

Initial Cases under China's AML

Paul Jones
Jones & Co.
Toronto

Although China's Anti-Monopoly Law¹ (the "AML") only came into effect on August 1, 2008 based on press reports there have already been a number of cases filed, complaints made and mergers reviewed despite the lack of explanatory regulations. A review of these cases provides some guidance on how the implementation of the AML may proceed.

The AML has only 57 articles in 8 chapters and is generally considered a very brief outline of the basic principles of competition law in China. In this regard it appears to exemplify the civil law nature of China's legal system. According to press reports there were more than 40 draft regulations in progress as of August 1, 2008 but not one had been adopted.² The number of regulations suggests that many regulations are with respect to the application of the AML to specific industries, such as insurance or finance.

The enforcement agencies are still getting organized. On September 13, 2008 the State Council approved operating rules for the Anti-Monopoly Committee, and the Committee under the Chairmanship of Wang Qishan, the Vice Premier of the State Council, held its first meeting.³ There are three government agencies involved in enforcing the AML. Documents governing the functions⁴ of the three agencies suggest that the Ministry of Commerce (MOFCOM) will be responsible for mergers, The National Development and Reform Commission (NDRC) will be responsible for price-related behavior, such as

¹中华人民共和国反垄断法 (Zhonghua Renmin Gongheguo Fan Longduan Fa), Presidential Decree No. 68, adopted at the 29th Session of the Standing Committee of the 10th National Peoples Congress and promulgated on August 30, 2007 to come into effect August 1, 2008.

²辛红 (Xin Hong), 反垄断法遭遇尴尬: 40余个配套规则无一出台 (Fan Longduan Fa Zaoyu Ganga: 40 Yu Ge Peitao Guize Wuyichutai - Anti-Monopoly Law Implementation is an Embarrassing Experience: More than 40 Subordinate Regulations Have Not Yet Been Released), 法制日报 (Fazhi Ribao - Legal System Daily), 2008-07-28, available at: http://news.xinhuanet.com/politics/2008-07/27/content_8780958.htm. A Regulation on merger notification thresholds was adopted shortly afterwards.

³国务院批准反垄断委员会工作规则 反垄断工作有序推进 (Guowuyuan Pizhun Fan Longduan Weiyuanhui Gongzuo Guize Fan Longduan Gongzuo Youxu Tuijin - State Council approves the rules for the Anti-Monopoly Commission: Anti-Monopoly work advances in an Orderly Manner), 新华网 (Xinhuanet), 2008-09-13, available online at: http://news.xinhuanet.com/politics/2008-09/13/content_9982466.htm.

⁴ Known as “三定 (San Ding)” which can be roughly translated as “three specifics.”

cartels, and that the State Administration for Industry and Commerce (SAIC) would be responsible for unilateral conduct, unfair competition and abuse of dominant position. While the regulators in the agencies are still pre-occupied with getting organized, the private right of action in Article 50 of the AML has taken on a more significant role. The general rule in civil law is that a party who has suffered damage as the result of another party's breach of the law has a private right of action against the party separate from any action that the regulators may take.

There is considerable discussion as to whether there is a private right of action for a breach of the administrative monopoly provisions in Chapter V of the AML. Generally one view is that there is a private right of action using a broader civil law reading of the text of the Notice and the AML. The other view uses a narrower common law type of analysis of the specific words and considers the compromises made to include administrative monopolies in the AML over the determined opposition of the state agencies. It says that only the AML Enforcement Authority can bring such an action.

With respect to guidelines regarding the abuse of intellectual property rights, on November 3, 2008 a vice president of the SPC gave an interview in which he stated that the SPC would soon start work on the drafting of a judicial interpretation to define the reasonable limits of intellectual property rights.⁵ Academic writing suggests that the civil law concept of "good faith," known in Chinese law as 诚实 (chengshi) will play a major role.⁶

Initial Cases – Private Actions

There are now press reports of 7 private actions brought under the AML. None of them are against a foreign company, but three of them are against administrative bodies.

Administrative Cases

One of the first administrative monopoly cases involved the General Administration for Quality Supervision, Inspection and Quarantine (AQSIQ).⁷ The facts of the case are

⁵ 杨维汉 (Yang Weihang), 最高法院拟启动反垄断民事诉讼司法解释起草工作 (Zuigao Fayuan Ni Qidong Fan Longduan Minshi Susong Sifa Jieshi Qicao Gongzuo - Supreme Court to Start Drafting a Judicial Interpretation on the AML and IP), 新华网 (Xinhuanet), 2008-11-03, available online at: <http://www.chinaipr.com/file/2008110413787.html>.

⁶ As set out in the 中华人民共和国民法通则 (Zhonghua Renmin Gongheguo Minfa Tongze – General Principles of the Civil Law) adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986.

⁷ Beijing Zhaoxin Information Technology Ltd., Dongfang Huike Fangwei Jishu Youxian Zeren Gongsi – Oriental Huike Anti-Counterfeiting Technology Ltd., Zhongshe Wang Meng Information Security Technology Ltd., and Heng Xin Digital Technology Ltd. v. Guojia Zhiliang Jiandu Jianyan Jianyi Zongju-State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), filed August 1, 2008 in Beijing No. 1 Intermediate People's Court, assigned file number "(2008)— Zhongang Chuizi Di 1340 Hao." This case is widely reported in the press. For a summary of the case in English see Zhu Tao, Antitrust Claim Puts State Agency on Trial, *Caijing*, 2008-08-27, available online at:

complicated but it may be summarized as a case of a standard setting body requiring the use of a technology in which it had a financial interest, to the detriment of the plaintiffs' technologies. In early September the Beijing No. 1 Intermediate People's Court ruled that they would not accept the case because the limitation period for the complaint under the Administrative Litigation Law had expired.⁸ The plaintiffs initially said that they would appeal but later wrote to the State Council asking it to intervene.⁹ In the end it was reported that the AQSIQ withdrew the rule in controversy.¹⁰

In the Yuyao case¹¹, the Mingbang accounting firm alleges that it was discriminated against in the establishment of a service center for the setting up of new businesses when its competitor, Yangming, was allowed to set up a window in the new service center, resulting in a loss of business. The plaintiffs cite Article 8 and Chapter V of the AML concerning administrative monopolies as the basis for their action. Mingbang had previously applied to Ningbo Municipal Government for administrative re-consideration and lost. The State Administration of Taxation has issued a notice specifically requiring that tax offices and tax agents cannot share the same office space.¹² This case is reportedly now settled with the municipal government promising equal space.¹³

<http://english.caijing.com.cn/2008-08-27/100077449.html> . For a copy of the Statement of Claim, see 佚名 (Yi Ming), 四家企业向国家质检总局提起反垄断诉讼(Sijia Fangwei Qiye Xiang Guojia Zhiqian Zongju Tiqi Fan Longduan Susong - Antitrust Complaint filed by the Four Anti-Counterfeiting Companies against AQSI), 网易科技 (Wangyi Keji), 2008-08-01, available online at: <http://www.erpworld.net/article/2008-08-04/0P4224K2008.shtml> .

⁸朱弢(Zhu Tao), “反垄断第一案”未被法院受理(“Fan Longduan Diyi An” Wei Bei Fayuan Shouli - “First Anti-Monopoly Case” has not been accepted by the Court), 财经(Caijing) 2008-09-04, available online at: <http://www.caijing.com.cn/2008-09-04/110010483.html> . The decision appears to be based on Article 41 of the 最高人民法院, 关于执行〈中华人民共和国行政诉讼法〉若干问题的解释(Zuigao Remin Fayuan, Guanyu Zhixing “Zhonghua Renmin Gongheguo Xingzheng Susong Fa” Ruogan Wenti de Jieshi - Supreme People's Court Interpretation on Several Problems in Implementing the PRC Administrative Litigation Law), adopted at the 1088th Meeting of the Judicial Committee on November 24, 1999 and in effect from March 10, 2000. The actual decision is not yet available.

⁹周凯(Zhou Kai), 律师上书国务院呼吁纠正相关部门行政垄断行为 (Lushi Shangshu Guowuyuan Huyu Jiuzheng Xiangguan Bumen Xingzheng Longduan Xingwei -Lawyers Release Letter to State Council asking Relevant Departments to Rectify the Administrative Monopoly Behavior), 搜狐(Sohu), 2008-10-08.

¹⁰朱弢 (Zhu Tao), -国家质检总局撤销电子监管推进机构 (Guojia Zhiqian Zongju Chexiao Dianzi Jianguan Tuijin Jigou - AQSIQ Withdraws its Promotion of its Electronic Monitoring Agency), 财经 (Caijing - Finance), 2008-10-24; available online at: <http://www.caijing.com.cn/2008-10-24/110022863.html> .

¹¹ Zhejiang Yuyao Mingbang Tax Accountants v. Yuyao City Administration, filed August 1, 2008. See 秦旭东(Qin Xudong), 浙江余姚市政府遭遇反行政垄断诉讼 (Zhejiang Yuyao Shi Zhengfu Zaoyu Fan Xingzheng Longduna Susong - Zhejiang Yuyao City Administration is served with an Anti-Administrative Monopoly Lawsuit), 财经网 (Caijing Net) 2008-08-05, available online at: <http://www.caijing.com.cn/2008-08-05/110002570.html> .

¹²国家税务总局(Guojia Shui Wuzongju - State Tax Administration), 《关于进一步规范税收执法和税务代理工作的通知》国税函字 [2004] 957号 (Guanyu Jinyibu Guifan Shuishou Zhifa He Shuiwu Daili

The final private administrative monopoly case was filed on November 27, 2008 against the government operated digital television broadcaster in Hangzhou City in Hangzhou West Lake District People's Court by a couple of professors.¹⁴ The broadcaster had imposed a unilateral rate increase.

None of the courts in these administrative monopoly cases have been reported as rejecting the case on the grounds that only the AML Enforcement Agency could bring such an action.

Other Cases

There is an insurance industry trade association case in Chongqing where the association was accused of setting rates in contravention of Articles 3 and 13 of the AML.¹⁵ There is also a bank case in Chongqing.¹⁶ The bank was accused of charging excessive fees and refusal to deal, however an expert providing commentary for the press story about the case suggested that the dispute is really about the contract between the parties.

Since the resolution of the AQSIQ dispute the leading case in the press is one filed against Beijing Netcom, a telecommunications service provider, based on it charging different rates to people with a Beijing residence permit (known as a "hukou") and those without. Many people without such a permit have lived and worked in Beijing for years.¹⁷

Gongzuo de Tongzhi - Notice regarding further Standardizing the Law regarding Tax Enforcement and Tax Agency Work, Guoshui Hanzi [2004] 957Hao].

¹³秦旭东(Qin Xudong) and 朱弢(Zhu Tao), 全国首例反垄断民事诉讼正式立案(Quanguo Shouli Fan Longduan Minshi Susong Zhengshi Li'an – The Nation's First Official AML Case), 财经 (Caijing – Finance), 2008-09-19, available on line at: <http://www.caijing.com.cn/2008-09-19/110014193.html> .

¹⁴赵何娟 (Zhao Hejuan), 杭州数字电视遭遇反垄断民诉 (Hangzhou Shuzi Dianshi Zaoyu Fan Longduan Minsu – Hangzhou Digital Television hit with Anti-Monopoly Civil Suit). 财经 (Caijing – Finance), 2008-12-04; available online at: <http://www.caijing.com.cn/2008-11-28/110032663.html> .

¹⁵ Liu Fangrong v. Chongqing Baoxian Xiehui – Chongqing Insurance Association, filed August 1, 2008. See 张友 (Zhang You) and 刘振盛 (Liu Zhensheng), 保险反垄断第一案 重庆保险协会被诉(Baoxian Fan Longdun Diyi An Chongqing Baoxian Xiehui Bei Su - First Anti-Monopoly Insurance Case: Chongqing Insurance Association Sued), 21 世纪网(21 Shiji Wang - 21st Century Net), 2008-08-13, available online at: http://www.21cbh.com/HTML/2008/8/13/HTML_FLH1G1U8AIQR.html .

¹⁶ Chongqing Xibu Pochan Qingsuan Gongsi - Chongqing Western Bankruptcy Liquidation Corporation v. Jianshe Yinhang Chongqing Fenheng - China Construction Bank, Chongqing Branch, filing date not known, Chongqing Intermediate People's Court. See 胡俊华 (Hu Junhua), 银行业反垄断第一案 建行成被告 (Yinhangye Fan Longduan Diyi An Jianhang Cheng Beigao - China Construction Bank is the Defendant in the first Anti-Monopoly Case in the Banking Sector), 每日经济新闻 (Meiri Jingji Xinwen - Daily Economic News), 2008-09-12, available online at: http://www.nbd.com.cn/ NewShow.aspx?D_ID=124006 .

¹⁷ 李方平(Li Fangping) v. China Netcom (Group) Co., Ltd., filed August 1, 2008 in Chaoyang District Court in Beijing, and accepted by the court about September 19, 2008, and transferred to the Beijing No. 2 Intermediate People's Court In early November. See 北京网通可能成为国内反垄断案第一被告(Beijing

More recently Chinese consumers have targeted a Western consumer favorite, high gas prices.¹⁸ Article 17(1) prohibits dominant operators from selling products at unfairly high prices or buying products at unfairly low prices.

Three of the seven private actions reported to date benefit a broad class of consumers.

Merger Reviews

In an interview released on November 21, 2008 by MOFCOM's Information Office¹⁹ the head of MOFCOM'S Anti-Monopoly Bureau stated that 8 merger reviews had been completed and approved out of 13 accepted (meaning the submission has been accepted as being complete), including the approval of the InBev takeover of Anheuser-Busch that had conditions attached.²⁰ The interview contains a detailed description of the process.

A more significant test of the AML will be the review of the proposed acquisition by Coca-Cola of Huiyuan Juice Group Limited.²¹ Although the first material was submitted in September, the file was not considered complete until November 19th, and the initial 30 day review period runs from that date.²²

Wangtong Keneng Chengwei Guonei Fan Longduan An Diyi Beigao - Beijing Netcom may become the first AML defendant), 第一财经日报(Diyi Caijing Ribao - First Financial Daily), 2008-09-17; 民间反垄断第一案正式被法院受理(Minjian Fan Longduan Diyi An Zhengshi Bei Fayaun Shouli - First Civil AML Case Officially Accepted by Court), 无锡日报(Wuxi Daily), 2008-09-20; and 袁京(Yuan Jing), 反垄断第一案移送二中院(Fan Longduan Fan Longduan Diyi An Yisong Er Zhongyuan - The First AML Transferred to the No. 2 Intermediate People's Court), 北京日报(Beijing Daily), 2008-11-05.

¹⁸ Li Fangping v. 中国石化北京分公司 (Zhongguo Danhua Beijing Fen Gongsi – China Petrochemical – Beijing Branch, also known as “Sinopec”), Beijing No. 1 Intermediate People's Court/Haidian District People's Court, filing date not known but likely last week of November, 2008. See 田享华 (Tian Xianhua) and 王佑 (Wang You), 中石化被诉滥用市场支配地位 (Zhong Danhua Bei Su Lanyong Shichang Zhipei Diwei – Sinopec sued for Abuse of Dominant Market Position), 第一财经日报 (Diyi Caijing Ribao - First Financial Daily), 2008-12-04.

¹⁹ 商务部反垄断局负责人就经营者集中反垄断审查有关问题答记者问 (Shangwubu Fan Longduan Ju Fuzeren Jiu Jingyingzhe Jizhong Fan Longduan Shencha Youguan Wenti Da Jizhe Wen, - Interview with the Ministry of Commerce Anti-Monopoly Bureau Officer in Charge of Merger Review), 2008-11-21, online at: <http://www.mofcom.gov.cn/aarticle/zhengcejd/bj/200811/20081105906893.html> .

²⁰ See People's Republic of China Ministry of Commerce Notice No. 95, 2008 for the conditions, available online at: <http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html> . There are also a number of English language commentaries available.

²¹ 李静(Li Jing), 可口可乐提交反垄断审查申请 最快 30 天出结果 (Kekou Kele Dijiao Fan Longduan Shencha Shenqing – Coca Cola AML Review Application Submitted), 新京报(Xin BeiBao – Beijing News), 2008-09-20.

²² Coca-Cola Antitrust Review Begins, Xinhua, 2008-12-05; available in English at: <http://english.cri.cn/3130/2008/12/05/65s430161.htm> .

While this area is active not enough is available at this time to draw significant guidance from the cases.

Complaints to the Enforcement Agencies

There have been a number of reports in the press about a complaint made by a Beijing lawyer regarding Microsoft.²³ On August 1st the lawyer sent letters to each of MOFCOM, NDRC and SAIC requesting that the agencies investigate Microsoft for anti-competitive conduct and suggested a fine of \$1 Billion USD. The alleged conduct was abuse of dominant position by excessive pricing, lack of inter-operability and bundling. It is not clear that any agency has positively responded to the complaint.

In Hebei Province two lawyers have complained to NDRC regarding the price of oil, based on the unfair price provision of Article 17 of the AML.²⁴ This appears to be unconnected to the private action discussed earlier.

Another lawyer has made a complaint to SAIC accusing U.S. listed Baidu.com of abuse of its dominant position.²⁵ It was accuse of letting unlicensed suppliers of medical products pay for higher rankings on its results page without alerting users.²⁶

A complaint was made to MOFCOM, NDRC and SAIC about telecom prices and a proposed re-organization. MOFCOM replied that the complaint about the re-organization

²³中国律师申请对微软反垄断调查 建议罚 10 亿美元 (Zhongguo Lvshi Dui Weiruan Tichu Fan Longduan Diaocha Sheqing Jianyi Fakuan 10 Yi Meiyuan - Chinese Lawyer Proposes an Anti-Monopoly Investigation of Microsoft; Suggested Fine 1 Billion USD), 法制日报(Ri Fazhi Wang – FazhiRibao) - Legal System Net/ Legal Daily, 2008-08-17, available online at: http://news.xinhuanet.com/legal/2008-08/17/content_9424867.htm .

²⁴曹天健(Cao Tianjian), 河北两律师向国家发改委提申请 请求立即调整成品油价格(Hebei Liang Lüshi Xiang Guojia Fagaiwei Ti Shenqing Qingqiu Liji Tiaozheng Chengpin You Jiage – In Hebei two lawyers Request that the NDRC immediately adjust refined oil prices), 法制网——法制日报(Fazhi Ribao – Legal System Daily), 2008-11-22.

²⁵中国网络反垄断第一案:律师建议罚百度 1.7 亿 (Zhongguo Wangluo Fan Longduan Diyi An Lüshi Jianyi Fa Baidu 1.7 Yi, Nanfang Baoye Wang – China’s First Internet AML Case: Lawyer Proposes Fining Baidu RMB 170,000,000), 南方报业网—南方都市报 (Nanfang Dou Shi Bao – Southern All City Reports), 2008-11-10.

²⁶ Baidu.com Fights for its Reputation, South China Morning Post, 2008-11-20.

was not within their mandate and the lawyer has applied for administrative reconsideration of that decision.²⁷

In September a group of privately owned Chinese express delivery companies wrote to MOFCOM and others regarding alleged predatory pricing by FedEx. They later were given a closed door meeting with the State Post Office management.²⁸

Finally the NDRC has announced an investigation into bank service fees. Although the announcement does not mention it, a complaint regarding the fees was made by a Beijing lawyer just after the AML came into force.²⁹

Guidance

Despite earlier fears it does not appear at this stage that foreign firms have been particularly targeted for AML actions. The Microsoft complaint was to be expected.

However administrative bodies and “natural monopolies” represent 8 of the 13 private actions or complaints to the enforcement agencies. Some of these cases were brought by lawyers who may simply be seeking to establish their reputations for future AML work. Still there has been significant use of the AML to stand up to the power of the state. The Administrative Litigation Law³⁰ has previously not proved quite so popular on its own.

After three cases the courts have not yet imposed a restrictive view of the right of private action against administrative bodies. Foreign businesses who feel that they have been treated unfairly by an administrative body may wish to take note.

All things considered the integration of the AML into China’s legal system appears to be off to a robust start after only a few months.

²⁷李欣欣(Li Xinxin), 商务部因电信重组反垄断执法“涉诉第一案”被告(Shangwubu Yin Dianxin Chongzu Cheng Fan Longduan Zhifa She Su Diyi An Beigao – Ministry of Commerce Becomes the First Defendant of Anti-Monopoly due to Restructuring), 新闻晨报(Xinwen Chenbao – Morning News), 2008-11-21.

²⁸周玲玲(Zhou Lingling), FedEx Facing Unfair Operation Charge, Caijing, 2008-11-24, available online at: <http://www.caijing.com.cn/2008-11-24/110031249.html> (Chinese) and <http://english.caijing.com.cn/2008-11-24/110031378.html> (English) .

²⁹ NDRC Investigates Bank Charges, CRIenglish.com, 2008-10-10; available in English at: <http://english.cri.cn/3130/2008/10/10/1861s413260.htm> .

³⁰中华人民共和国行政诉讼法 (Zhongguo Renmin Gongheguo Xingzheng Susong Fa - Administrative Litigation Law of the People’s Republic of China), adopted at the Second Session of the Seventh National People’s Congress on April 4, 1989, and came into force the same day.