# Private Litigation under China's Anti-Monopoly Law: Empirical Evidence and Procedural Developments

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## Abstract

The growing scale of enforcement of China's Anti-Monopoly Law (AML) has drawn the attention of multinational businesses, their legal counsels, and the academic community concerned with the development of this branch of law. While much of the public discourse has evolved around the public enforcement of the AML by the administrative authorities, relatively little attention has been paid to the development of the judicial practice of private anti-monopoly litigation. The present paper is a result of the empirical case law research based on the analysis of the published court judgments guided by the judicial interpretations issued by the Supreme People's Court. The research addresses the procedural law aspects that continue to influence the development of private enforcement of the AML in China: legal standing of the plaintiff, burden and standard of proof, assessment of economic evidence, available judicial remedies, etc. The paper demonstrates how the specified procedural rules have affected the judicial practice and attempts to map the directions for further development of China's legal framework for private enforcement of the AML. The paper also contributes to the broader discussion on the reform of the private enforcement of competition law, which is currently being undertaken in the European Union and other national and regional competition law regimes worldwide.

**Key Words:** Anti-Monopoly Law, Antitrust, China, Competition law, Courts, Private litigation, Civil procedure, Private enforcement, Burden of proof, Standard of proof, Damages

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# I. Introduction

The legal basis for private antitrust enforcement in China is condensed in a single article of the Anti-Monopoly Law (AML), which has been in force since 2008: "Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities."[1] Four years later, in 2012, the Supreme People's Court adopted the Judicial Interpretation on Certain Issues Related to the Adjudication of Civil Disputes based on the AML (Judicial Interpretation),[2] aimed at providing guidance to the courts in handling private antitrust claims. Since then, the attention of scholars and practitioners alike has been focused on the development of both public and private antitrust enforcement in China.[3] The present paper is set to contribute to this discourse by analyzing the empirical evidence of private litigation under AML in the light of the civil procedure rules. It attempts to identify the trends and tendencies in this emerging branch of private litigation in China and to map out the prospect for its likely future development.

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1. Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti- Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 50, http://www.china. org.cn/government/laws/2009-02/10/content_17254169.htm (last visited Jan. 16, 2017) [hereinafter AML]; *see also* PETER J. WANG, COMPETITION LAW IN CHINA: LAWS, REGULATIONS, AND CASES 3-22 (Sebastien J. Evrard, Yizhe Zhang & Baohui Zhang eds., 2014), for the unofficial English translation of the AML.
2. Guanyu Shenli Yin Longduan Xingwei Yinfa de Minshi Jiufen Anjian Yingyong Falü Ruogan Wenti de Guiding (关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规) [Provisions on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Caused by Monopoly] (promulgated by the Jud. Comm. Sup. People's Ct., May 8, 2012, effective June 1, 2012) (China) [hereinafter Judicial Interpretation]. *See also* Zhan Hao, *The Chinese People's Supreme Court Issues the First Judicial Interpretation on the Anti-Monopoly Private Litigation*, E-COMPETITIONS BULL., May 8, 2012; Susan Ning, *The Chinese People's Supreme Court Issues Judicial Interpretation Governing Private Antitrust Litigation*, E-COMPETITIONS BULL., May 8, 2012; Peter J. Wang, Sébastien J. Evrard & Yizhe Zhang, *The Chinese Supreme People's Court Sets Framework for Antitrust Litigation*, E-COMPETITIONS BULL., May 14, 2012.
3. *See, e.g.*, XIAOYE WANG, THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW (2014); THE CHINESE ANTI-MONOPOLY LAW: NEW DEVELOPMENTS AND EMPIRICAL EVIDENCE (Michael Faure & Xinzhu Zhang eds., 2013); CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS (Adrian Emch & David Stallibrass eds., 2013).

It should be noted that the collection and analysis of the published court judgments in private antitrust cases remain a challenging task due to the following factors that affect the availability and completeness of the collected data. First, since the court judgments are not regarded as a formal source of law in China,[4] there has been relatively little attention paid to their publishing and accessibility until recently. In 2010, "in order to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality," the Supreme People's Court issued the Provisions concerning work on case guidance, which provided for the publication of the Guiding Cases that should be used by the courts as a reference in similar cases.[5] It has been subsequently clarified that the Guiding Cases should be only quoted among the reasons for adjudication by the referring court and not as a legal basis for its adjudication.[6] Up until now, the Supreme People's Court has published 77 Guiding Cases.[7] Although none of the Guiding Cases concern the adjudication under the AML,[8] they do provide valuable insights into various civil liability issues, such as the legal standing of the plaintiff, judicial remedies, and calculation of damages that have direct relevance to the private litigation under the AML.[9] Second, while the publication of the court judgments is still a work in progress, they are currently accessible throughout various official and unofficial sources: the

4. *See generally* BENJAMIN VAN ROOIJ, ANNEMIEKE VAN DEN DOOL & WILLIAM JING GUO, LAWMAKING AND SOURCES OF LAW IN CHINA (2017).
5. "Anjian Zhidao Guiding" Guiding ("案件指导规定" 规定) [Provisions on the Regulations for the Guidance of Cases] (promulgated by the Judicial Comm. Sup. People's Ct., Nov. 15, 2010, effective Nov. 26, 2010), art. 7, https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/guiding-cases-rules-20101126-english.pdf (last visited Jan. 16, 2017) (China).
6. "Anli Zhidao Gongzuo Guiding" Xize Shishi Xize ("案例指导工作规定" 细则实施细则) [Detailed Implementing Rules on the Provisions on the Work of Case Guidance] (promulgated by Judicial Comm. Sup. People's Ct., Apr. 27, 2015, effective May 13, 2015), art. 10, https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/10/guiding-cases-rules-20150513-english.pdf (last visited Jan. 16, 2017) (China).
7. *Zhidao Anli* (*指导案例*) [*Guidance Case*], ZHONGHUA RENMIN GONGHEGUO ZUIDA RENMIN FAYUAN (中华人民共和国最高人民法院) [SUP. PEOPLE'S CT. OF CHINA], http://www.court.gov.cn/shenpan-gengduo-77.html (last visited Jan. 16, 2017).
8. Among the 77 Guiding Cases, there are 36 civil cases, but none of them concerns private antitrust litigation.
9. *See* Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121, 121-39 (2014); Jocelyn E.H. Limmer, *China's New "Common Law": Using China's Guiding Cases to Understand How to Do Business in the People's Republic of China*, 21 WILLAMETTE J. INT'L LAW & DISP. RESOL. 96, 96-133 (2013); Deng Jin-Ting, *The Guiding Case System in Mainland China*, 10 FRONTIERS L. CHINA 449, 449-74 (2015).

Supreme People's Court's China Judgments Online,[10]China Law Info database of the Peking University,[11] various commercial legal resources as well as the official websites of individual courts. Third, since the quality of legal reasoning in some judgments is unsatisfactory, the courts are often unwilling to publish them, or if published, they present little value for the qualitative legal research.[12] Fourth, some AML-based civil cases concern the state-owned enterprises (SOEs) and may involve information that is regarded as a state secret.[13] In order to increase the transparency of the judicial decision making, the Supreme People's Court has continuously (in 2010,[14] 2013,[15] and 2016[16]) instructed the lower courts to publish their judgments on the internet. These regulations explicitly exempted the judgments containing state secrets from publication. Due to the above mentioned factors, the empirical data collected for the purposes of the present study is based on approximately 50 private

10. CHINA JUDGMENTS ONLINE, http://wenshu.court.gov.cn (establishing a database by the Supreme People's Court in 2013 with an objective to publish all valid judgments within three years); *see* Liu Shu-De (刘树德), *Zuigao Renmin Fayuan Sifa Guize de Gongji Moshi – Jian Lun Anli Zhidao Zhidu de Wanshan* (最高人民法院司法规则的供给模式-兼论案例指导制度的完善) [*The Supplying Mode of the Judicial Rules of the Supreme People's Courts – On Perfection of Case Guidance System*], 9 QINGHUA FAXUE (清华法学) TSINGHUA L. REV. 81, 90 (2015).
11. BEIDA FALÜ XINXIWANG (北大法律信息网) [BEIJING U. LEGAL INFO. NETWORK], http://www.chinalawinfo.com.
12. *See* Shumei Hou & Ronald C. Keith, *A New Prospect for Transparent Court Judgment in China?*, 20 CHINA INFO. 61, 61-86 (2012); Jiang Da-Xing, *'Words of Judges': Problems of Ideology, Special Knowledge, and Explanation Techniques*, CHINESE J. L. 43, 43-47 (2011).
13. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated Nat'l People's Cong., Apr. 9, 1991, amended Aug. 31, 2012, effective Jan. 1, 2013), art. 156 (China) (precluding public access to judgments containing state secrets, business secrets and personal privacy data).
14. Guanyu Renmin Fayuanzai Hulianwang Gongbu Caipan Wenshu de Guiding (关于人民法院在互联网公布裁判文书的规定) [Provisions on the Issuance of Judgments on the Internet by the People's Courts] (promulgated by the Judicial Comm. Sup. People's Ct., Nov. 21, 2010).
15. Zuigao Renmin Fayuan guanyu Renmin Fayuanzai Hulianwang Gongbu Caipan Wenshu de Guiding (最高人民法院关于人民法院在互联网公布裁判文书的定) [Provisions on the Issuance of Judgments on the Internet by the People's Courts] (promulgated by Judicial Comm. Sup. People's Ct., Nov. 13, 2013, effective Jan. 1, 2014).
16. Dui Hua Foundation, *China: SPC Issues New Regulations on the Release of Court Judgments Online*, HUM. RTS. J. (Sept. 14, 2016), http://www.duihuahrjournal.org/2016/09/china-spc-issues-new-regulations-on.html (referring to the Regulations Regarding the Release of Court Judgments Online (promulgated by the Judicial Comm. Sup. People's Ct., July 25, 2016, effective Oct. 1, 2016)) (last updated Sept. 30, 2016) (last visited Jan. 16, 2017) (China).

antitrust cases that have been published by the respective courts.[17] This number appears to be lower than the generic statistics reported by various official and unofficial sources.[18]

The present paper provides a quantitative and qualitative assessment of the collected jurisprudence in the light of the civil procedure rules applicable to the private anti-monopoly litigation in China. The discussion is structured as follows. Section II provides a general overview on the territorial and subject matter jurisdiction over private AML disputes exercised by the Chinese courts. Section III addresses the connection between public and private AML enforcement on the example of the follow-on and stand-alone civil lawsuits. Section IV focuses on the legal standing of the plaintiff – basis requirements that a party has to meet in order to qualify as a proper plaintiff in private AML litigation. Section V concerns with the burden and standard of proof incumbent upon the plaintiff in order to succeed in a civil case under the AML. Section VI briefly addresses the issues related to quantification of damages in private AML cases. The trends and tendencies in China's private AML enforcement are summarized in the concluding Section VII of the paper.

17. This number includes a larger number of court judgments because in some cases the first instance ruling was appealed and dismissed by a higher court and then re-adjudicated. All of the resulting court judgments were counted as a part of a single case.
18. For example, according to the report of the Supreme People's Court, by the end of 2011, there were a total of 61 private AML cases accepted by the courts, of which 53 cases were completed; *see* Zhang Xianming (张先明), *Zuigao Fayuan Chutai Fan Longduang Anjian Sifa Jieshi* (最高法院出台反垄断案件司法解释) [*Supreme Court Issued an Antitrust Case Judicial Interpretation*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. NEWS] (May 8, 2012), http://rmfyb.chinacourt.org/paper/html/2012-05/09/content_44542.htm?div=-1 (last visited Feb. 21, 2017); *See also* Dacheng Fan Longduan Tuandui (大成反垄断团队) [Dacheng Anti-Monopoly Team], *2015 Zhishi Chanquean Yu Fan Longduan Gaofeng Luntan: Quanfangqui Pilu Fan Longduan Zhifa Shuju* (2015 知识产权与反垄断高峰论坛：全方位披露反垄断执法数据) [*2015 Intellectual Property and Anti-Monopoly Summit Forum: Overall Disclosing Anti-Monopoly Enforcement Data*], ZHONGHUA RENMIN GONGHEGUO GUOJIA FAZHANHE GAIGE WEIYUANHUI (中华人民共和国国家发展和改革委员会) [NAT'L DEV. & REFORM COMMISSION OF CHINA] (Sept. 14, 2015), http://mp.weixin.qq.com/s?__biz=MzA3NTMwMTkxNA==&mid=214213189&idx=1&sn=da3a39babd767c242c949dbb3d0b877e&3rd=MzA3MDU4NTYzMw==&scene=6#rd (last visited Feb. 21, 2017), for a production of following private AML enforcement statistics by the 2015 Intellectual Property and Antitrust Forum: 10 cases in 2008/2009; 33 in 2010; 48 in 2011; 55 in 2012; 72 in 2013; 86 in 2014.

## II. Jurisdiction over Private AML Disputes

The Judicial Interpretation allocated the first instance jurisdiction to hear private AML disputes to the following courts: "intermediate people's courts of cities where the capital of a province, autonomous region, provincial level municipality, or specifically designated city in the state plan is located, or at other intermediate people's courts designated by the Supreme People's Court."[19] The capital cities of the provinces, autonomous regions, and province level municipalities (or municipalities under the direct control of the Central Government: Beijing, Tianjin, Shanghai, and Chongqing) are 32 in number. Normally, each capital city of the province and autonomous region has one intermediate people's court (Guangzhou has two, including the Intellectual Property Court), while municipalities directly under the Central Government's control have more than one intermediate court. For example, Beijing has four intermediate courts (including the Intellectual Property Court), Chongqing has 5, Tianjin has 2, and Shanghai has 4 (including the Intellectual Property Court). Therefore, in total, there are 44 intermediate courts that have jurisdiction over the AML civil cases. The "specifically designated city in the state plan" indicates the city with special regulations concerning certain aspects of social and economic development. Currently there are five such cities: Dalian, Qingdao, Ningbo, Xiamen, and Shenzhen.

The Judicial Interpretation also provides that upon authorization by the Supreme People's Court, the lower level people's courts may exercise jurisdiction over first instance civil monopoly cases.[20] In June 2015, the Supreme People's Court has authorized 165 lower level courts to exercise jurisdiction over the intellectual property (IP) cases, including AML cases.[21] One of the reasons why IP courts have jurisdiction over AML-based private disputes is because in China, "disputes over monopoly" are included in the cause of civil action titled "disputes related to intellectual property rights and

19. Judicial Interpretation, *supra* note 2, art. 3; *see* WANG, *supra* note 3, at 243-48.
20. Judicial Interpretation, *supra* note 2, art. 3.
21. Minshi Anjian Anyou Guiding (民事案件案由规定) [Provisions on Causes of Action for Civil Cases] (promulgated by Judicial Comm. Sup. People's Ct., Feb. 18, 2011, effective Apr. 1, 2011) (China).

competition" under the Supreme People's Court's 2011 Provisions on the Causes of Civil Action.[22]

The Judicial Interpretation has also regulated the transfer of cases from one court to another in situations where two or more plaintiffs have filed their claims against the same defendant based on the same monopoly conduct with different courts having jurisdiction over the matter.[23] In such cases, the court that accepts an AML-based civil case and learns about the already commenced litigation on the same subject should transfer the case to the court that earlier asserted its jurisdiction. The Supreme People's Court also has instructed the lower courts to combine the claims against the same defendant based on the same monopoly conduct in joint trials.[24]

For example, in 2013, Guangzhou Intermediate People's Court merged two lawsuits filed by different plaintiffs against Guangdong Yantang Milk Co. for the alleged abuse of the dominant position in the market for the supply of dairy products in the form of refusal to deal and differential treatment between contract-based deliverymen and its own employees.[25] Guiyang Intermediate People's Court composed a similar joint trial in 2014 when it merged two cases where different plaintiffs lodged AML-based claims against Zunyi Railway Co. and Chengdu Railway Bureau for the alleged monopolistic pricing and restrictions on trading which, according to the plaintiffs, constituted an abuse of dominant market position.[26]

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22. Provisions on Causes of Action for Civil Cases, pt. 16 ("Disputes over monopoly" covers the following categories of disputes: (1) Disputes over monopoly agreement (disputes over horizontal monopoly agreement, disputes over vertical monopoly agreement); (2) Disputes over abuse of dominant market position (disputes over monopolistic pricing, disputes over predatory pricing, disputes over refusal to deal, disputes over limitation on trading, disputes over tie-trading, disputes over differential treatment); (3) Disputes over concentration of undertakings). *See also* YILIANG DONG, HONGYAN LIU & KNUT B. PISSLER, THE 2011 REGULATION ON THE CAUSES OF CIVIL ACTION OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA: A NEW APPROACH TO SYSTEMISE AND COMPILE THE STATUS QUO OF THE CHINESE LEGAL SYSTEM (2012); Tian Junwei v. Carrefour China Inc., (Beijing High People's Ct. June 18, 2015) (For example, in the following case the defendant filed an objection to the jurisdiction of Beijing IP Court. Both the first instance court and the second instance court clearly upheld the jurisdiction of the IP court in AML-related civil cases.).
23. Judicial Interpretation, *supra* note 2, art. 6.
24. *Id.*
25. Chen Guiying v. Guangdong Yantang Milk Co., (Guangdong Higher People's Ct. Oct. 31, 2013); Chen Wenjian v. Guangdong Yantang Milk Co., (Guangzhou Interm. People's Ct. Feb. 1, 2013).
26. Jiang Yugui v. Zunyi Ry. Co., (Guiyang Interm. People's Ct. Dec. 20, 2014); Zhao Xing v. Zunyi Ry. Co., (Guiyang Interm. People's Ct. Dec. 15, 2014).

It should be emphasized, however, that the above mentioned joint trials do not constitute class action litigation that is well-known in a number of Western jurisdictions.[27] One of the pre-conditions for the joint trial is the launch of litigation by more than one plaintiff, which severely restricts the possibility for collective litigation under the AML.[28] The Civil Procedure Law provides for two types of representative litigation: with an identified[29] and unidentified[30] number of persons. Such lawsuits can be launched in any field of civil litigation and it has been used for consumer disputes including contractual, tort, and labor relations. In theory, the representative litigation system could be applied in AML cases. Nevertheless, the research of the available jurisprudence has yielded no cases that would be based on the representative litigation system with a certain number of persons. If the lawsuit were filed on behalf of an uncertain number of consumers whose interests have been injured by the monopoly conduct, it would fall into the category of public interest litigation.[31] The commencement of the public

27. *See, e.g.*, Francesco Denozza & Luca Toffoletti, *Class Actions in Private Enforcement of EC Antitrust Law: The Commission Green Paper*, *in* THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE: LESSONS FROM AMERICA 239 (Juergen G. Backhaus, Alberto Cassone & Giovanni B. Ramello eds., 2012).
28. *See* Jiang Zhe (蒋喆) & Ma Yun-He (马云鹤), *Fan Longduanfa Gongli Jiuji de Kunjing Yu Sili Jiuji de Chulu* (*反垄断法公力救济的困境与私力救济的出路*) [*Dilemma of Public Enforcement and Way of Private Enforcement*], 37 SHENYANG SHIFAN DAXUE XUEBAO (SHEHUI KEXUE BAN) (沈阳师范大学学报 (社会科学版)) [J. SHENYANG NORMAL U.] 36, 38 (2013).
29. Civil Procedure Law art. 53 ("If the persons comprising a party to a joint action is large in number, the party may elect representatives from among themselves to act for them in the litigation. The acts of such representatives in the litigation shall be valid for the party they represent. However, modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subject to the consent of the party they represent.") In order to prevent the abuse of representation, the law has regulated that when it comes the disposal of the claim, it needs the consent of all participants, which has severely restricted the authority of the representative and increased the cost and administrative burden of the representative litigation.; *see also* Liu Si-Qin (刘思芹), *Woguo Daibiaoren Susong Zhidu Zhi Lifa Wanshan* (*我国代表人诉讼制度之立法完善*) [*Legislative Perfection of Chinese Representative Litigation System*], 2 FAZHI YU SHEHUI (法治与社会) [LEGAL SYS. & SOC'Y] 49, 49 (2015).
30. Civil Procedure Law art. 55 ("Relevant bodies and organizations prescribed by the law may bring a suit to the people's court against such acts as environmental pollution, harm of the consumer's legitimate interests and rights and other acts that undermine the social and public interest.").
31. *See, e.g.*, Beijingshi Diyi Zhongji Renminfayuan Zhishichanquan Ting (北京市第一中级人民法院知识产权庭) [IP Tribunal of Beijing First Intermediate People's Court], *Fanlongduan*

interest litigation is currently limited to specific fields (environmental law and consumer protection law) and to a circle of qualified plaintiffs (such as consumer associations,[32] public prosecutors).

## III. Public and Private Enforcement of Anti-Monopoly Law: "Follow-On" Actions and Independent Civil Litigation

The anti-monopoly law in China can be enforced via both public/administrative (by the three anti-monopoly enforcement authorities: the National Development Reform Commission (NDRC) – price-related monopoly conduct; the State Administration for Industry and Commerce (SAIC) – non-price-related monopoly conduct; the Ministry of Commerce (MOFCOM) – merger control)[33] and private/civil (private litigation under AML) procedural frameworks. In regard to private enforcement, the Judicial Interpretation allows the plaintiffs to file the civil lawsuit either independently or after "the decision convicting the monopoly conduct by the anti-monopoly

*Minshisusong Zhong Daibiaoren Susong Zhidu de Shi Yu Wanshan* (*反垄断民事诉讼中代表人诉讼制度的是与完善*) [*Application and Performing of the Representative Litigation System in Anti-Monopoly Civil Litigation*], FALÜ SHIYONG (法律适用) [J. L. APPLICATION] 103, 103-107 (2010).

32. Zhonghua Renmin Gongheguo Xiaofei Zhe Quanyi Baohu Fa (中华人民共和国消费者权益保护) [Law on the Protection of Consumer Rights and Interests (2013 Amendment)] (promulgated by Standing Comm. Nat'l Peopl's Cong., Oct. 25, 2013, effective Mar. 15, 2014), art. 47 (China) (prescribing the Consumer Association of China and the consumer associations established in the provinces, autonomous districts, and municipalities directly under the Central Government are authorized to launch lawsuits for protection of legal rights and legitimate interests of consumers). *See also* Zuigao Guanyu Shenli Xiaofei Minshi Gongyi Susong Anjian Shiyong Falü Ruogan Wenti de Jieshi (最高关于审理消费民事公益诉讼案件适用法律若干问题的解释) [Interpretation on Several Issues Concerning Application of Laws in the Hearing of Consumer-Related Civil Public Interest Litigation] (promulgated by Judicial Comm. Sup. People's Ct., Apr. 24, 2016, effective May 1, 2016) (China); Richard W. Wigley, *China's National People's Congress and Supreme People's Court Issue Amendments and Interpretations, Respectively, Leading to Increases in Public Interest Class Action-Type Litigation*, E-COMPETITIONS BULL., Jan. 31, 2015.

33. *See also* Alexandr Svetlicinii & Juan-Juan Zhang, *The Competition Law Institutions in the BRICS Countries: Developing Better Institutional Models for the Protection of Market Competition*, 2 CHINESE POL. SCI. REV. 85, 85-100 (2017).

enforcement authority comes into effect."[34] As a result, the availability of both "follow-on" and "stand-alone" private litigations under AML raises a number of issues related to the relationship between public and private enforcement, their potential overlaps, complementarity, and conflicts.

A cursory overview of the types of cases investigated by the Chinese anti-monopoly enforcement authorities demonstrates that public enforcement has been essentially preoccupied with the prosecution of anti-competitive agreements. The court practice, on the other hand, indicates that the majority of the AML-based civil litigation cases concern the alleged abuse of market dominance.

Table 1: Public and Private AML Enforcement[35]

| Enforcement authority | Type of monopoly conduct | 2008-2012 | 2013 | 2014 | 2015 | Total |
|---|---|---|---|---|---|---|
| NDRC | Monopoly agreement | 9 | 6 | 8 | 3 | 26 |
| | Abuse of dominant market position | 1 | 1 | 2 | 1 | 5 |
| SAIC | Monopoly agreement | 8 | 4 | 3 | 4 | 19 |
| | Abuse of dominant market position | 0 | 0 | 5 | 9 | 14 |
| Courts | Monopoly agreement | 2 | 1 | 2 | 0 | 5 |
| | Abuse of dominant market position | 9 | 5 | 7 | 12 | 36 |

Source: Beijing Bar Association, Competition and Anti-Monopoly Law Committee, *2013 Annual Report of Competition Law* (26 January 2014); Beijing Bar Association, Competition and Anti-Monopoly Law Committee, *2014 Annual Report of Competition Law* (21 April 2015); Beijing Bar Association, Competition and Anti-Monopoly Law Committee, *2013 Annual Report of Competition Law* (12 March 2016); China Judgments Online, http://wenshu.court.gov.cn; Bei Da Fa Yi, http://www.lawyee.net/ Case/ Case.asp; PKU Law, http://www.pkulaw.cn/Case/; Itslaw, http://www.itslaw. com/bj; LexisNexis, https://hk.lexiscn.com; Westlaw, http://app.westlawchina.com/, and Wolters Kluwer, http://www.wkinfo.com.cn.

34. Judicial Interpretation, *supra* note 2, art. 2.

35. The investigated cases of the NDRC and SAIC include only published cases on the official websites of the respective authorities. It should be noted that administrative investigations often concern numerous undertakings. The court cases included in the table refer to the AML-based cases completed with the judicial decision (judgment or order) and published in various databases.

Thus, the enforcement practice indicates that there is currently little overlap between the two modes of AML enforcement. Nevertheless, the availability of "stand-alone" claims maintains the risk of concurrent proceedings and raises the need for coordination between public and private enforcement. The most well known example of such coordination is the abuse of dominance litigation pursued by Huawei against IDC.[36] Huawei claimed that IDC implemented discriminatory pricing for its patented wireless communication technology, which violated the FRAND commitments and placed Huawei at a competitive disadvantage vis-a-vis its competitors.[37] While Huawei launched private AML litigation against IDC in China (first before the Shenzhen Intermediate People's Court and then on appeal before the Guangdong Higher People's Court), it also urged the NDRC to launch an investigation against IDC. While Huawei prevailed on both fronts, IDC conceded and the dispute was concluded with a settlement between the parties and the acceptance of IDC's commitments by the NDRC.

Table 2: *Huawei v IDC* (public and private enforcement)

| Date | Actions |
|---|---|
| July 2011 | IDC filed a lawsuit against Huawei in Delaware Court for multiple patent infringements. IDC also filed a complaint against Huawei before the US International Trade Commission (ITC) to launch a Section 337 investigation. |
| August 2011 | ITC began its Section 337 investigation. |
| December 2011 | Huawei launched a lawsuit against IDC before Shenzhen Intermediate People's Court. |
| February 2013 | Huawei won the lawsuit.[38] Both parties appealed to Guangdong Higher People's Court. |
| May 2013 | Huawei reported to NDRC that IDC abused its dominant position. |
| June 2013 | NDRC launched an investigation against IDC concerning the alleged abuse of dominant position. |

36. Huawei v. IDC, (Guangdong Higher People's Ct. Oct. 21, 2013).
37. *See generally* Jyh-An Lee, *Implementing the FRAND Standard in China*, 19 VAND. J. ENT. & TECH. L. 37, 37-85 (2016).
38. *See* Meng Yanbei, *The Shenzhen Intermediate Court Decides that a Telecom Company Abused its Patent Rights by Requiring to Pay Excessive Royalties for Essential Patents for Mobile Telephone Technology (Huawei / America IDC)*, E-COMPETITIONS BULL., Feb. 2013.

| Date | Actions |
|---|---|
| June 2013 | ITC decided that Huawei didn't infringe the patent rights of IDC.[39] |
| October 2013 | Huawei won the lawsuit before Guangdong Higher People's Court.[40] |
| January 2014 | The parties concluded a conciliation agreement and filed a motion to NDRC to terminate the investigation. |
| February 2014 | NDRC accepted the commitments offered by IDC and suspended the investigation.[41] |

One of the crucial relationships between public and private enforcement of AML is the possibility of using evidence obtained through the investigations of the AML enforcement authorities before the courts in private litigation. As far as the follow-on claims are concerned, both the AML and the Judicial Interpretation are silent on the evidentiary role of the administrative agency's infringement decisions when used in the private anti-monopoly litigation. An earlier draft of the Judicial Interpretation, released by the Supreme People's Court for public consultation, included the following provision:

> *"Where a party alleges, in a civil dispute case involving monopoly, that the facts as affirmed in the legally effective judgment of a people's court is justified, the party shall not be required to bear the burden of proof in respect of the allegation, unless the other party has contrary evidence sufficient to reverse the allegation."*[42]

39. Certain Wireless Devices with 3G Capabilities and Components Thereof, Inv. No. 337-TA-800, (Dec. 19, 2013), https://usitc.gov/secretary/fed_reg_notices/337/337_800_notice 12192013sgl.pdf(last visited Jan. 16, 2017).
40. *See* David Stallibrass, *The Guangdong High Court Upholds Shenzhen Intermediate Court Decision in Abuse of Dominance Case Involving IP Rights (Huawei / Interdigital)*, E-COMPETITIONS BULL., Oct. 28, 2013; Zhan Hao & Song Ying, *The Guangdong High Court Settles a High Profile Case Dealing with Refusal to Licence Intellectual Property, Which Must be Taken with Caution (Huawei / IDC)*, E-COMPETITIONS BULL., Oct. 28, 2013.
41. Zhao Jianguo & Zhu Wenming, *China Suspends Anti-Monopoly Investigation Against IDC*, CHINA IP NEWS (June 4, 2014), http://www.cipnews.com.cn/show Article_syzk.asp? Articleid=31870 (last visited Jan. 16, 2017).
42. Guanyu Shenli Longduan Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Guiding (Zhengqiu Yijian Gao) (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)) [Provisions on Several Issues Concerning the Application of Law in the Trial of Monopoly Civil Dispute Cases (Draft for Comments)] (promulgated by Judicial Comm.

The specified provision was aimed at establishing a sort of judicial precedent that would alleviate the burden of proof on the subsequent plaintiffs claiming the existence of an anti-monopoly conduct that had already been proven in a preceding litigation. This provision would be especially relevant for Chinese private anti-monopoly litigation due to the absence of the collective actions mechanism that would allow numerous plaintiffs to pursue a joint claim against the same defendant.

A similar rule was envisaged for the decisions of the anti-monopoly enforcement authorities: "With regard to the facts as affirmed in a decision in which the anti-monopoly law enforcement agency finds that a monopoly behavior has occurred and the effects of which have been ascertained, the provision of the preceding paragraph shall apply as a reference."[43] Both of the above mentioned provisions have been deleted from the final text of the Judicial Interpretation, which has left the evidentiary weight of the court judgments and administrative decisions in the subsequent anti-monopoly litigation and follow-on suits unclear. In the absence of the specific evidentiary guidelines for the anti-monopoly litigation, the plaintiffs have to follow the general rules on the assessment of evidence in civil proceedings. Thus, according to the Supreme People's Court's Provisions on Evidence in Civil Proceedings, the facts determined or conclusions made by the administrative authorities do not fall within the category of evidence that exempts the respective party from the burden of the proof.[44] In addition, Article 77 of the same Provisions provided that "the probative force of public documentary evidence produced by a State organ or social organization according to its function and power is more powerful than that of other documentary evidence."[45]

The following cases illustrate the attempts of the plaintiffs to use the facts

Sup. People's Ct., Apr. 25, 2011), art 11 (China).

43. *Id.*

44. Minshi Susong Zhengju de Guiding (民事诉讼证据的规定) [Provisions on Evidence in Civil Proceedings] (promulgated by Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002), art. 9 (China) ("For any of the following facts, a party concerned shall be exempt from the burden of proof: (1) a well-known fact; (2) a law of nature; (3) a fact that can be presumed according to a legal provision or a known fact and a rule of thumb; (4) a fact confirmed by legally effective ruling of the people's court; (5) a fact confirmed by an effective arbitration award of an arbitral institution; and (6) a fact certified by a valid notarized document. Items (1), (3), (4), (5) or (6) of the preceding paragraph shall not apply if a party concerned produces evidence to the contrary that repudiates the fact mentioned therein.").

45. *Id*. art. 77.

established by the anti-monopoly enforcement authorities as evidence in their own private anti-monopoly litigations. In 2011, the NDRC was investigating whether two Chinese state-owned companies, China Telecom and China Unicom, have engaged in abusive price-related practices on the broadband Internet market.[46] The case received wide publicity and was labeled as a "litmus test on how the AML will be applied to state-owned enterprises (SOEs) and their role in China's regulatory reform."[47] After receiving the proposed commitments by China Telecom aimed at the modification of its current practices, the NDRC eventually suspended the investigation. In 2013, Yang Zhiyong, a private plaintiff, launched a lawsuit against China Telecom before the Shanghai First Intermediate People's Court. The plaintiff alleged that China Telecom's pricing policies for broadband access, mobile phone, and other telecom services were excessive, discriminatory, and an abuse of dominant position. Since neither the dominant position nor the alleged abuse had been confirmed by the NDRC, both the first instance and the appellate court (Shanghai Higher People's Court) concluded that the plaintiff failed to meet the requisite standard of proof and dismissed the case.[48]

In another case, a private plaintiff, Tian Junwei, was successful in using the infringement decision issued by the NDRC against six infant formula manufacturers, penalizing them for the resale price maintenance practices,[49] as evidence in a private litigation suit.[50] Both the Beijing IP Court and the

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46. *See, e.g.*, Susan Ning, *The Chinese National Development and Reform Commission (NDRC) Confirms Investigation for Abuse of Dominance Against Two Giant State-Owned Telecommunication Operators (China Telecom, China Unicom)*, E-COMPETITIONS BULL., Nov. 14, 2011; Meng Yanbei, *The China's Bureau of Price Supervision and Anti-monopoly of NDRC Initiates Antitrust Investigation Case Against Telecom Operators on the Basis of Art. 17, 18 & 19 AML (China Telecom and China Unicom)*, E-COMPETITIONS BULL., Dec. 2012.

47. Allan Fels, Xiaoye Wang & Jessica Su, *The Chinese National Development and Reform Commission's Investigates Alleged Discriminatory Pricing of Network Access Fees (China Telecom and China Unicom)*, E-COMPETITIONS BULL., Dec. 2, 2011.

48. Yang Zhiyong v. China Telecomm., (Shanghai Higher People's Ct. Dec. 14, 2015).

49. *See, e.g.*, Hao Qian, *The Chinese NDRC Imposes Record Fines on Six Major Infant Formula Makers for Vertical Price-Fixing Practices (Biostime, Mead Johnson, Dumex, Abbott, FrieslandCampina, Fonterra)*, E-COMPETITIONS BULL., Aug. 7, 2013; Susan Ning, *The Chinese NDRC Imposes Fines on Several Foreign Infant Milk Formula Companies for Price Fixing (Nestlé, Abbott Laboratories)*, E-COMPETITIONS BULL., Aug. 7, 2013; Michael Gu, *The Chinese NDRC Announces Penalties of CNY 668 Million Imposed for an Agreement on Resale Price Maintenance on the Market for Baby Milk Formula*, E-COMPETITIONS BULL., Aug. 7, 2013.

50. Tian Junwei v. Carrefour China Inc., (Beijing High People's Ct. June 18, 2015).

Beijing Higher People's Court accepted the facts confirmed in the NDRC's investigation as admissible evidence in the private anti-monopoly dispute.

Given the above mentioned distinctions in the focus of the AML enforcement authorities' investigations and the private AML litigation, the overlap between public and private enforcement of the AML remains limited. Despite the notable examples of coordinated public and private enforcement proceedings like the Huawei case, the limited transparency of the administrative authorities' investigations and the impossibility of launching collective "class action"-style lawsuits will continue to separate the two procedural venues for AML enforcement.

## IV. Legal Standing of the Plaintiff

One of the immediate obstacles that private plaintiffs would encounter on their way towards judicial remedies in anti-monopoly disputes is the qualification as a proper plaintiff, which is also regarded as legal standing in Western legal systems. The Judicial Interpretation broadly indicates that "natural persons, legal persons or other organizations" can act as plaintiffs in private anti-monopoly litigation.[51] In defining a qualified plaintiff, the Chinese Civil Procedure Law stipulates that "the plaintiff must be a natural person, legal person or any other organization that has a direct interest in the case."[52]

In the field of competition law, the Chinese scholars have often equated "direct interest" with "direct damage."[53] For example, some authors distinguished

51. *See* Judicial Interpretation, *supra* note 2, art. 1.
52. *See* Civil Procedure Law art. 119.
53. *See, e.g.*, Qi Ding (齐玎), *Fan Longduan Siren Susong Yuangao Zige Zhi Bijiao* (*反垄断私人诉讼原告资格之比较*) [*Comparison of Plaintiff Qualifications in Anti-Monopoly Litigation*], 6 MINSHI CHENGXUFA YANJIU (民事程序法研究) [CIV. PROC.] 54, 61 (2011); Wan Zong-Zan (万宗瓒), *Lun Fan Longduan Siren Susongzhong Yuangao Zige de Kuozhang – Jiyu Yuwai Jingyan de Falü Jiejian* (*论反垄断私人诉讼中原告资格的扩张-基于域外经验的法律借鉴*) [*On the Extent of Plaintiff Qualifications in Private Anti-Monopoly Litigation – Law Reference on Basis of Foreign Experiences*], 1 DONGNAN XUESHU (东南学术) [SOUTHEAST ACAD. RES.] 169, 171 (2013); Luo Yun-Xiang (罗云香), *Lun Fan Longduan Siren Susong Yuangao Zige de Eryuan Hua* (*论反垄断私人诉讼原告资格的二元化*) [*Dualization of Plaintiff Qualification in Private Anti-Monopoly Litigation*], 8 SHENYANG YONGYEDAXUE XUEBAO (SHEHUIKEXUE BAN) (沈阳工业大学学报(社会科学版)) [J. SHENYANG U. OF TECH.] 559, 559-62 (2015).

between direct and indirect purchasers when attempting to define the legal standing of different types of plaintiffs in private antitrust litigation.[54] It was also noted that while the direct purchasers may suffer from the monopoly price, they could also pass these damages onto the final consumer by increasing the price of their own products affected by the upstream monopoly pricing.[55] In such situations, as argued by some Chinese scholars, the indirect purchasers also suffer damages caused by the monopoly pricing. This means that the indirect purchasers should also qualify as eligible plaintiffs.[56] It was argued that both direct and indirect purchasers should be allowed to claim damages in antitrust cases, simultaneously allowing the defendants to apply "passing-on defense" in order to limit the extent of the defendant's liability.[57]

The equation between "direct interest" and "direct damage" has been implicitly supported by judicial practice, where the courts have primarily examined the legal relationship between plaintiff and defendant as well as the existence of any "direct damage" that the plaintiff suffered due to the alleged anti-competitive conduct of the defendant. For example, in a 2016 case concerning an alleged anti-competitive agreement concluded between the Guangdong Football Association and one of the private service providers, the court held that the plaintiff was merely a football fan that could not suffer any "direct damages" from the defendants' behavior and, therefore, should be disqualified from the case.[58] The same conclusion was reached by the court in the above mentioned case against *China Telecom* where the customer complained about the discriminatory charges applied to the residential and

54. *See* Liu Fei (刘菲), *Jianli Woguo Fan Longduan Jianjie Goumaizhe SuSong Jizhi – Jiyu Duimei Ou Jianjie Goumaizhe Guize de Pingxi* (*建立我国反垄断简介购买者诉讼机制-基于对美欧间接购买者规则的评析*) [*To Create Chinese Anti-Monopoly Indirect Purchaser Litigation Mechanism-Analysis on Basis of The Indirect Purchaser Rules of USA and EU*], 5 FAZHI YU JINGJI (法制与经济) [LEGAL & ECON.] 167, 167-70 (2011).

55. *See* Zhang Ming (张明), *Fan Longduan Minshisusong Zhongjian Jie Goumaizhe Yuangao Zige Wenti Yanjiu* (*反垄断民事诉讼中间接购买者原告资格问题研究*) [*Study on the Plaintiff's Qualifications in Civil Anti-Monopoly Cases*], 4 QIQIHAER DAXUE XUEBAO (ZHEXUE SHEHUIKEXUE BAN) (齐齐哈尔大学学报(哲学社会科学版)) [J. QIQIHAR U.] 70, 70 (2015).

56. Xie Qian (谢骞), *Fan Longduan Minshisusong Yuangao Zige Zhidu Yanjiu* (*反垄断民事诉讼原告资格制度研究*) [*Study on the Plaintiff's Qualifications Civil Anti-Monopoly Cases*], 23 CHANGCHUN LIGONGDAXUE XUEBAO (SHEHUIKEXUE BAN) (长春理工大学学报(社会科学版)) [J. CHANGCHUN U. SCI. & TECH.] 38, 41 (2010).

57. *See* Qi Ding, *supra* note 53, at 60.

58. Liu Xiaowu v. Guangdong Football Ass'n, (Guangdong Higher People's Ct. Nov. 13, 2015).

business customers, but he failed to demonstrate how the alleged discrimination affected his legitimate interests.[59]

The acceptance of the legal standing of indirect purchasers was demonstrated in *Tian Junwei v. Carrefour China Inc. & Abbott Inc.* litigation[60] where one of the defendants was an infant formula manufacturer prosecuted by NDRC for resale price maintenance practices. Another defendant acted as a distributor for these products who sold the products to the final consumers (including the plaintiff). While the case has not yet been completed on the merits, the future judgment is expected to provide more clarity on the legal standing of indirect purchasers.[61] In another case that was heard by the Changsha Intermediate People's Court and Hunan Higher People's Court, the plaintiff was a customer of an auto repair shop alleging the existence of excessive pricing imposed by Nissan on its authorized repair outlets.[62] Although the plaintiff was not successful on the merits,[63] his legal standing has been confirmed.

## V. Burden of Proof and Standard of Proof

One of the major challenges of China's private enforcement of AML concerns the difficulties encountered by private plaintiffs in meeting the requisite standard of proof.[64] Before the adoption of the Judicial Interpretation in 2012, the overwhelming majority of the private claims brought to Chinese courts under the AML were dismissed due to the plaintiff's failure to prove the alleged

59. Yang Zhiyong v. China Telecomm., (Shanghai Higher People's Ct. Dec. 14, 2015).
60. Tian Junwei v. Carrefour China Inc., (Beijing High People's Ct. June 18, 2015).
61. *See* Xie Qian, *supra* note 56, at 41.
62. Liu Dahua v. Hunan Huayuan Indus. Co., (Hunan Higher People's Ct. June 22, 2012).
63. *See* Jessica Su, *A Chinese Intermediate Court Dismisses Antitrust Claims for Failing to Prove Abusive Conduct in the Car Aftermarket (Dongfeng Nissan Case)*, E-COMPETITIONS BULL., Dec. 15, 2011; Meng Yanbei, *A Chinese Higher People's Court Rejects Plaintiff's Claim Alleging that a Vehicle Manufacturer and a Vehicle Repair Service Shop Abused Their Dominant Market Position by Requiring High Profits and Refusing to Deal (Liu Dahua v. Dongfeng Nissan Passenger Vehicle Company)*, E-COMPETITIONS BULL., Nov. 1, 2013.
64. *See, e.g.*, QIANLAN WU, COMPETITION LAWS, GLOBALIZATION AND LEGAL PLURALISM: CHINA'S EXPERIENCE 157-60 (2013); Adrian Emch & Jonathan Liang, *Private Antitrust Litigation in China – The Burden of Proof and Its Challenges*, 1 CPI ANTITRUST CHRON. 1 (2013).

infringement and/or the resulting harm.[65] The Judicial Interpretation has explained and refined several aspects related to the allocation on the burden of proof, legal and factual presumptions, and the assessment of different types of evidence such as publicly available information and reports produced by economic experts.[66] While under the general principles of civil procedure where the party who makes a claim has to prove his or her burden,[67] the plaintiff in a private anti-monopoly litigation has to adduce sufficient evidence as to the existence of monopolistic behavior, damages, and the causality between the monopolistic behavior and the damages.[68]

The Supreme People's Court in its 2012 Judicial Interpretation provided for the inversion of burden of proof in certain situations.[69] In the case of horizontal anti-competitive agreements described in Article 13.1(1)-(5) AML, the defendant has to prove that the alleged conduct does not restrict competition.[70] For example, in the case of *Shenzhen Hui'erxun Science & Technology Co. v. Shenzhen Pest Control Association*,[71] the plaintiff claimed that the self-discipline convention adopted by the association was a monopoly agreement, which restricted price competition on the market for pest prevention and control services, and prevented the plaintiff from obtaining a lower price from a member of the association.[72] Nevertheless, the defendant

65. *See* James H. Jeffs, *Private Rights of Action Under the Anti-Monopoly Law – The First Five Years*, *in* CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 307 (Adrian Emch & David Stallibrass eds., 2015).
66. *See* Zhu Li, *Taking a Close Look at the Supreme People's Court's Guidance for Private Antitrust Litigation*, *in* CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 289 (Adrian Emch & David Stallibrass eds., 2015).
67. Zuigao Renmin Fayuan Guanyu Shiyong 《Zhonghua Renmin Gongheguo Minshisusong Fa》 de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Jan. 30, 2015, effective Feb. 4, 2015), art. 91.
68. *See* Zhan Ren-Hai (詹仁海), *Fan Longduan Sifa Jieshi Beijing Xia de Siren Zhixing Juzheng Zeren Fenpei* (*反垄断司法解释背景下的私人执行举证责任分配*) [*Allocation of Burden of Proof in Private Enforcement in Context of Anti-Monopoly Judicial Interpretation*], 11 FAZHI YU SHEHUI (法治与社会) [LEGAL SCI. & SOC'Y] 123, 123 (2015).
69. *See* AnJie Law Firm, *Allocation of Burden of Proof in Private Antitrust Litigation*, LEXOLOGY (Sept. 8, 2016), http://www.lexology.com/library/detail.aspx?g=ad77a61a-68c0-4b42-aa5e-90082797313f. (last visited Feb. 22, 2017).
70. Judicial Interpretation, *supra* note 2, art. 7.
71. Shenzhen Hui'erxun Sci. & Tech. Co. v. Shenzhen Pest Control Ass'n, (Guangdong Higher People's Ct. 2012).
72. *See also* Hao Qian, *Trade Associations and Private Antitrust Litigation in China*, 1 CPI ANTITRUST CHRON. 1 (2013).

showed that its price regulation policies have been adopted for the purposes of public interest in order to protect the environment and the health of the service supplier's employees. In cases not related to the specified types of horizontal monopoly agreements, the plaintiff bears the burden of proof pursuant to the general rules of civil procedure. The outcome of the *Rainbow v. Johnson & Johnson* litigation confirmed that the above mentioned inversion does not apply to the vertical agreements.[73]

The AML also provides the shifting of the burden of proof in relation to the existence of a dominant position. Thus, Article 19 of AML introduces several presumptions of dominance based on the market share thresholds.[74] Once the market share of the defendant is established, the presumption of dominance shifts the burden of proof to the defendant to produce evidence that there is an absence of dominance as a defense. The most notable case on the determination of dominance that has reached the Supreme People's Court is *Qihoo v. Tencent*.[75] The court acknowledged that if the market share of the operator amounts to 50%, it could deduce its market dominant position. However, this deduction could be overruled because the determination of market dominance is the result of multi-factor assessment. Even though Tencent's market share on certain market segments exceeded 80%, the Supreme People's Court held that Tencent did not have dominance in the relevant market.[76]

The Judicial Interpretation has introduced two more presumptions related to

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73. *See, e.g.*, Zhan Hao, *The Chinese Shanghai People's High Court Awards Damages to be Paid by a Major US-Headquartered Healthcare Supplier for Vertical Restrictive Practices (Rainbow / Johnson & Johnson)*, E-COMPETITIONS BULL., Aug 1, 2013. See also GU MINKANG, ANTITRUST LAW AND PRACTICE IN CHINA AND HONG KONG 90-92 (2016) (criticizing the court's approach to the burden of proof in this case), where the author noted that the AML equally prohibits horizontal and vertical agreements that are "designed to eliminate or restrict competition." The defendants in all cases will have a chance to prove that suspected agreements (horizontal or vertical) do not affect competition. So by requiring the plaintiff to bear additional burden of proof in relation to vertical agreements, the court would render the application of Article 15 AML less meaningful or more burdensome.

74. AML, *supra* note 1, art. 19 ("(1) the market share of one undertaking accounts for more than 50% of the relevant market; (2) the combined market share of two undertakings accounts for 75% of the relevant market; (3) the combined market share of three undertakings accounts for three-quarters of the relevant market; (4) an undertaking whose market share is less than 10% shall not be presumed to have a dominant position.").

75. Qihoo v. Tencent, (Sup. People's Ct., Oct. 8, 2014).

76. *See* Susan Ning & Kate Peng, *The Chinese Supreme Court Elaborates Detailed Fundamental Principles of Anti-Monopoly Law, in Particular in the Context of Abuse of Dominance on the Internet Market, in its First Anti-Monopoly Case (Qihoo / Tencent)*, E-COMPETITIONS BULL., Oct. 16, 2014.

the determination of dominance. One presumption is that a public utility enterprise or any other business operator, which enjoys a lawful monopoly position, would be considered dominant on the relevant markets.[77] Since such markets normally constitute natural or legal monopolies, the court would easily presume the existence of a dominant position in line with the analysis of the market structure and the competitive conditions.[78] For example, in the case of *Huzhou Yiting v. Huzhou Termites*,[79] the court accepted the presumption of the defendant's dominance because the defendant was registered by the Huzhou Planning and Construction Bureau as an exclusive service provider for the termite control.[80] The same presumption of dominance has been accepted by the courts in cases dealing with a road toll operator,[81] automotive fuel distributor,[82] railways operator,[83] and local TV broadcasters.[84]

It should be noted, however, that the SOE status of the defendant does not have an effect on the determination of its dominance in the absence of natural or legal monopoly conditions. For example, in the case of *Ningbo Keyuan Plastics. Co. v. Ningbo Lianneng Heat Co.*,[85] the plaintiff claimed that the defendant abused its dominant position by threatening the plaintiff with the suspension of the heat supply and by forcing the plaintiff to sign unfair agreements. Although the plaintiff proved that defendant was a public institution, the court did not accept this fact as a presumption of the market dominance position. Following a market analysis, the court held that, compared to other competitors in the relevant market, the defendant did not

77. Judicial Interpretation, *supra* note 2, art. 9.
78. *See* Hu Li (胡丽), *Hulianwang Qiye Shichang Zhipei Diwei Rending de Lilun Fansi Yu Zhidu Chonggou* (*互联网企业市场支配地位认定的理论反思与制度重构*) [*Identification of Dominant Position of Internet Companies and Reconstruction of the System: Reflection from the Theoretical Perspective*], 35(2) XIANDAI FAXUE (现代法学) [MOD. L. SCI.] 93 (2013).
79. Huzhou Yiting Termites Control Serv. Co. v. Huzhou Termites Control Inst. Co., (Zhejiang Higher People's Ct., Aug. 27, 2010).
80. *See also* Allan Fels, Xiaoye Wang & Jessica Su, *A Chinese Intermediate People's Court Dismisses Antitrust Claims for Failing to Prove Abusive Conduct in the Termite Prevention Service Market (HY/HT)*, E-COMPETITIONS BULL., June 7, 2010.
81. Feng Yongming v. Fujian Expressway Co., (Fujian Higher People's Ct., Dec. 18, 2012).
82. Wuxi Baocheng Gas Cylinder Inspection Co. v. Wuxi Huarun Gas for Car Co., (Jiangsu Higher People's Ct., Oct. 23, 2012).
83. Jiang Yugui v. Zunyi Ry Co., (Guiyang Interm. People's Ct., Dec. 20, 2014); Zhao Xing v. Zunyi Ry Co., (Guiyang Interm. People's Ct., Dec. 15, 2014).
84. Wu Xiaoqin v. Shanxi Broad. & TV Network Intermediary Co., (Sup. People's Ct., May 31, 2016).
85. Ningbo Keyuan Plastics Co. v. Ningbo Lianneng Heat Co., (Ningbo Interm. People's Ct., Mar. 3, 2014).

possess the dominant position because it was unable to impose the transaction conditions such as price. The same conclusion was reached by the court in the case of *Li Weiguo v. China Telecom Shanxi Branch*,[86] where the SOE was accused of abusing its market dominance through excessive pricing of optical routers.

Another presumption on the existence of dominant position established in the Judicial Interpretation is related to the defendant's publicly disclosed information that could be used as evidence to show dominance on the relevant market.[87] In an AML-based civil litigation, it is often difficult for the private party to obtain the requisite evidence because it is often in possession of the defendant or other market players. Prior to the adoption of the Judicial Interpretation in 2012, the Chinese courts had been reluctant to accept the defendant's statement as credible evidence for determination of dominant position. For example, in the case of *Renren v. Baidu*,[88] the plaintiff had submitted various media statements to claim that the defendant was the largest Chinese search engine with more than 50% of the market share. However, the court rejected the presumption and held that the supplied statements did not include any details on the methods used for calculating the market share.[89] In another case, a Shanghai court concluded that the defendant's statements announced on its web-site were a sort of advertising, which could not be relied upon for the purpose of ascertaining market dominance without other types of evidence in that regard.[90]

Although the Judicial Interpretation has instructed the courts to accept the defendant's statements as evidence of market dominance, the subsequent judicial practice demonstrates that such information alone is often insufficient to satisfy the plaintiff's burden of proof.[91] In the case of *Qihoo v. Tencent*,[92]

86. Li Weiguo v. China Telecom Shanxi Branch, (Shanxi Higher People's Ct., July 28, 2015).
87. Judicial Interpretation, *supra* note 2, art. 10.
88. Tangshan Renren Info. Serv. Co. v. Beijing Baidu Netcom Sci. & Tech. Co., (Beijing Higher People's Ct., July 9, 2010).
89. Peter J. Wang, Yizhe Zhang & H. Stephen Harris, *A Chinese Court Issues Second Abuse of Dominance's Decision Under the New Anti-Monopoly Law (Baidu, TRISC)*, E-COMPETITIONS BULL., Dec. 18, 2009.
90. Beijing Shusheng Elec. Tech. Co. v. Shanghai Shengda Network Dev. Co., (Shanghai Higher People's Ct., Dec. 17, 2009).
91. Xu Hao (许浩), *Fan Longduan Susong Juzheng 'Zizheng Longduan' Youxiao* (*反垄断诉讼举证'自证垄断'有效*) *The Effectiveness of 'Confession of Monopoly' in Burden of Proof of Anti-Monopoly Litigation*, FENGHUANGWANG CAIJING (凤凰网财经) [IFENG FIN.] (May 11, 2012, 7:35 PM), http://finance.ifeng.com/roll/20120511/6448132.shtml (last visited Jan. 17, 2017).

the plaintiff used the information published by the defendant as evidence of the defendant's high market share. However, the court emphasized that besides the market share, there were other factors to be considered, such as competition conditions, financial and technological factors, the extent of reliance of other operators on the defendant, and the market access barriers.[93] As a result of considering the above mentioned factors, the role of the information published by the defendant in determining its market position was far from being decisive. On another occasion, Qihoo was sued for the alleged abuse of dominance on the privacy software market for directing the plaintiff's messages into spam folder. The Beijing court rejected the market penetration data released by the defendant as a credible evidence of the market dominance.[94]

Another instance of shifting the burden of proof between the plaintiff and the defendant concerns cases of abuse of dominant position where the AML offers the defendant with the possibility to provide a "valid justification" in relation to the following types of business practices: selling products at dumping prices, refusing to deal with trading partners, imposing exclusivity obligations on the trading partners, tying and bundling, and discriminating between trading partners.[95] Hence, the plaintiff will bear the initial burden of proof in relation to the defendant's dominant position on the relevant market and the existence of an abusive behavior, while the defendant will bear the burden of proof to raise "valid justification" as a defense.[96]

In practice, the courts have developed two types of "valid justification" that would exempt the defendants from liability in the abuse of dominance cases. The first type relates to the commercial reasonableness justified by the specific features of the respective industry or market. For example, in the case of *Renren v. Baidu*[97] the plaintiff argued that the defendant abused its dominant position by shielding the "National Medical Network" operated by the plaintiff from the search engine of Baidu. The defendant showed that

92. Qihoo v. Tencent, (Sup. People's Ct., Oct. 8, 2014) (China).
93. *See, e.g.*, Meng Yanbei, *The Chinese Guangdong High People's Court Renders a Judgment on the Definition of Relevant Market in an Alleged Abuse of Dominance Case in the IT Sector (Qihoo / Tencent)*, E-COMPETITIONS BULL., Mar. 28, 2013.
94. Beijing Mishi Tech. Co. v. Beijing Qihoo Tech. Co., (Beijing Higher People's Ct., Apr. 30, 2015).
95. AML, *supra* note 1, art. 17.
96. Judicial Interpretation, *supra* note 2, art. 8.
97. Tangshan Renren Info. Serv. Co. v. Beijing Baidu Netcom Sci. & Tech. Co., (Beijing Higher People's Ct., July 9, 2010).

shielding the "National Medical Network" from the search engine results was justified by the fact that the plaintiff's platform contained numerous links to unverified information, which affected the quality and safety of information received by the consumers. The court accepted the defendant's reasoning and dismissed the claim. In the case of *Wuxi Baocheng Gas Cylinder Inspection Co. v. Wuxi Huarun Gas Co.*,[98] which originated in Jiangsu province, the defendant proved that its policy restricting the number of gas refills at its fueling stations was due to the high workload that it experienced as an exclusive provider of the specified services. The court held that high workload constituted an acceptable "valid justification" and the defendant could not be charged with the refusal to deal because the delay in fulfilling the contract orders was a subject of contract law and not AML litigation. In the 2015 case of *Wang Xinyu v. Chinanet Xuzhou*,[99] the Nanjing Intermediate People's Court accepted the defendant's "valid justification" concerning the adjustment of retail prices over certain periods of time.

The second type of "valid justification" accepted by the Chinese courts in abuse of dominance cases concerns situations where the defendant's practice has been approved by the administrative authorities. For example, in 2012 the Fujian Higher People's Court heard the case of *Feng Yongming v. Fujian Expressway Co.*[100] where the plaintiff complained about the fact that the defendant, an SOE and the exclusive operator of province highways, offered the electronic road toll cards at differentiated prices, according discounts to the customers of the Bank of China. Since the plaintiff had an account in a different bank, he could not benefit from the said discount. The court noted that the specified practices had been approved by the administrative regulation of the provincial authorities and dismissed the claim. In a 2010 case, *Huzhou Yiting v. Huzhou Termites*,[101] the plaintiff argued that the incumbent provider of termite control services colluded with the Planning and Construction Bureau of Huzhou to restrict the access of competing providers to the relevant market. The Hangzhou Intermediate People's Court dismissed the claim holding that the refusal to authorize plaintiff's services was based on the

98. Wuxi Baocheng Gas Cylinder Inspection Co. v. Wuxi Huarun Gas for Car Co., (Jiangsu Higher People's Ct., Oct. 23, 2012).
99. Wang Xinyu v. Chinanet Xuzhou, (Nanjing Interm. People's Ct., Oct. 26, 2015).
100. Feng Yongming v. Fujian Expressway Co., (Fujian Higher People's Ct., Dec. 18, 2012).
101. Huzhou Yiting Termites Control Serv. Co v. Huzhou Termites Control Inst. Co., (Zhejiang Higher People's Ct., Aug. 27, 2010).

legitimate grounds pursuant to the requirements set by the Ministry of Construction.[102]

In order to assist the parties and the court in understanding and interpreting economic evidence, the Judicial Interpretation refers to "experts with relevant knowledge to explain specific questions of the case in court."[103] It should be noted that the above mentioned "experts" do not appear in the capacity of expert witnesses appointed by the court as defined by Civil Procedure Law.[104] As a result, the evidentiary weight of the opinion made by the experts hired by the parties would not be regarded in the same way as an expert opinion prepared by the neutral expert appointed by the court. In relation to expert witnesses, the Judicial Interpretation provides that the court can entrust professional organizations or individual experts to conduct market surveys or economic assessment on specific issues of the case.[105] Under the rules of civil procedure, such expert witnesses must have certain qualifications and follow certain procedures.[106] In the *Qihoo v. Tencent* case,[107] the judge held that a review on whether the expert's opinion contained sufficient facts or data; whether it had applied reasonable and reliable market investigation or economic analysis methodology; whether it had considered the relevant facts that can affect the results of market investigation or economic analysis; and whether the expert had fulfilled his/her tasks with caution and diligence, which a professional person should have performed.[108] The same case demonstrates that deficiencies in the party-appointed experts' knowledge and qualifications can often only be discovered at the cross-examination stage. For example, the defendant's invited expert attempted to justify a wider definition of the relevant market based on the substitutability of various products. When asked whether various products sold in the same shopping mall (lunch boxes, juices, cameras, USB drives, etc.) should be considered as belonging to the same relevant market, the expert answered in the positive.[109]

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102. *See* Fels, Wang & Su, *supra* note 80.
103. Judicial Interpretation, *supra* note 2, art. 12.
104. Civil Procedure Law art. 76.
105. Judicial Interpretation, *supra* note 2, art. 13.
106. Civil Procedure Law art. 63(1). *See also* Decision of the Standing Committee of the National People's Congress on Questions Concerning the Regulation of Expert Evaluation (promulgated by the Standing Comm. People's Cong., Apr. 24, 2015, effective Apr. 24, 2015); GU MINKANG, *supra* note 73, at 93-95.
107. Qihoo v. Tencent, (Sup. People's Ct., Oct. 8, 2014).
108. *Id.*
109. *See* Li Sheng-long (李生龙), *Fan Longduan Susongzhong Huanjia Yijian de Xinzhi – Yi*

It is also expected that the probative value of the conclusions delivered by the court-appointed experts will be higher than that of other documentary evidence, such as audio-visual materials and testimony of a witness.[110] However, the ultimate assessment of such evidence can still vary from case to case.[111] The screening of the published AML judgments did not reveal any instances where such evidence would be commissioned by the court. Moreover, the Judicial Interpretation seems to suggest that the court, upon the initiative of the parties, makes the appointment of an expert or a professional organization. Only when the parties fail to reach a consensus as to which person(s) or organization(s) should be appointed, the court can decide to make their own appointments.[112]

The judicial practice indicates that in the absence of a detailed rule concerning the assessment of the statements or reports delivered by the party experts, the courts consider them on a case-by-case basis. For example, in the case of *Rainbow v. Johnson & Johnson*,[113] both parties submitted numerous expert opinions. The plaintiff attempted to show the adverse effects of the RPM obligations on market competition, while the defendant intended to

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*Zhuanjia Fuzhuren Zhidu Gaige Weizhu Xian* (*反垄断诉讼中专家意见的性质-以专家辅助人制度改革为主线*) [*Nature of Expertise Opinion in Anti-monopoly Litigation - Taking the Reform of the Expert System as the Main Line*], 13 RENMIN SIFA (人民司法) [PEOPLE'S JUDICATURE] 99, 101 (2015).

110. Provisions of the Supreme People's Court on Evidence in Civil Proceedings (promulgated by the Sup. People's Ct., Dec. 26, 2001, effective Apr. 1, 2002), art. 77(2).
111. Judicial Interpretation, *supra* note 2, art. 13.
112. *Id.*
113. Beijing Ruibang Yonghe Tech. & Trade Co. v. Johnson & Johnson Med. (Shanghai) Ltd., (Shanghai Higher People's Ct., Aug. 1, 2013). *See also* Jessica Su, *A Chinese Intermediate People's Court Hears the First Private Litigation Challenging Vertical Price-Fixing (Johnson & Johnson)*, E-COMPETITIONS BULL., Feb. 3, 2012; Jessica Su, *A Chinese Intermediate Court Dismisses Allegations of Vertical Price-Fixing Against Medical Equipments Company (Johnson & Johnson)*, E-COMPETITIONS BULL., May 18, 2012; Susan Ning, *The Chinese Shanghai Higher Court Renders Final Judgment in First Antitrust Private Action (Rainbow / Johnson & Johnson)*, E-COMPETITIONS BULL., Aug. 1, 2013; Steve Cave, *The Chinese Shanghai People's Court Orders a Manufacturer to Pay 530,000 Yuan for Setting an Artificial Price Floor (Rainbow / Johnson & Johnson)*, E-COMPETITIONS BULL., Aug. 1, 2013; Zhan Hao, *supra* note 73; Zhan Hao, *The Shanghai Higher Court Decides on the First Private Antitrust Action Involving Vertical Agreements (Rainbow / Johnson & Johnson)*, E-COMPETITIONS BULL., Aug. 1, 2013; Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang & Baohui Zhang, *The Shanghai Higher Court and One of China's Antitrust Regulators Issues Decisions that Resale Price Maintenance Violated China's Anti-Monopoly Law (Rainbow / Johnson & Johnson)*, E-COMPETITIONS BULL., Aug. 1, 2013.

prove the beneficial effects of the said practices. The court considered that the plaintiff met the requisite burden of proof by successfully proving the adverse effects of the RPM obligations based on at least four aspects: incomplete competition of the relative market, the strong market power of the defendant, the motivation of the defendant to restrict the resale prices, and the impact on RPM obligations on competition. In the case *Ningbo Keyuan Plastics Co. v. Ningbo Lianneng Heat Co.*,[114] the parties both hired experts to explain the nature and function of a heat pipe. The judgment delivered by the Ningbo Intermediate People's Court did not contain any reference to the opinions of these party-appointed experts.

## VI. Quantification of Damages

The Judicial Interpretation specifies the following types of judicial remedies that can be obtained by the plaintiffs as a result of a private antitrust litigation: (1) the court's order to cease the infringement; (2) assumption of civil liability for the infringement by compensating the plaintiff for the damages; and[115] (3) invalidation of the contract between undertakings or the decision of an association of undertaking.[116] Unlike other jurisdictions, such as the United States, China's principles of tort law do not provide for multiple damages.[117] Although plaintiffs routinely claim damages in private antitrust litigation, there is a wide gap between the amounts claimed and damages awarded. The following table represents an overview of damages that are claimed and awarded in several private antitrust cases.

114. Ningbo Keyuan Plastics. Co. v. Ningbo Lianneng Heat Co., (Ningbo Interm. People's Ct., Mar. 3, 2014).
115. Judicial Interpretation, *supra* note 2, art. 14.
116. *Id.* art. 15.
117. Zhang Shao-Rong (张少容), *Woguo Fan Longduan Fa Minshizeren Zhidu Yanjiu* (*我国反垄断法民事责任制度研究*) [*Research on China's Anti-Monopoly Civil Liability System*], 3 HUBEI JINGGUAN XUEYUAN XUEBAO (湖北警官学院学报) [J. HUBEI U. POLICE] 102, 104 (2014).

Table 3: Comparison between claimed and awarded damages

| Case | Damages claimed | Damages awarded | Percentage of damages that the court awarded in comparison to what had been claimed |
|---|---|---|---|
| *Zou Zhijian v. Guangxi Yunde Transport Co., Chongzuo Terminal of Guangxi Yunde Transport Co., Chongzuo Service Center of Guangxi Yunde Transport Co.*[118] | CNY 362,640.80 | CNY 30,000 | 8.27% |
| *Beijing Ruibang Yonghe Technology & Trade Co., Ltd. v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China)*[119] | CNY 143,993,000 | CNY 530,000 | 0.37% |
| *Huawei v. IDC*[120] | CNY 20,000,000 | CNY 20,000,000 | 100.00% |
| *Lou Binglin v. Beijing Aquatic Products Wholesale Trade Association*[121] | CNY 772,512 | No damages awarded | 0.00% |
| *Wu Xiaoqin v. Shanxi Broadcast & TV Network Intermediary Co.*[122] | CNY 15 | CNY 15 | 100.00% |

118. Zou Zhijian v. Guangxi Yunde Transp. Co., (Guangxi Autonomous Region Higher People's Ct., 2011).
119. Beijing Ruibang Yonghe Tech. & Trade Co. v. Johnson & Johnson Med. Ltd., ( Shanghai Higher People's Ct., Aug. 1, 2013).
120. Huawei v. IDC, (Guangdong Higher People's Ct., Oct. 21, 2013).
121. Lou Binglin v. Beijing Aquatic Prods. Wholesale Trade Ass'n, (Beijing Higher People's Ct., Apr. 9, 2014).
122. Wu Xiaoqin v. Shanxi Broad. & TV Network Intermediary Co., (Sup. People's Ct., May 31, 2016). *See also* Susan Ning, *The Chinese Xi'an Intermediate People's Court Rules in Favour of a Consumer in a Case of Abuse of Dominance on the Market for Local Cable Service (Shanxi Broadcast)*, E-COMPETITIONS BULL., Jan. 5, 2013.

Several cases indicate that plaintiffs experience difficulties in providing proof concerning the quantification of damages claimed in private antitrust litigation. For example, in *Renren v. Baidu*, the plaintiff alleged that Baidu search engine was dominant on the Chinese search engine market. It argued that the defendant used this dominant position to downgrade the website of the plaintiff in the search results, which caused the plaintiff to sustain economic losses in the amount of CNY 1,106,000.[123] Without adequate evidence as to the causality and amount of the losses, the court qualified the plaintiff's claims as mere speculation unsupported by evidence and dismissed the claim for damages.

The judicial practice indicates that the quantification of damages is not a requisite part of the plaintiff's burden of proof because the ultimate decision as to the exact amount of damages remains with the court. In the above mentioned *Huawei v. IDC* case, although Huawei didn't submit the evidence concerning the amount of the damages, the court awarded a compensation amount of RMB 20 million based on the nature of the tortfeasor's behavior, the extent of fault, the duration of the infringement, effects of the damages, and the reasonable litigation expenses sustained by the plaintiff.[124]

Finally, even when the plaintiff can convincingly quantify the damages it suffered, it still bears the burden of proof as to the causality between the anti-competitive conduct and the damages. The absence of causality will excuse the defendant from civil liability for the monopolistic behavior or it will affect the extent of such liability.[125] For example, in *Ruibang v. Johnson & Johnson*,[126] the plaintiff claimed various types of damages, including the loss of profits, price difference between the defendant's products and those purchased at higher price from the third party, bid bond required from the participants in the public procurement tenders, cost of inventory, staff-related expenses, advertising fees spent over last 15 years, and damages to the commercial reputation, etc. The court awarded only damages related to the loss of profits from declining sales of the products supplied by the defendant.

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123. Tangshan Renren Info. Serv. Co. v. Beijing Baidu Netcom Sci. & Tech. Co., (Beijing Higher People's Ct., July 9, 2010).
124. Huawei v. IDC, (Guangdong Higher People's Ct., Oct. 21, 2013).
125. *See* Tan Yuan (谭袁), *Longduan Minshizeren Goucheng Yaojian Yanjiu* (*垄断民事责任构成要件研究*) [*Research on Requirements of Monopoly Civil Liability*], 31(2) HEBEI FAXUE (河北法学) [HEBEI L. SCI.] 159, 165 (2013).
126. Beijing Ruibang Yonghe Tech. & Trade Co. v. Johnson & Johnson Med. (Shanghai) Ltd., (Shanghai Higher People's Ct., Aug. 1, 2013).

In relation to other types of damages, the plaintiff failed to show their connection to the anti-competitive conduct of the defendant.

## VII. Conclusion

The quantitative and qualitative analysis of the jurisprudence of Chinese courts in the field of private anti-monopoly litigation allows several preliminary observations that are expected to affect further development of judicial practice in this emerging area of civil litigation to be drawn.

First, the decentralized subject matter jurisdiction over private AML-based disputes, the absence of the Guiding Cases in the field of AML, and the unfinished process of publication of the court judgments will continue to affect the uniform application and interpretation of the AML and pose substantial difficulties for the research and unification of the judicial practice in this field.

Second, despite the wide access of potential plaintiffs to the first instance courts based on their territorial jurisdiction, the absence of the functioning mechanisms for group representation and currently underdeveloped practice of public interest litigation will continue to reduce the incentives for individual plaintiffs (especially natural persons or consumers) to initiate private AML-based litigation.

Third, despite the availability of both "follow-on" and "stand-alone" litigations in the field of AML, the focus of public and private enforcement of the AML has been different. While anti-monopoly enforcement authorities have concentrated their efforts on the investigation and prosecution of anti-competitive agreements, private plaintiffs have often alleged the existence of the abuse of dominant market position. As the first cases of "follow-on" litigation have been emerging, the Chinese courts will be expected to develop a more coherent approach towards the evidentiary value of the decisions issued by anti-monopoly enforcement authorities and to address the issues related to parties' access to this type of evidence under the rules of civil procedure.

Fourth, while the legal standing of the private plaintiffs in AML litigation continues to be defined on the basis of the general principles of "direct interest," the emerging jurisprudence indicates that both direct and indirect purchasers have been recognized as eligible plaintiffs. With the increase in

AML-based private litigation, the courts will have to clarify their stance on the availability of the "passing-on" defense for the damages attributable to the defendant in order to acknowledge the existence of these two types of plaintiffs.

Fifth, the collected jurisprudence indicates that the burden of proof, standard of proof, and the availability of the requisite evidence will continue to determine the success of AML-based private litigation. The success rate for the plaintiffs has been on the rise in the aftermath of the 2012 Judicial Interpretation issued by the Supreme People's Court, which has facilitated the burden of proof requirements by introducing a set of legal presumptions shifting the burden of proof between the parties (hardcore horizontal agreements, determination of dominance, valid justifications for anti-competitive practices, role of evidence obtained from public sources, etc.). At the same time, the specified procedural tools appear to be insufficient in order to facilitate the plaintiff's burden of proof in the absence of the adequate evidence discovery mechanism.

Sixth, despite the importance of the economic evidence and its assessment in the AML cases recognized by the Supreme People's Court, the lack of procedural rules regulating the status of economic parties engaged by the parties, the evidentiary value of the reports produced by such experts, and the reluctance of the judiciary to engage court-appointed experts will continue to downplay the role of the economic evidence as well its assessment by the court.

Seventh, the damages and their quantification in AML cases have not been regarded as a major issue due to the fact that this type of evidence is not mandatory, and the plaintiffs have been primarily seeking other types of judicial remedies such as invalidation, rescission of contracts, and court orders obliging the defendant to modify its commercial practices.

The above mentioned trends in the development of the AML-based private litigation identified on the basis of the emerging practice of the Chinese courts constitute the unique features of the "Chinese way" in private antitrust enforcement. The dominant role of the public enforcement carried out by the administrative anti-monopoly enforcement authorities, the current disconnection between public and private enforcement in terms of competition policy pursued by the state as well as the lack of effective procedural mechanisms (collective actions, evidence discovery, economic experts and economic evidence) relevant to the antitrust cases have resulted in a relatively autonomous

evolution of private AML litigation in China. With the continuous opening-up of the Chinese markets for foreign investors as well as the "going global" strategy of the Chinese firms that are increasingly engaged in mergers and acquisitions abroad, the private enforcement of AML will gain further significance. As a result, the continuous monitoring and study of the judicial practice in this field should be further encouraged.

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