美国律师协会反垄断法部和国际法部对
最高人民法院关于审理垄断民事纠纷案件
适用法律若干问题的规定(征求意见稿)的共同意见

2011 年 6 月 1 日

本呈递意见中所述之观点只由美国律师协会反垄断法部及国际法部共同提出。鉴于该等意见未获美国律师协会之会员代表大会或理事会批准，因此不应被视为代表美国律师协会的政策。

美国律师协会(“ABA”)反垄断法部(“反垄断部”)和国际法部(“国际法部”，以下统称“两部门”)谨就中国最高人民法院(“最高法院”)于 2011 年 4 月 25 日公布的《关于审理垄断民事纠纷案件适用法律若干问题的规定(征求意见稿)》(“征求意见稿”) [1]呈递如下意见和建议。两部门意识到征求意见稿体现出了最高法院的大量想法和付出的巨大努力，并对此 表示赞赏。同时对最高法院提供给我们呈递意见的机会表示欢迎，并希望我方建议能有所助益。在适当的情况下，两部门可提供进一步意见或参与和最高法院的商谈。

两部门中数以万计的成员在美国及其它法域的反垄断法和竞争法以及这些法律的实践影响方面具备丰富的经验。两部门的建议和意见体现了其成员在美国法律方面的专业知识、对国际反垄断法和竞争法的谙熟，以及对反垄断问题进行经济分析的专业知识。

[1] http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm。两部门的意见基于对征求意见稿的非正式译文。

总体评论及概要

两部门赞赏最高法院为澄清按照《反垄断法》提起民事案件程序的努力。最高法院在《就征求意见稿答记者问》[2]中披露，自反垄断法于 2008 年生效以来，共有反垄断民事案件 43 件，已审结 29 件。法院指出，这些案件疑难复杂，经济与法律问题相互交织，而对消费者、企业和行业均可有重大影响。因此，征求意见稿所规定的指导原则应有助于各级人民法院审理日益增加的可能提起的反垄断法案件。

两部门赞赏征求意见稿大体符合最高法院的四项起草原则：一是遵循法律规定；二是反映成熟的司法经验；三是从国情和实际出发；四是体现全球视野和国际眼光。征求意见稿为审理民事诉讼案件的许多关键方面提供了指导。征求意见稿就反垄断法民事纠纷制订了管辖权规则，减轻了关于由哪个法院审理反垄断法项下索赔、抗辩或反诉的可能产生的疑惑。征求意见稿认定了有权提起反垄断法索赔的各方，并规定了审理牵涉同一垄断行为及被告的多个案件的程序，此种程序可能成为常见情况。重要的是，征求意见稿解决了反垄断法中的举证责任问题，就侵权、损害的因果关系及损害赔偿的金额提出了不同的举证要求，在某些情况下规定了证据开示及专家证据，并对某些类型的证据建立保护机制。征求意见稿也考虑到了人民法院审理的诉讼和反垄断执法机关的执法之间的相互作用。它规定了人民法院可以判定的救济类型，以及同一行为过程中可能牵涉的反垄断法及其它法律之间的相互关系。最后，征求意见稿规定了反垄断法项下的民事案件的诉讼时效。

尽管征求意见稿大体上明智地处理了民事案件中的各种关键方面，就第四项体现全球视野和国际眼光的原则而言，两部门谨认为征求意见稿中的若干条款若能做出以下调整将会更为完善。从数方面上说，两部门的建议和意见都是有限的。首先，征求意见稿并未对多种可能的情况提供指导，而尤其在当前反垄断法民事诉讼发展的初期不可能对此提供指导。因此，两部门并未试图预测各种可能发生的情况，而是鼓励最高法院继续积极监测事态发展、公布反垄断法民事诉讼的有关裁判（裁判透明度可能有助于研究如何改

[2] “就征求意见稿答记者问”公布于 http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201104/t20110425_19877.htm。两部门的意见基于对“就征求意见稿答记者问”的非正式译文。

进诉讼程序）、并考虑定期根据发展状况全面审议指导意见。其次，两部门成员执业经历的某些方面可能带有美国诉讼独特的特色，其未必适用于中国。

简而言之，两部门谨建议：

- 第五条
  - 加以扩展，要求通知法院所有早先就相同被告的同一被诉垄断行为提起的案件，对在《民事诉讼法》第五十三条的范围以外就共同诉讼受理条件提供指导，并
  - 删掉第三句予以限制：因同一被诉垄断行为对相同被告提起诉讼的，所有后立案的案件应被移送到先立案的法院。

- 第六条
  - 加以扩展，要求通知法院反垄断执法机构就同一被诉垄断行为对被告的任何相关决定或进行中的执法。

- 第九条
  - 加以澄清，确认就存在市场支配地位和被诉垄断行为的性质建立的初步认定可以被推翻，并
  - 予以限制，删掉仅仅基于“相关市场缺乏有效的竞争，而交易相对人又对其提供的商品或者服务具有高度依赖性”就推定具有支配地位，。

- 第十条
  - 澄清间接受害人是否有权在第四条项下提起诉讼，并
  - 间接受害人若有权在第四条项下提起诉讼，予以修改，规定直接和间接受害人因同一被诉垄断行为向相同被告提起的诉讼应在第五条项下予以合并审理。

- 第十一条
  - 加以澄清，确认只有不可再上诉的最终裁判或决定可以接受成为认定的事实的证据，且不得以公司在反垄断执法机构程序中的承诺推定存在违法行为。

- 第十二条
  - 加以扩展，规定允许在适当情况下进行相互证据公示，并
  - 予以限制，删掉申请人需证明未能从第三方获取证据的要求。

- 第十三条
  - 加以扩展，允许当事人就涉及诉讼的各个领域提交专家证据，无需向人民法院提出申请，也不要求当事人的专家具备独立性。

- 第十四条
  - 加以扩展，对于在解决滥用支配地位的讨论中对向反垄断执法机构进行的自愿披露予以保密处理，并
  - 加以澄清，确认仅在特殊情况下才不公开进行听证，并明确哪类信息属于需要保护措施的“个人隐私等可能影响公共利益或者他人合法权益的内容”。

- 第十七条
  - 加以修改，规定在考虑案件的救济措施时，人民法院应考虑所有对所涉垄断行为已经使用的纠正措施。

- 第十八条
  - 加以澄清，说明是否在反垄断法诉讼中可根据《合同法》第三百二十九条判定合同或者相应条款无效，且
  - 如果根据《合同法》第三百二十九条的判定确可纳入反垄断法的民事诉讼，应加以修订，确保被告有充分机会就《合同法》第三百二十九条的可能适用为自己辩护。

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE SUPREME PEOPLE'S COURT DRAFT PROVISIONS ON THE TRIAL OF CIVIL MONOPOLY CASES

June 1, 2011

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law ("Antitrust Section") and the Section of International Law ("International Law Section"; together, the "Sections") of the American Bar Association ("ABA") respectfully respond to the invitation to comment on the Provision on Relevant Issues Concerning the Application of Law in the Trial of Civil Monopoly Dispute Cases (Draft for Comment) ("Draft Provision"), of China's Supreme People's Court ("SPC") published on April 25, 2011.[1] The Sections recognize and appreciate the substantial thought and effort of the SPC reflected in the Draft Provision. The Sections welcome the opportunity provided by the SPC to offer these comments, and hope that they may be of assistance. The Sections are available to provide additional comments, or to participate in consultations with the SPC, as appropriate.

The tens of thousands of members of the Sections have substantial experience in the antitrust and competition laws of the United States and other jurisdictions, and in the practical implications of those laws. The Sections' comments reflect their members' expertise with U.S. law and their familiarity with antitrust and competition law internationally, as well as their expertise in the economic analysis of antitrust issues.

General Comments and Executive Summary

The Sections commend the efforts of the SPC to clarify the procedures for civil cases brought under the Anti-Monopoly Law ("AML"). As the SPC disclosed in its "Responses to Reporters' Requests"[2] regarding the Draft Provision, there have been 43 civil antimonopoly cases brought since the AML became effective in 2008, and 29 of them have already been concluded. These cases, as the Court noted, are complex, because they include legal and economic issues, and may have important effects on consumers, enterprises and economic sectors. Therefore, the guidance provided by the Draft Provision should be helpful to the

[1] http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm. The Sections' comments on the Draft Provision are based on an unofficial translation.

[2] The "Responses to Reporters' Requests" was published at http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201104/t20110425_19877.htm The Sections rely in these comments on an unofficial translation of the "Responses to Reporters' Requests".

People's Courts as they adjudicate the increasing numbers of AML cases that appear likely to be filed.

The Sections appreciate that the Draft Provision is generally in accordance with the SPC's four principles in drafting: first, follow the law; second, reflect mature judicial experience; third, accommodate national conditions and reality; and fourth, reflect a global vision and international perspective. The Draft Provision provides guidance in many crucial aspects of adjudicating civil lawsuits. The Draft Provision establishes the rules of jurisdiction over civil AML disputes, lessening the possibility of confusion regarding the appropriate court to adjudicate any claim, defense or counterclaims that arises under the AML. It identifies the parties with standing to bring AML claims and sets forth the procedure for trying multiple cases, which are likely to be a common occurrence, involving the same monopolistic conduct and accused party. Importantly, the Draft Provision addresses the burden of proof in AML cases, requiring distinct proof of violation, causation of injury and amount of damages, provides for discovery and expert evidence in certain circumstances, and establishes protections for certain types of evidence. The Draft Provision also considers the interaction between lawsuits in the People's Courts and proceedings at the Anti-Monopoly Enforcement Authorities ("AMEAs"). It sets forth the types of remedies that the People's Courts may order, and the interaction between the AML and other laws that may also be implicated in a single course of conduct. Finally, the Draft Provision establishes a statute of limitations for civil cases under the AML.

While the Draft Provision generally deals with these various crucial aspects of civil cases wisely, in the spirit of the fourth principle of a global vision and international perspective, the Sections respectfully suggest that several articles of the Draft Provision would benefit from the adjustments presented below. The Sections' comments are limited in several ways. First, the Draft Provision does not, and cannot especially at this early stage in the development of civil AML litigation, provide guidance on many possible situations. Therefore, rather than attempt to anticipate all possible scenarios, the Sections encourage the SPC to continue actively to monitor developments, publish decisions relating to AML civil lawsuits so that the transparency may facilitate study of how procedures may be improved, and to consider regular comprehensive review of the Provisions in light of developments. Second, aspects of the experience of the Sections' members may be the result of distinctive characteristics of litigation in the United States and may not be applicable to China.

In summary, the Sections respectfully suggest:

- Article 5
    - Expand to provide guidance beyond Article 53 of the Civil Procedure Act about when joint actions may be accepted and to require notification to the court of any earlier-filed cases against a common defendant for the same alleged monopolistic conduct, and
    - Limit by deletion of the third sentence that requires the transfer of all later filed cases to the court of the first filed case against a common defendant for the same alleged monopolistic conduct.

- Article 6
    - Expand to require notification to the court of any relevant decision or ongoing proceeding by an AMEA regarding the defendant for the same alleged monopolistic conduct.

- Article 9
    - Clarify to confirm that the established presumptions on the existence of dominant market position and the nature of the allegedly monopolistic conduct are rebuttable, and
    - Limit by the deletion of the presumption of dominance based solely on whether "the relevant market lacks effective competition, and the transaction counterparts highly depend on the products or services supplied by the enterprise".

- Article 10
    - Clarify whether indirectly injured parties have standing under Article 4 to bring lawsuits, and
    - If indirectly injured parties have standing, revise to provide that lawsuits brought by directly and indirectly injured parties against the same defendants for injuries suffered from the same alleged monopolistic conduct should be consolidated under Article 5.

- Article 11
    - Clarify to confirm that only final, no longer appealable judgments and rulings may be accepted as proof of the facts confirmed therein, and that no inferences may be made of illegal conduct based on a company's commitments in an AMEA proceeding.

- Article 12
    - Expand to provide for reciprocal discovery in appropriate circumstances, and
    - Limit by the deletion of the requirement that the requesting party demonstrate inability to obtain the evidence sought from third parties.

- Article 13
    - Expand to permit the submission by the parties of expert evidence on all fields relevant to the lawsuit, without application to the People's Court and without any requirement that the parties' experts be independent.

- Article 14
    - Extend to provide confidential treatment to voluntary disclosures to AMEAs in the course of discussions to resolve investigations of abuse of dominance, and
    - Clarify that hearings be closed to the public only in extraordinary circumstances and as to what types of information may be "personal private and other information which may affect the public interest or the legal interests of others" that would require protective treatment.

- Article 17
    - Revise to provide that the People's Court, in imposing remedies in a case, should consider all corrective measures that may already be imposed against the implicated monopolistic conduct.

- Article 18
    - Clarify as to whether invalidation based on Article 329 of the Contract Law may be imposed within an AML proceeding, and
    - Revise to ensure that the defendant has sufficient opportunity to defend itself with regard to the potential application of Article 329 of the Contract Law if there is such an incorporation of Article 329 into AML civil litigations.

Article 5

Alleged monopolistic conduct often may have injured more than one party. Therefore, it is important that Article 5 provides guidance on how to handle the different combinations of lawsuits that may be filed in such situations. The Sections support the choice provided to aggrieved parties to file lawsuits individually or jointly consistent with the Civil Procedure Law[3] and the discretion granted to each People's Court to consolidate cases before it against a common defendant for the same alleged monopolistic conduct.[4] It may be helpful if Article 5 included guidance beyond Article 53 of the Civil Procedure Law as to when joint actions may be accepted.

However, the third sentence of Article 5 is likely to create problems, in requiring that where cases are filed in different courts against a common defendant for the same alleged monopolistic conduct, the courts with the later filed cases must transfer those cases to the court with the first filed case within 7 days of learning of the existence of the first filed case. This requirement may provoke unseemly races to courthouses all over China. For example, there may be several parties in Shanghai who might have their cases transferred to Guangzhou merely because one party filed a case first in Guangzhou. Rushing to court to secure a forum benefit may result in the filing of cases that are not well conceived or prepared. The Sections suggest that Article 5 require plaintiffs to inform the court in which they are filing a lawsuit of any earlier-filed cases that they are aware of against the same defendant for the same alleged monopolistic conduct, and establish factors that should be considered in determining which court should adjudicate such cases and a process in which those factors would be applied. For example, in the United States, there is a Judicial Panel on Multidistrict Litigation that is responsible for determining if and to which court "civil actions involving one or more common questions of fact are pending in different districts" may be transferred for pretrial proceedings

[3] The Sections note that, in the United States, joint actions include class actions, which raise many issues of procedure. Article 5 appears to address only lawsuits that are governed by Article 53 of the Civil Procedure Act. If Article 5 is intended also to cover lawsuits governed by Articles 54 and 55 of the Civil Procedure Act, which bear some similarities to class actions, then the Sections suggest that the Draft Provision expressly confirm that intent and provide additional guidance on how such lawsuits should be managed by the People's Courts.

[4] As noted in the discussion of Article 10, such discretion to consolidate is especially important where there are separate cases brought by indirectly and directly injured parties.

"for the convenience of parties and witnesses" and to "promote the just and efficient conduct of such actions."[5]

Article 6

Article 6 provides that aggrieved parties generally may file a lawsuit after an AMEA decision regarding the alleged monopolistic conduct has been confirmed effective, or may file a case directly with the People's Court. The one exception is civil lawsuits against enterprises that were required by administrative authorities in violation of AML Articles 32 or 36 to conduct business according to the administrative authorities' conditions or to perform proscribed monopolistic acts. Such lawsuits pursuant to Articles 32 or 36 may be filed only after there has been an adjudication that the administrative acts involved were abuses of administrative power that eliminated or restricted competition.

The Sections recognize that there are concerns regarding frivolous lawsuits alleging abuses of administrative power, and that, even if there were such abuses, lawsuits against enterprises that were subject to the abuses might be viewed as lawsuits against the victims instead of the perpetrators of the abuses. Therefore, it is appropriate to have a stricter standard before such lawsuits may be filed. The Sections suggest, however, that the SPC consider whether the requirement in Article 6 that there be an adjudication of abuse of administrative power in violation of the AML before a lawsuit may be filed relating to AML Articles 32 or 36 is the appropriate standard, if alternatives exist that may accomplish the same objectives.[6]

As to all other types of lawsuits, the Sections suggest that Article 6 require notification to the court of any relevant decision or ongoing proceeding by an AMEA regarding the defendant for the same alleged monopolistic conduct, so that the People's Court may exercise its discretion under Article 16 to suspend the lawsuit.

Article 9

The Sections support the Draft Provision's choice of basic procedural method for proof of abuse of dominance under AML Article 17, as reflected in Draft Provision Article 9. The Draft Provision allocates an initial burden to the claimant for each key element of an Article 17 claim – definition of the relevant market, the accused party's possession of a dominant position in that market, and the accused party's conduct that is prohibited by AML Article 17. Then, if a *prima facie* case has been established on each element by the claimant's evidence, Article 9 shifts the burden to the accused party to rebut the conclusion suggested by the claimant's evidence.

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[5] 28 U.S.C. §1407.

[6] Another standard may be to have the AMEA review the proposed lawsuit to determine whether the aggrieved party has been substantially affected by the alleged monopolistic conduct and whether there is significant basis to believe that the alleged monopolistic conduct violates the AML. A similar system has been effective in Canada, where Section 103.1 of the Competition Act was enacted to require private parties to seek leave from the Competition Tribunal before filing lawsuits under certain sections of the Competition Act.

This basic methodology has at least two major advantages: First, it should enable the courts to establish an order of proof and organize the presentation of evidence on each element of the claim in a logical and sequential fashion, thereby allowing proceedings to be conducted in an efficient manner.

Second, this burden-shifting methodology should assist the courts in rejecting at an early stage of the proceeding any claims for which insufficient evidence has been presented by the claimant. Should the claimant fail to provide evidence that appears at least *prima facie* sufficient to define the relevant market, to establish the respondent's dominant position, or to prove the nature of the accused party's conduct as prohibited by Article 17,[7] there is no further need for presentation of evidence by the accused party or other proceedings, and the case can be terminated.

Promptly identifying baseless or inadequately supported claims and thereby vindicating the innocent are important functions in any system of law enforcement.[8] They are especially important for abuse of dominance claims. If claimants are allowed to impose needless litigation costs and burdens on innocent firms, such firms will hesitate to engage in conduct that may be challenged under the law, even if the conduct is lawful and promotes competition and the firm expects to be vindicated by the ultimate outcome. Thus, procedural practices in cases involving competitive practices – such as the allocation and shifting of burdens of proof according to consistent rules – that reduce the time and cost of proceedings without foreclosing meritorious claims, contribute not only to effective legal administration, but also directly to the competitiveness of the market.

While the Sections applaud the basic choice of methodology under Draft Provision Article 9, they perceive a few aspects that might lead to unnecessary confusion or avoidable inefficiency in the litigation of private civil claims under the AML. These include the following:

1. Article 9 allows the courts to adopt a variety of presumptions to establish certain elements required under AML Article 17. For example, according to Article 9, the respondent's possession of a dominant market position may be presumed from its status as a public utility, or from its "exclusive legal authorization to supply certain products or services." While these attributes are commonly indicative of some possibility that the respondent has a dominant market position, it is important to allow respondents a realistic opportunity to demonstrate that the presumption is invalid in light of the circumstances of any particular case. Thus it is essential that Article 9 emphasize that the presumptions are rebuttable. The People's Courts should allow respondents significant flexibility in the kinds of evidence and arguments they are

[7] Presumably, the claimant either already possesses such evidence or successfully applied under Article 12 for discovery to obtain such evidence.

[8] This is an important aspect of private civil antitrust litigation in the United States. The U.S. Supreme Court has consistently ruled that a case should be dismissed without trial or further process once it is clear that the claimant has insufficient legal basis and/or factual evidence for a claim. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

allowed to present on the issue of dominant position and the People's Courts should assess this evidence objectively.

2. The status of presumptions is also particularly relevant with regard to proof of the character of the respondent's conduct. The types of conduct listed in items 1-7 of AML Article 17 may give rise to some suggestion of abuse, but again it is essential to allow respondents significant flexibility in the evidence and arguments they are permitted to rely upon in disproving the abusive character of conduct in those categories. The presumptions identified in Article 9 may prove to be useful, but they would ultimately become counterproductive if adopted too readily or inflexibly, or if respondents were given insufficient flexibility to rebut such presumptions.

3. The Sections have significant concern with regard to the presumption of dominance referred to in Article 9 clause (iii), if "the relevant market lacks effective competition, and the transaction counterparts highly depend on the products or services supplied by the enterprise." To presume dominance in such circumstances, even if that presumption is rebuttable, could complicate and introduce elements of unfairness or inaccuracy into private civil antitrust proceedings. Moreover, the threshold requirement for this presumption, that "the relevant market lacks effective competition" would generally require extensive evidence that would nullify the goal of presumptions to expedite proceedings.

   Antitrust and competition laws directed at unilateral conduct focus on conduct by firms that possess significant market power in a well-defined relevant market. AML Article 17 prohibits only conduct by dominant undertakings, and therefore does not prohibit conduct that may be viewed as opportunistic or otherwise improper if performed by an undertaking that is not dominant. However, one firm may "highly depend" upon another firm's products or services even if that other firm lacks the substantial market power that is commonly viewed as a prerequisite to applying abuse-of-dominance or monopolization principles. Firms may "highly depend" upon each other for reasons unrelated to market power in a defined relevant market. For example, a retailer may have chosen to deal with a specific distributor over an extended period of time, investing in facilities and business systems that would make it difficult to switch to a different distributor of the same goods. This might give rise to a situation in which the retailer "highly depends" on this specific distributor, even where the distributor does not possess any significant degree of market power in a defined relevant market. Such conduct appears to be outside the prohibitions of Article 17 of the AML.

   In addition, the presumption of Article 9(iii) appears to be inconsistent with the AML. Article 19 of the AML creates presumptions of dominance based on market share. So long as the accused party has adequate opportunities for rebuttal, it may be reasonable to presume that public utilities and enterprises with exclusive legal supply authority hold market shares in excess of the 50% threshold in AML Article 19(1). This supports the rebuttable presumptions established in Draft Provision Article 9(i) and (ii). In contrast, a company in a market which "lacks effective competition", that

provides goods and services on which trading parties "highly depend", does not necessarily have a market share greater than the statutory presumption of AML Article 19. In fact, the AML calls in Article 18 for consideration of dependency among business operators as only one of at least five considerations relevant to an assessment of dominance.[9] AML Article 18(4) does not authorize a presumption of dominance based on a situation of dependency. Instead, Article 18 makes clear that the considerations listed are merely a non-exhaustive set of factors relevant to dominance, and that no one factor is determinative of dominance, let alone creates a presumption of dominance.[10] Accordingly, the Sections respectfully suggest that clause (iii) be omitted from the final version of Article 9.

Article 10

Article 10 places the burden of proof on the party accused of monopolistic conduct, to demonstrate that the allegedly aggrieved parties have passed on all or part of their damages to others. Article 10 apparently contemplates that if such a demonstration is made, then the accused party may owe no or less damages to the allegedly aggrieved parties. In such a situation, the accused party may owe no damages at all to any injured party unless those indirectly injured parties have a right to seek compensation. The "Responses to Reporters' Requests" indicate that in fact the intent of Article 4 of the Draft Provision is to provide all parties who are damaged, directly or indirectly, with standing to bring a civil suit under Article 50 of the AML. Such an intent to provide standing to indirectly injured parties should be expressly stated in either Article 4 or Article 10 to avoid confusion in the People's Courts. Moreover, if this is the intent, it would be prudent to provide in Article 5 that, where directly and indirectly injured parties all file lawsuits against the same defendants for injuries suffered from the same alleged monopolistic conduct, the People's Court should consolidate such lawsuits consistent with the Sections' comments regarding Article 5.

While many states in the U.S. permit indirect purchaser suits, the standards, approaches, and presumptions to employ for handling those often complex suits have been the subject of substantial and still ongoing debate in the U.S. and the EU. Consolidation of direct and indirect purchaser suits may provide at least a partial answer.[11] However, even in

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[9] AML Article 18(4) provides that "The dominant market status shall be determined according to the following factors . . . (4) the degree of dependence of other business operators upon the business operator in transactions".

[10] AML Article 18(6) provides for consideration of "other factors" relating to the determination of market dominance.

[11] Under the Clayton Act in the United States, indirect purchasers have no standing to bring action for damages for violations of the Sherman Act, except in a few specific types of situations. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). This is consistent with the rule under the Clayton Act that accused parties also have no right to demonstrate that any injury to the direct purchaser has been passed on to indirect purchasers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The U.S. Supreme Court was concerned that a contrary rule would further complicate complex cases and reduce incentives for private lawsuits, and may subject defendants to multiple liability, concluding that antitrust enforcement would be more effective by concentrating recovery in directly injured parties rather than diluting them among directly and indirectly injured parties. In contrast, several U.S. states have laws that permit indirectly injured parties as well as directly injured parties to file lawsuits, and some states have attempted to address the challenges of such multiple lawsuits by requiring consolidation. E.g., *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 233 P.3d 1066 (2010). The concern of duplicative damages has been

circumstances where consolidation is an option, there are additional, difficult questions in such lawsuits on which lower courts may need additional guidance from the SPC, such as determining the extent of passing-on or the remoteness of a claim. Accordingly, if the SPC is going to allow direct and indirect actions (whether consolidated or not), it may wish to monitor closely cases involving both directly injured and indirectly injured parties, and consider providing more detailed guidance on how such lawsuits should be managed.

Article 11

The Sections welcome the first two paragraphs of Article 11, facilitating private enforcement of the AML by reducing the plaintiff's burden of proof when there exists a legally effective judgment or ruling or a legally effective decision issued by an AMEA regarding the alleged monopolistic conduct. Article 11 applies the principle of maintaining the integrity of the judicial system and efficiently using limited judicial resources.

The Sections understand that, by "legally effective judgment or ruling" the SPC refers to judgments and rulings that are final, after either a trial of second instance or the expiration of the time for appeal. Judgments and rulings that are subject to appeal are not yet legally effective, and facts confirmed therein should therefore not be directly accepted without the parties submitting relevant evidence. Therefore, it would be helpful if the SPC would clarify that judgments and rulings on which a re-adjudication procedure can be or has been launched will be treated differently, *i.e.*, if a re-adjudication procedure can be or has been initiated, the parties in antitrust civil lawsuits claiming facts confirmed by these judgments or rulings will still need to prove such facts.

The second paragraph of Article 11 refers to "AMEAs' legally effective decisions." The Sections respectfully request that the SPC confirm that AMEAs' legally effective decisions in this context are those decisions that are no longer appealable (through administrative reconsideration, administrative lawsuit or State Council ruling). The SPC might consider whether AML civil proceedings should be suspended until all appeals of a relevant AMEA decision have been exhausted, denied or waived.[12]

The Sections applaud the SPC preserving in the third paragraph of Article 11 the incentives for companies to undertake commitments in AMEA AML proceedings, by prohibiting plaintiffs from relying on such commitments to "directly" infer the existence of monopolistic conduct. However, it is unclear whether "indirect" inference would be allowed, and if yes, what that would mean in practice. In order to avoid dampening companies' incentives to undertake

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widely publicized. *See* Report and Recommendations of the Antitrust Modernization Commission, Ch. 3B, available at http://www.amc.gov/report_recommendation/amc_final_report.pdf.

[12] The general rule in European Union competition law is that the European Commission's decisions under appeal are binding on national courts, but in most cases it is appropriate for the national courts to stay proceedings pending the final resolution of appeals against the decisions of the European Commission. See Case C-344/98, Masterfoods, 2000 E.C.R. I-11369, at para. 57. Courts in the United States have substantial discretion to stay proceedings pending completion of other proceedings that may have a substantial impact on the pending action. E.g., Fed. R. Civ. P. 56(f).

commitments during AMEA proceedings, the Sections suggest a blanket prohibition against any presumption of illegal conduct based on a company's commitments in an AMEA proceeding.

Article 12

Article 12 permits the aggrieved parties to apply for a court decision ordering the party accused of unlawful behavior to produce relevant evidence under certain conditions. The Sections believe that authorizing discovery of evidence from the accused party is a valuable tool in antitrust cases, especially because some agreements in violation of the AML may be secret by their very nature and their details known only to the wrongdoers. However, the Sections recommend that this article be reciprocal and also allow the accused party to obtain discovery in appropriate situations. This is because, in some cases, the evidence may not be held by or available to the accused party and thus the accused party may be unable to defend itself. For example, evidence to demonstrate under Article 10 that damages were passed on by the aggrieved parties would most likely be in the hands of those very parties and would not be available to the accused parties unless they could also obtain a court order under Article 12.

It is wise to forbid unreasonably broad, unlimited discovery that could be characterized as a "fishing expedition." Nonetheless, as the SPC has noted in its "Responses to Reporters' Requests" regarding the detailed provisions on the burden of proof, monopoly civil cases are lengthy and complex in part because of the difficulty of obtaining relevant evidence. The four part-test in Article 12 for obtaining a court decision for discovery of evidence is generally in the mainstream of international antitrust law and policy and strikes a balance between facilitating the plaintiffs' ability to prove their claims while not imposing costs upon defendants without fair justification.

The first requirement for obtaining a court order for discovery is that the applicants must have sufficient evidence to prove that the alleged *unlawful monopolistic conduct* probably *caused* them to suffer *damages*. The Sections understand that this requirement means that alleged aggrieved parties must possess adequate hard evidence to support their claim and may not file a case based on mere speculation. The Draft Provision wisely adopts a standard that requires alleged aggrieved parties to have some real evidence that they suffered damages from an alleged violation, as a threshold for requiring defendants to be put to the time and expense of searching their records for evidence.[13]

The remaining three requirements of Article 12 require the requesting party to show that they have been unable to obtain the evidence from other sources, that the evidence is necessary to prove their claims and that the defendants actually possess this evidence. The Sections respectfully suggest that the requirement that the evidence is unavailable from other sources may be overbroad, and may unnecessarily complicate and therefore delay decisions regarding discovery. If the evidence is necessary and the defendants actually possess the

[13] This standard is consistent with the recent United States Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), requiring more than speculation to survive a motion to dismiss. If there is insufficient evidence to overcome a motion to dismiss, so that the claim should be dismissed simply on the basis of the complaint, there should be insufficient basis to justify permitting discovery.

evidence, it may be more equitable to impose the burden of providing the evidence on the defendant instead of on a third party to the lawsuit, unless the defendant demonstrates that it would be less burdensome to obtain the evidence from another source. On the other hand, it is not unreasonable to expect an accuser to have reviewed readily available public information and to have done so likely even before filing a claim.

Article 13

The Sections commend Article 13 of the Draft Provision for facilitating the use of expert economic evidence in civil monopoly cases. As stated in the "Responses to Reporters' Requests," the Draft Provision goes to "great length" to support expert testimony because civil monopoly cases cross the boundary between law and economics and often require expert evidence on the market, dominance, anticompetitive effects, and damages to support the claims of aggrieved parties. The Sections highly commend Article 13 for its recognition that economic analysis, market research and other forms of expert analysis may be useful in resolving questions that arise in private civil litigation under the AML. Such analysis has proven very useful if not essential in many forms of private civil antitrust dispute resolution that occur throughout the world.

Article 13 provides that: "The parties may apply to the People's Court to have experts in economics and industry appear and explain the specialized issues in the case. The parties may apply to the People's Court to retain independent expert organizations or expert persons to produce market research or economic analysis reports, and may also on their own retain independent expert organizations or expert persons to produce market research or economic analysis reports; the People's Court may review and dispose of such reports in accordance with relevant provisions in the Civil Procedure Law and related judicial interpretations."

The Sections respectfully suggest that Article 13 be broadened and/or clarified in certain respects.

1. The People's Courts should permit the appearance of experts and the introduction of expert analysis regarding *any* field of expertise relevant to the issues in dispute, including not only economic or industry expertise, but also scientific or technical expertise having legitimate bearing on the matter. This could include engineering expertise (for example, to show that different products perform the same function and might therefore constitute competing products), statistical expertise (to assess conflicting contentions about elasticity of demand or other economic variables relevant to definition of the relevant market) or some other form of expertise.

2. The presentation of expert testimony or studies on specialized issues should not require application to the court, but should be viewed as among the essential rights of the litigants. Subject to the court's authority to determine that a proffered expert or expert report is relevant to the issues in dispute and that such evidence meets

objective and scientific standards,[14] the parties should be permitted to support or defend against claims based on their own views of the weight and utility of the evidence. Therefore, the Sections suggest that the first sentence in Article 13 may be deleted, since Article 13 also provides that the People's Court may treat expert reports "in accordance with relevant provisions in the Civil Procedure Law and related judicial interpretations."

3. With respect to "independent" experts and expert organizations that the parties may retain on their own, the Sections suggest that a requirement of independence is unnecessary. For example, the parties may already have in their employ industry experts or economists who are knowledgeable about the specialized issues in the case. As suggested in (2), the parties should be permitted to introduce their own expert evidence as a matter of right, subject to the court's determination that such evidence is relevant and meets objective and scientific standards.

4. Article 13 appears to provide for the appointment by the People's Court of independent experts and expert organizations at the parties' application. The Sections are familiar with similar provisions for private civil antitrust litigation in other jurisdictions.[15] While such provisions tend to be used rarely in the United States and scholars are divided on the ultimate utility of court-appointed experts, the Sections perceive no reason why such a provision could not be fashioned into a useful component of private civil litigation under the AML. The Sections respectfully suggest that the SPC may wish to monitor closely cases involving the use of court-appointed experts and to maintain an open mind regarding ways in which the practice could be adapted to improve the administration of private civil cases under the AML.

Article 14

Article 14 wisely recognizes that civil monopoly cases often involve confidential business secrets or state secrets. It allows confidential material to be protected from disclosure by limiting access to the evidence to counsel or protecting it by a confidentiality order of the court. In particular, Article 14 also provides for confidential treatment of voluntary disclosures made to AMEAs pursuant to AML Article 46. These provisions are consistent with the AML and within the mainstream of international competition law in protecting such secrets from disclosure, and consistent with increasing the likelihood of success of the leniency program provided in AML Article 46. The Sections suggest that confidential treatment also be extended to voluntary disclosures to AMEAs in the course of discussions to resolve investigations of abuse of dominance.

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[14] In the United States, the court must find that the expert material is reliable before admitting it into evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (reliability assessed according to following criteria: (1) whether expert theory or technique being presented to the court can be and has been tested; (2) whether theory or technique has been subjected to peer review and publication; (3) known or potential rate of error and the existence of standards controlling the technique's operation; and (4) whether theory or technique is generally accepted in the relevant scientific community).

[15] In the United States, for example, court-appointed experts are specifically permitted. Federal Rules of Evidence 706.

Article 14 also provides that the court may hear the case in closed session in order to protect such information. In the experience of the Sections' members, court hearings and trials are open to the public. The Sections urge that the Draft Provision make it clear that the public may be excluded from the hearings or from a part thereof only when confidentiality concerns cannot otherwise be accommodated and only as long as the confidential material is discussed. Respect for the judicial system is increased when the public has the unrestricted opportunity to observe the court system in action.

Article 14 also protects from disclosure information implicating "personal private and other information which may affect the public interest or the legal interests of others". The Sections respectfully request that the Draft Provision define these terms, perhaps by giving examples of the types of information intended to be protected. More clarity would benefit all of the parties in civil monopoly cases so that they do not inadvertently disclose anything that the courts would prohibit.

Article 17

Article 17 raises a similar but separate concern as that noted for Article 11with regard to the interrelationships between the administrative and civil proceedings.

While the first paragraph of Article 17 states that a company in violation of the AML may face "civil responsibilities," the remedies that can be imposed by a People's Court pursuant to the second paragraph seems to go beyond civil damages or preventive injunctions, by allowing the court to take measures to "eliminate the danger," if such danger exists. This broad remedial discretion seems to encompass the structural and behavioral remedies that can be instituted by an AMEA or a court during administrative proceedings. While this remedial discretion might seem necessary to establish a true and effective "dual-enforcement" system, it nonetheless raises the possibility of inefficient conflict between the two procedures (and their courts). For example, suppose a company doing business in multiple provinces is found to have violated the AML by an AMEA and the administrative courts, and an AMEA and the administrative courts have implemented certain corrective measures to remedy the violation that would apply to all provincial territories. Meanwhile, a private plaintiff has brought a concurrent civil anti-monopoly lawsuit in one province. Article 17 would appear to allow a civil court in that province to implement a remedy that could conflict with and in certain cases effectively override the administrative proceeding's remedy. The Sections respectfully suggest that the Draft Provision at least provide that the People's Court should consider all corrective measures that may already be imposed against the monopolistic conduct implicated in the case, in imposing remedies in the case before the court. This should be feasible especially if under Article 16 the People's Court suspends the lawsuit pending the completion of an AMEA investigation.

Article 18

The second paragraph of Article 18 provides that technology agreements that do not violate "mandatory provisions" [16] of the AML but otherwise "illegally monopolizes technology and impedes technology development" under Article 329 of the Contract Law,[17] may be voided by the court in whole or in part. Article 18 seems to indicate that the scope of Article 329 of the Contract Law is broader than the AML. Article 329 of the Contract Law applies to technologies, which often does, but not necessarily, involve intellectual property rights ("IPR"). In contrast, AML Article 55 relates only to IPR and provides that only abuse of IPR to eliminate or restrict competition violates the AML. It appears that the Draft Provision contemplates that invalidation based on Article 329 of the Contract Law may be imposed within an AML proceeding for judicial efficacy and expediency. If the SPC chooses to provide for such an incorporation of Article 329 into AML civil litigations, the Draft Provision should at least ensure that the defendant has sufficient opportunity to defend itself with regard to the potential application of Article 329 of the Contract Law, which raises broader issues than the AML.

Conclusion

The Sections hope that these suggestions are helpful to the SPC and would be pleased to offer any further assistance that may be useful as the SPC finalizes the provision. The Sections recognize the substantial work that the SPC has accomplished in developing the Draft Provision, and appreciate the SPC's consideration of our comments and those of others.

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[16] The Sections suggest revision of Article 18 to clarify as to which provisions of the AML are "mandatory" in this context.

[17] The SPC in Article 10 of its Judicial Interpretation concerning Certain Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts sets out six circumstances that fall within Article 329 of the Contract Law: (i) restricting one party from conducting new research and development based on the contractual subject technology, or restricting one party from using the improved technology, or the conditions for the parties to exchange improved technologies not being reciprocal, such as requiring one party to gratuitously provide the other party with the improved technology, to transfer the improved technology to the other party non-reciprocally, to gratuitously and solely possess, or jointly own, the intellectual property of the improved technology; (ii) restricting one party from obtaining similar or competitive technology from other sources; (iii) impeding a party's sufficient exploitation of the contractual subject technology in a reasonable way pursuant to market demand, including unreasonably restricting the quantity, varieties, price, sales channel or export market of the contractual subject technology; (iv) requiring the technology accepter to agree to unnecessary conditions for exploiting the technology, including purchasing unnecessary technologies, raw materials, products, equipment, services or accepting extraneous employees; (v) unreasonably restricting the channels or sources for the technology accepter to purchase raw materials, parts and components, products or equipment; and (vi) prohibiting the accepter of the technology from challenging the validity of the intellectual property of the contractual subject technology, or restricting challenges.