

Ten key trends and impact on antitrust civil litigation as China's Supreme People's Court finalized new judicial interpretation

The SPC Interpretation represents a significant move from both procedural and substantive perspectives in antitrust civil litigation.

- Antitrust Civil Litigation
- New SPC Interpretation



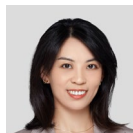
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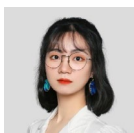
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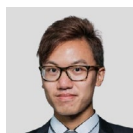
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Executive Summary

On June 24, 2024, the Chinese Supreme People's Court ("SPC") officially issued the *Judicial Interpretation of Antitrust Civil Litigation* (the "**New SPC Interpretation**"). The SPC Interpretation represents a significant move from both procedural and substantive perspectives in antitrust civil litigation as it comprehensively refines the judicial approach since the last interpretation issued in 2012.

The New SPC Interpretation consists of six chapters and 51 articles, covering procedural issues, market definitions, anticompetitive agreements, abuse of dominance, civil liability, and supplementary provisions. It sheds more light on procedural issues such as the burden of proof, the coordination between the judiciary and enforcement agencies, and the consolidation of lawsuits involving the same anticompetitive conduct. It also enhances the overall assessment framework by refining substantive rules such as the criteria for finding anticompetitive behavior and determining market dominance, as well as other aspects such as offering clarifications for civil liabilities and damages calculations.

This article highlights ten key trends and their expected impact on antitrust civil litigation from the three following aspects:

- (1) new trends enhancing interactions between the courts and enforcement authorities;
- (2) clarifications of evidentiary thresholds for parties in different cases;
- (3) new concepts and rules to improve the completeness of the antitrust legal framework.

1. New trends enhancing interactions between courts and enforcement authorities

#1: New follow-on litigation mechanism will alleviate plaintiffs' burden of proof in civil litigation

The New SPC Interpretation specifies the presumptive effect of findings in antitrust administrative decisions in follow-on civil proceedings¹ – if the antitrust enforcement authority has concluded the case, the plaintiff needs only to show evidence of the losses suffered as a result of the anticompetitive conduct. This approach has already been adopted in recent judicial practice. For instance, in 2022, the SPC in the *SAIC-GM* case fully recognized the probative value of a prior antitrust administrative penalty decision in a follow-on action for the purpose of proving the facts related to the case. By recognizing the prior decision, the SPC significantly lessened the plaintiff's burden of proof in establishing the alleged anticompetitive conduct.

Despite the prior adoption of this approach in judicial practice, the New SPC Interpretation is the first time this approach has been recognized at the legislative level. With this legislative recognition, we expect that more individuals and companies will consider follow-on actions to seek compensation for their losses from anti-competitive behavior that has been penalized by the administrative authorities. For companies that have been or will be subject to administrative penalties, they are advised to carefully formulate their defense strategy (e.g. preparing defense arguments and strategizing the disclosure and redaction of important internal documents) in relation to the administrative investigations as it may affect their follow-on actions.

#2: Civil actions may be suspended for an ongoing administrative enforcement proceeding

The New SPC Interpretation provides that a court may suspend civil proceedings if the antitrust enforcement authority has already initiated an official investigation into the same case.² Given that antitrust enforcement authorities have a wide range of investigative powers to collect evidence and determine illegal conduct, the suspension of the civil proceedings can notably lessen the plaintiff's burden of proof in the civil proceedings by enabling them to rely on the findings reached by the antitrust enforcement authority. Duplicated case investigations can thus be avoided by allowing a civil action to be suspended pending the outcome of the administrative proceeding, which will better utilize public resources and enhance the consistency of the outcomes between administrative enforcement proceedings and civil litigation.

In practice, businesses should be aware that the suspension of civil litigation pending the outcome of the antitrust administrative action may delay a plaintiff's claim due to the lengthy and complex nature of antitrust administrative investigations.

It is worth noting that the SPC removed from the New SPC Interpretation a provision originally appearing in the consultation draft that permitted the courts to exchange case leads with the administrative authorities. Without this specific information-sharing provision, it remains unclear how the courts will share information with the administrative authorities in practice.

¹ Article 10 of the New SPC Interpretation

² Article 13 of the New SPC Interpretation

#3 The Procuratorate may initiate civil proceedings on public interest grounds

Consistent with the Anti-Monopoly Law ("AML")³, the New SPC Interpretation specifically empowers the Procuratorate to initiate civil proceedings on grounds that anticompetitive conduct has caused harm to the public interest. ⁴Compared to private plaintiffs, the Procuratorate has greater means and resources to investigate and fact-find, especially in cases with wide public impact. We expect that the Procuratorate will proactively gather evidence of anticompetitive conduct and focus on sectors essential to people's livelihoods, such as the internet, public utilities and pharmaceuticals.

It remains to be seen how antitrust litigation grounded on protecting the public interest can be brought in practice. Many issues are unclear, such as whether the Procuratorate should refer information to the administrative authorities for suspected anticompetitive conduct, how to navigate the potential overlap between the roles of the Procuratorate and the administrative authorities, and whether a Procuratorial action can co-exist with a private action. Businesses should, therefore, remain vigilant in their public communications to avoid attracting scrutiny from the Procuratorate.

2. More clarifications of evidentiary thresholds for parties

#4 Plaintiff and defendant burdens of proof in concerted practice cases – defendants must justify parallel acts with competitors

The New SPC Interpretation requires the court to comprehensively examine all relevant factors when determining concerted practice.⁵ Importantly, the New SPC Interpretation explains that if evidence shows consistent behavior among the defendants, the plaintiff can meet its preliminary evidentiary burden either by providing evidence of contact among the defendants or by explaining the market structure of the relevant market. The burden then shifts to the defendants to explain and justify their consistent behavior, such as by demonstrating that the actions were implemented independently in response to market conditions.

This burden-shift to defendants to justify their consistent behavior highlights the importance for businesses to carefully document commercial decision-making in their daily operations. They should take appropriate administrative steps, such as creating and keeping records that explain the commercial rationale behind the price adjustments, to justify their behavior when prompted.

In addition, the New SPC Interpretation also specifically regulates algorithmic collusion, reflecting the court's concern about the use of data, algorithms, technology, and platform rules to engage in coordinated conduct.⁶

³ Article 60 of the AML

⁴ Article 12 of the New SPC Interpretation

⁵ Relevant factors include the consistency of behavior, market structure, contact and information exchanges between undertakings, and defendants' explanations. (Article 18 of the New SPC Interpretation)

⁶ Article 24 of the New SPC Interpretation

#5 With resale price maintenance presumed to be anti-competitive, the plaintiff's burden of proof is significantly lessened, while the defendant faces a greater challenge in establishing pro-competitive effect

Consistent with the legal position of horizontal anticompetitive agreements, the New SPC Interpretation presumes resale price maintenance ("RPM") to be illegal. Thus, the defendant bears the burden to prove that the agreement does not have the effect of eliminating or restricting competition. By stating this presumption in the New SPC Interpretation, the SPC has finally aligned its position with that of the administrative authority as set out in the AML amendment issued in 2022.

Importantly, the New SPC Interpretation has deliberately removed the provision from the consultation draft requiring the plaintiff to show the anticompetitive effect of non-price vertical monopoly agreements. The reason for this removal was likely to avoid increasing the plaintiff's burden when the legality of non-price vertical monopoly agreements remains unclear and also to preserve flexibility for supporting rules to be enacted in the future.

Finally, the New SPC Interpretation reiterates that the court will balance and consider the pro- and anti-competitive effects of vertical agreements, which applies to adjudicating the legality of all vertical agreements, including those involving resale price restrictions.⁷

#6 New "preliminary" evidentiary threshold lessens plaintiff's burden of proof in abuse of dominance cases

At the outset of an abuse of dominance case, the court must determine whether the defendant has a dominant position in the relevant market, which is typically challenging for plaintiffs to establish with sufficient evidence. To ease the plaintiff's burden, the New SPC Interpretation introduces a new preliminary evidentiary threshold that significantly reduces the plaintiff's burden by focusing on three objective elements based on price, quality and market share.⁸ If the plaintiff provides sufficient evidence to establish these three elements, the court will presume that the defendant is dominant unless the defendant can provide evidence to rebut that presumption.

It should be noted that the new preliminary evidentiary threshold does not equate to an un rebuttable market dominance – the plaintiff is still required to strengthen their evidence of market dominance for the court to conduct a case-by-case analysis considering the specific industry. For example, in an abuse of dominance case in the pharmaceutical industry in 2023, although the defendant had a 100% market share for active pharmaceutical ingredients as an intermediary input, the SPC held that it was necessary to consider the competitive constraints indirectly exerted by different medicines providing the same treatment function in the downstream market when assessing the market power of the manufacturer of the active pharmaceutical ingredients.

#7 Compared to administrative authorities, the courts will take a more sophisticated and systematic approach when evaluating abusive commercial conduct, especially in excessive pricing and refusal to deal

Drawing on established judicial practice, the New SPC Interpretation takes a more sophisticated and systematic

⁷ Pro-competitive effects include avoiding free-riding, fostering intra-brand competition, maintaining brand image, improving service quality and foster innovation. Anti-competitive effects include raising barriers to market entry, impeding more efficient operational means and restricting intra- and inter-brand competition.

⁸ The court will consider whether an undertaking has been able to maintain significantly higher prices, whether the quality of goods has significantly deteriorated without a substantial loss of users, and whether an undertaking has been able to maintain a significantly higher market share.

approach when evaluating abusive conduct, which provides a helpful analytical framework for both courts and litigating parties.

Previously, for unfairly high or low pricing, enforcement authorities largely relied on comparable price analysis across regions and/or over different periods, or by analyzing price changes relative to production costs. This method is particularly questionable in cases concerning industries typically characterized by significant innovation overhead or other sunk costs. In an attempt to address this issue, the New SPC Interpretation sets out a more comprehensive set of economic factors in addition to the comparable price analysis.

These economic factors include the profit margin, costs and reasonable profits; the sale or purchase price of the product in upstream or downstream markets; the sale or purchase price of similar products by other undertakings; and the duration of high or low pricing.⁹ By evaluating these economic factors, the courts are adopting a more comprehensive approach in assessing pricing, which is consistent with recent judicial practice. For instance, in an abuse of dominance case in the pharmaceutical industry in 2023, the SPC examined the impact of a price increase on competition in terms of market competition, innovation, economics and consumer welfare and ultimately held that the defendant's price increase did not constitute unfairly high pricing.

For refusal to deal, the New SPC Interpretation sets out preliminary factors for finding a refusal to deal¹⁰ and provides certain justifications¹¹ for the defendant's conduct. The New SPC Interpretation also specifically sets out the factors for finding a refusal to deal in the context of internet platforms or software, access to technology or data and intellectual property licensing. These factors include feasibility, substitutability, reconstruction cost, degree of dependence, and impact of the refusal.

It is noteworthy that the New SPC Interpretation does not refer to the "essential facilities" doctrine as previously proposed in the consultation draft when determining refusal to deal, which reflects a more cautious approach by the courts. This more cautious approach is consistent with the SPC's 2023 decision in *Hitachi's rare earth case*, where the SPC did not support the lower court's finding that the defendant's patent constituted an "essential facility".

3. New concepts and rules to improve the completeness of the legal regime

#8 Single economic entity and genuine agency are formally recognized

Although the single economic entity concept has appeared in some Chinese court cases, such concept has not been formally recognized by the Chinese courts until the New SPC Interpretation. In line with other major jurisdictions, the New SPC Interpretation relies on "control" as the determinative factor for a single economic entity.¹² The New SPC Interpretation states that a single economic entity will be formed if: (i) an undertaking has the ability to exert decisive influence over other undertakings; or (ii) two or more undertakings are controlled or subject to decisive influence by the same third undertaking. Nonetheless, this provision remains nascent, and we await answers on its

⁹ Article 36 of the New SPC Interpretation

¹⁰ Conduct that will preliminarily constitute a refusal to deal includes outright refusal to trade, imposing trading conditions that are obviously difficult to accept, or causing unreasonably delays. (Article 38 of the New SPC Interpretation)

¹¹ Justifications include force majeure or other objective reasons, the counterparty suffering from deteriorated business conditions, or the counterparty failing to comply with reasonable requests. (Article 38 of the New SPC Interpretation)

¹² Article 19 of the New SPC Interpretation

practical adoption, such as whether the standard of control will align with that in the merger context, what will be the required shareholding level to find control, and what role other factors such as personnel appointments and business relationships will play.

Similarly, the New SPC Interpretation formally recognizes genuine agency. For example, an agency agreement between an undertaking and its agent would not constitute a vertical anticompetitive agreement.¹³ However, the New SPC Interpretation only provides a generic standard under which the agent "*does not assume any substantial commercial or business risk*" under an agency agreement. Without more specific elements being provided, it remains to be seen exactly how a defendant can invoke this agency model as a defense, for example in RPM cases, which presume RPM conduct to be illegal.

#9 Parity clauses by internet platforms may attract court attention

In response to concerns surrounding parity or "most favored nation" (MFN) clauses¹⁴, the New SPC Interpretation designates different situations in which these clauses may constitute anticompetitive conduct: (i) a competitive relationship exists between the platform and the businesses within the platform; (ii) a vertical relationship exists between the platform and the businesses within the platform or involves organizing other businesses to reach anticompetitive agreements; (iii) the platform allegedly abuses its dominance; (iv) the conduct allegedly violates Article 35 of the E-Commerce Law, e.g., imposing unreasonable restrictions, attaching unreasonable conditions or charging unreasonable fees.

According to the AML, parity clauses are not in themselves prohibited in China unless they are a means for maintaining resale price or in conjunction with other anticompetitive conduct, in which case the anticompetitive effect of the parity clauses will be evaluated. According to the New SPC Interpretation, in addition to potentially violating the AML, the MFN clauses may also violate the Chinese E-Commerce Law as an unreasonable restraint of trade. Thus, businesses should be mindful that even in the absence of an anticompetitive effect or a dominant position, MFN clauses may still violate Chinese laws.

#10 Guidance provided on "pay-for-delay" agreements

In recent years, the issue of reverse payment agreements has garnered widespread attention and discussion in many jurisdictions. In 2022, the SPC explicitly stated for the first time that reverse payment agreements can be subject to antitrust scrutiny in patent infringement disputes and outlined its approach in determining whether such agreements constitute anticompetitive conduct. Consolidating the judicial practice since that statement, the New SPC Interpretation¹⁵ specifies that reverse payment arrangements will preliminarily be deemed to constitute anticompetitive agreements if: (i) a patent holder provides significantly unreasonable monetary or other benefits as compensation to a generic drug supplier; and (ii) the generic drug supplier undertakes not to challenge the validity of the patent or undertakes to delay market entry. The parties involved in a reverse payment agreement may defend against an allegation of an anticompetitive agreement by proving the legitimacy of the compensation provided, for instance where the compensation serves as a reasonable resolution to a patent dispute.

¹³ Article 23 of the New SPC Interpretation

¹⁴ These clauses refer to situations where a platform may require businesses within the platform to offer trading terms that are equivalent to or better than the terms on other competitive platforms.

¹⁵ Article 20 of the New SPC Interpretation

China does not have a mandatory *ex ante* antitrust review procedure for patent settlement agreements. The absence of detailed guidance for evaluating patent settlement agreements means that parties need to conduct a careful self-assessment before entering into any settlement agreement, taking special care to ensure they can demonstrate that the terms of any patent settlement arrangement (such as patent settlement fees) can be justified and do not unnecessarily inhibit market entry.

Conclusion

Coinciding with the second anniversary of the AML amendments, the New SPC Interpretation embodies the latest judicial practice and provides important guidance for courts, plaintiffs and defendants in antitrust civil cases, aiming to enhance the quality and consistency of antitrust judicial decisions.

One of the core themes of the New SPC Interpretation is to lessen the burden of proof for plaintiffs in civil proceedings; hence, we expect more individuals and companies alleging losses suffered from anti-competitive conduct to be motivated to seek judicial recourse. On the other hand, businesses can rely on the rule clarifications offered by the New SPC Interpretation to improve their antitrust compliance systems. By properly understanding the New SPC Interpretation, businesses can pre-emptively avoid antitrust claims or, if already involved in antitrust civil proceedings, formulate appropriate response plans to mitigate adverse impacts.

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