FROM WEST TO EAST: PAVING A SMOOTHER ROAD FOR PRIVATE ANTITRUST CLAIMS

Foreign jurisdictions are increasingly embracing the view -- long held in the United States -- that civil antitrust litigation serves as a useful complement to government enforcement of competition laws and can effectively deter anticompetitive conduct. In recent months, both China and the United Kingdom have proposed significant modifications to their current frameworks for private antitrust actions. Both sets of changes are intended to reduce the burden private plaintiffs face in claiming and ultimately proving allegations of anticompetitive conduct.

Final rules issued by the Supreme People's Court of China governing civil anti-monopoly litigation took effect on June 1. Pursuant to China's Anti-Monopoly Law, the following actions by corporate individuals or businesses are classified as monopolistic conduct: (i) monopoly agreements, (ii) abuse of dominant market position, and (iii) concentration that may lead/leads to elimination or restriction of competition. The Anti-Monopoly Law also covers the abuse of administrative power by public departments or organizations for the purpose of eliminating or restricting competition. Approximately one dozen civil lawsuits have been filed since the Anti-Monopoly Law came into effect in 2008; none have resulted in a successful court victory for plaintiffs, largely based on the failure of such plaintiffs to meet the necessary burden of proof. The new provisions make it easier for private claimants to bring actions to pursue violations of China's Anti-Monopoly Law.

Under the new provisions:

- Civil plaintiffs complaining of monopoly agreements, abuse of dominant market position, or abuse of administrative power can take their disputes directly to a court (in lieu of awaiting the outcome of an investigation by a government anti-competition authority and appeal of that decision). Allegations of concentration leading to a reduction of competition (i.e., mergers or acquisitions of businesses with a certain amount of market power) remain within the primary jurisdiction of an anti-competition authority.

- The Supreme People's Court of China may designate certain "basic" courts (Primary People's Courts) with the jurisdiction to hear competition cases in the first instance. Absent such designation, the Intermediate People's Courts shall have initial jurisdiction.

- A People's Court may consolidate two or more cases concerning the same alleged monopolistic conduct brought before it (or another People's Court with the same jurisdiction).

- Civil plaintiffs may bring cases if they have suffered a loss as a result of the monopolistic conduct *or* if the contracts or articles of a trade association allegedly violate the Anti-Monopoly Law (whether or not the plaintiff has suffered injury as a result).

- Defendants bear the burden of proof with respect to rebutting allegations of the anti-competitive effect of horizontal monopoly agreements (such as in cases involving market-sharing, price-fixing, restrictions on sales, production, or technology development, and boycotts). Defendants must demonstrate that the agreement at issue does not have the effect of eliminating or restricting competition.

- In cases involving the abuse of administrative power by a public department or agency, a court may, at its independent discretion, determine that the defendant occupies a dominant position in the relevant market. This determination may be based upon public information, including a defendant's own statements regarding its market position. (Under the Anti-Monopoly Law, market share of greater than 50 percent creates a presumption of dominance.) Defendants may rebut this determination with sufficient contrary evidence.

The new provisions promulgated by the Supreme People's Court of China take effect on the heels of proposals by the UK Department for Business, Innovation and Skills ("UK-BIS") intended to encourage competition cases by private litigants. The UK-BIS proposals are designed to simplify and expedite the filing of competition actions by individuals and small businesses. Similar to the new procedures in China, the UK-BIS proposals would allow civil plaintiffs to bring actions directly to the specialist Competition Appeals Tribunal. Under the existing framework, plaintiffs can bring a direct action only to the High Court, whereas the Competition Appeals Tribunal can hear only those disputes in which a competition authority has already made a finding of infringement. The UK-BIS proposals would also provide for the transfer of competition cases from the High Court to the Competition Appeals Tribunal. The altered framework is intended to improve the ability of private plaintiffs to challenge anti-competitive behavior quickly and efficiently.

The UK-BIS proposals also introduce an "opt-out" framework to provide for collective action for damages, designed to loosen restrictions in the current rules which have acted as a barrier to collective action in the past decade. The framework would allow for both consumers and businesses to take part in collective actions, which could be brought directly to the Competition Appeals Tribunal, dispensing with the present requirement that a competition authority first make a finding of infringement prior to the claims being heard by a court or tribunal. The tribunal would assess actual damages for all consumers purportedly affected by the anticompetitive activity, not for just those claimants before it. All members of the affected group would be bound by the tribunal's decision unless they formally "opt-out." (Under the current regime, which has heard only one representative action, an individual can benefit from a group award only if he has "opted in.") The Competition Appeals Tribunal would be required to certify the sufficiency of the individual or group of individuals bringing the claim (law firms are specifically excluded), contingency fees would be prohibited, and, as under the existing rules, unsuccessful claimants would be responsible for costs.

To mitigate the effect an increase in private litigation could have on a company's incentive to approach the government in exchange for leniency, the UK-BIS proposals suggest the following measures: (i) the enactment of legislation to protect documents prepared for a leniency application from disclosure in private litigation, and (ii) the limitation of a defendant's liability to damages directly caused by that defendant's conduct (as opposed to joint and several liability for the cartel).

Comments on the UK-BIS proposals are due by July 24, 2012. Final rules are anticipated within three months from the close of this period.

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If you have any questions regarding this memorandum, please contact Matthew Freimuth (212-728-8183, mfreimuth@willkie.com), Nicole M. Naples (212-728-8636, nnaples@willkie.com), or the Willkie attorney with whom you regularly work.

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