOFCOM had only published merger review decisions in which its clearance was conditional or not granted.

For the full text of this decision, see MOFCOM Notice No. 35 (2012), Anti-Monopoly Review Decision Notice on the Conditional Approval of the Acquisition of Goodrich by UTC (20120335), available at http://fldj.mofcom.gov.cn/aarticle/ztxx/201206/20120608181083.html?2033480434=573380044 (in Chinese only).


China imposes restrictions on foreign investments in various sectors including telecommunications and media. To get around such restrictions, a number of companies in these sectors had adopted corporate group structures that use captive contractual arrangements to control (but not legally own) operating companies in China. This corporate group structure, based on the offshore parent company’s operational and financial control (through contracts) of an operating company that is not owned by the offshore parent company, is typically referred to as the VIE structure. This structure has been used for over a decade and had been viewed as somewhat of a gray area in terms of its legitimacy.

Such penalties (which are set forth in Article 13 of the Interim Measures) are generally consistent with those set forth in Article 48 of the AML and include a monetary penalty of no more than RMB500,000, and orders to cease the concentration or dispose of equity or assets within a prescribed time limit in order to restore market conditions to the way they were prior to the concentration.